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

From July 1, 1986 to June 30, 1987
Commonwealth of Virginia
Office of the Attorney General
Richmond
1987

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.

**The main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.
LETTER OF TRANSMITTAL

July 1, 1987

The Honorable Gerald L. Baliles
Governor of Virginia
State Capitol
Richmond, Virginia 23219

My dear Governor Baliles:

The Office of the Attorney General is charged by the Constitution of Virginia 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 7700 court cases and administrative proceedings involving practically every aspect of State government. This includes approximately 2400 cases to collect debts owed to the Commonwealth. In response to requests of State and local government officers and officials, the Attorney General also rendered 198 formal Opinions.

Significantly, attorneys in the Civil Litigation and Claims Sections, the Medicaid Fraud Control Unit, the Commerce and Natural Resources and Mental Health, Medical Assistance and Health Regulation Sections, the Highways and Transportation Section, and the Antitrust and Consumer Litigation Section, working with others, have recovered for the General Fund of the Commonwealth, State agencies, units of local government, and citizens of Virginia more than $29 million for fiscal year 1986-1987.

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 the period January 1986 through June 1987. In addition, as contemplated by § 2.1-128 of the Code of Virginia, I have also had prepared the customary volume containing the Opinions of the Attorney General, which 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,

Mary Sue Terry
Attorney General
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<td>Kelly A. Ford</td>
<td>Quinton</td>
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<td>Jerry G. Manning</td>
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<td>Jerry W. Ham</td>
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<td>Peter M. Shaw</td>
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<td>James W. Mitchell</td>
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<td>Paul N. Anderson</td>
<td>Richmond</td>
<td>Chf. Investigator &amp; Asst. Dir.</td>
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<td>Barry J. Bourne</td>
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<td>George Young</td>
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<td>Freddie A. Dixon</td>
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<td>Document Analyst</td>
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<td>Barbara O. Allen</td>
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<td>M. Patricia Boschen</td>
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<td>James A. Gargasz</td>
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<td>Karen D. Ladd</td>
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<td>Torencie G. Noziglia</td>
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<td>Bert L. Rohrer</td>
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<td>M. JacQuie Richardson</td>
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<td>Barbara H. Scott</td>
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ATTORNEYS GENERAL OF VIRGINIA
FROM 1776 TO 1987

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

1J. 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.

2Hon. 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.
3. Harvey B. Apperson .............................................. 1947-1948
4. J. Lindsay Almond, Jr. .............................................. 1948-1957
5. Kenneth C. Patty .............................................. 1957-1958
   A. S. Harrison, Jr. .............................................. 1958-1961
   Robert Y. Button .............................................. 1962-1970
   Andrew P. Miller .............................................. 1970-1977
   Gerald L. Baliles .............................................. 1982-1985
   Mary Sue Terry .............................................. 1986-

3. 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.

4. 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.

5. 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.


CASES DECIDED IN THE SUPREME COURT OF VIRGINIA

Bartrug v. Commonwealth. From Cir. Ct., City of Richmond. Petition for appeal of trial court's decision affirming judgment for delinquent income taxes against protesting taxpayer. Denied.


Beaver v. Commonwealth. From Cir. Ct., Prince George County. Petitioner claims improperly sentenced to death. Affirmed.

Birdsall v. Shepherd. From Cir. Ct., Albemarle County. Amount of contributions estate of second spouse to die entitled to receive from estate of first spouse to die for estate tax purposes. Petition denied.

Bloch v. Persin. Petition for writ of mandamus directing respondents to show cause why probation should not be terminated. Denied.


Clozza v. Bair. From Cir. Ct., City of Virginia Beach. Petitioner claims improperly sentenced to death. Appeal denied.

Commissioner, Dep't of Hwys. & Transp. v. Lanier Farm, Inc. From Cir. Ct., City of Martinsville. Condemnation case, evidence of speeding, access instruction. Reversed and remanded.


Cumbee v. Myers. From Cir. Ct., Montgomery County. Appeal from demurrer to mandamus action against circuit court clerk for refusal to record deed which was notarized "subscribed and sworn to." Writ granted.

DeCarlo v. Commissioner, Dep't of Hwys. & Transp. From Cir. Ct., Fairfax County. Appeal of condemnation case. Remanded for retrial.


Gray v. Commonwealth. From Cir. Ct., City of Suffolk. Death penalty based upon conviction of capital murder during robbery. Affirmed.

Hicks v. Hapgood. From Cir. Ct., Franklin County. Challenge of validity of grant of escheated lands. Petition for appeal denied.

Howard v. Warden. Habeas corpus relief denied based upon absence of right to effective assistance of counsel in collateral proceedings.

In re Armistead. Application for writ of mandamus to direct judge to enter orders in chancery order book as requested. Settled.

In re Bremner. From Cir. Ct., Hanover County. Petition for writ of mandamus to require circuit court clerk to reinstate plaintiff's memorandum of lis pendens nunc pro tunc. Dismissed.

In re City Wide Dev. Corp. From Cir. Ct., Arlington County. Petition for writ of prohibition to prohibit judge from requiring security bond. Denied.


In re Davis. Petition for writ of mandamus against circuit court judges for alleged false incarceration. Dismissed.

In re Dean. From Cir. Ct., Fairfax County. Petition for writ of prohibition to prohibit judge from acting in domestic case. Dismissed.

In re Wingate. From Cir. Ct., Mecklenburg County. Petition for writ of mandamus to require circuit court clerk to reinstate plaintiff's memorandum of lis pendens nunc pro tunc. Dismissed.

McDonald v. Board of Bar Examiners. Petition for writ of mandamus to compel defendant to admit petitioner to practice law. Dismissed.

Moore v. Compensation Bd. From Cir. Ct., Tazewell County. Writ of mandamus to compel Compensation Board to certify that administrative remedies are exhausted so that three-judge court may be appointed to hear appeal. Petition denied.

Morrison v. Commissioner, Dept of Hwys. & Transp. From Cir. Ct., Wise County. Equity suit to challenge proper notice of location and design hearing. Dismissed for failure to perfect appeal.


Pruett v. Commonwealth. From Cir. Ct., City of Virginia Beach. Appeal of capital murder and death sentence, numerous other issues. Affirmed.

Slominski v. Commonwealth. From Cir. Ct., City of Williamsburg/James City County. Appeal of denial of disability retirement benefits. Dismissed for failure to comply with filing requirements.


Travers v. County of Fairfax. From Cir. Ct., Fairfax County. Appeal from adverse decision in zoning case. Dismissed.


Via v. Williams. From Cir. Ct., Augusta County. Injunction to prevent Division of Motor Vehicles from revoking personalized license plate "ATH-EST." Injunction denied, appealed. Petition for writ of error denied.


Westmoreland Coal Co. v. Department of Labor & Indus. From Cir. Ct., Wise County. Request for declaration that telephone system at Wentz Mine Complex comply with § 40.1-85. Declaratory judgment affirmed.


Williams v. Poulsen. From Cir. Ct., Chesterfield County. Appeal of verdict in plaintiff's favor for wrongful incarceration resulting from deputy clerk's error. Petition refused.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Barnes v. Commonwealth. From Cir. Ct., City of Hampton. Definition of vileness in death penalty case.

Benderson Dev. v. Sciortino. From Cir. Ct., City of Virginia Beach. Challenge to constitutionality of Sunday closing laws.

Buckley v. College of William & Mary. From Cir. Ct., City of Richmond. Plaintiff alleges failure of notification that employment contract not renewable, as required by faculty handbook.
Chantilly Constr. Corp. v. Commonwealth. From Cir. Ct., City of Richmond. Construction contract, alleged impossibility of specification.


Commonwealth v. Hughes. From Cir. Ct., Pulaski County. Whether appellee is habitual offender.

Commonwealth v. Lotz. From Cir. Ct., City of Newport News. Appeal of adverse decision in fair housing law case referred by Real Estate Commission for prosecution and in which attorney's fees were awarded.

Commonwealth v. Lotz. From Cir. Ct., City of Newport News. Appeal of decision in favor of realtor's use of Christian symbol in advertising business.

Coolidge v. Commonwealth. From Cir. Ct., City of Richmond. Appeal of dismissal of action for injuries received when plaintiff slipped on ramp at Powhatan correctional visitors' center.

Creative Displays of Norfolk, Ltd. v. Commissioner, Dept of Hwys. & Transp. From Cir. Ct., City of Newport News. Declaratory judgment sought as to proper construction of § 33.1-370.

Delong v. Commonwealth. From Cir. Ct., City of Richmond. Challenge to capital murder conviction and death sentence.


Dunn v. Commissioner, Dept of Hwys. & Transp. From Cir. Ct., Prince William County. Eminent domain case involving jurisdictional question and ruling on instructions.

Etheridge v. Medical Center Hosp. Attorney General participating as amicus curiae in appeal challenging constitutionality of medical malpractice cap.

Feelin' Great, Inc. v. Commonwealth. From Cir. Ct., City of Richmond. Appeal of injunction and judgment awarding Commonwealth monetary penalties, costs and fees.

Ford Motor Co. v. Courtesy Motors. From Cir. Ct., City of Buena Vista. Appeals court reversed circuit court decision affirming administrative decision in favor of plaintiff stating that advisory board at Division of Motor Vehicles was improperly constituted, thus rendering decisions affected by board void. Amicus brief filed to have appeals court decision overturned due to issue of "de facto officer" doctrine.

Fowlkes v. Shell. From Cir. Ct., Brunswick County. Appeal of finding for defendants in case alleging defendant State Police officers and deputy sheriff shot and battered plaintiff.

Fox v. Custis. From Cir. Ct., Northampton County. Appeal of suit alleging willful and/or negligent failure to recommit after prisoner violated terms and conditions of parole.

Glazebrook v. Circuit Ct. of Powhatan County. From Cir. Ct., Powhatan County. Petition for writ of mandamus to compel court to issue order for nonsuit.
Great Atl. Management Co. v. Elliot. From Cir. Ct., City of Portsmouth. Appeal of granting of writ of prohibition in landlord-tenant case.

Heublein, Inc. v. Department of A.B.C. From Cir. Ct., Fairfax County. Action for declaratory judgment and injunctive relief, constitutional challenge to Virginia Wine Franchise Act.

Hladys v. Commonwealth. From Cir. Ct., City of Richmond. Review of administrative decision to terminate plaintiff as Medicaid provider.

In re Armisted. Application for writ of mandamus to direct judge to enter orders in chancery order book as requested.

In re Barrett. From Cir. Ct., City of Hampton. Petition for writ of mandamus to require judge to act upon motions filed by petitioner.

In re Kennedy's Piggly Wiggly Stores. Petition for writ of prohibition to prohibit court from conducting further proceedings in suit.

In re Lane. Petition for writ of mandamus to require court to recognize plaintiff's name change application.

Knopp Bros. v. Department of Taxation. From Cir. Ct., City of Staunton. Application for correction of erroneous assessment of taxes.

McGlothlin v. Circuit Ct. of Fairfax County. From Cir. Ct., Fairfax County. Petition for writ of mandamus to command lower court to adjudicate certain changes in custody order relating to petitioner's child.

Murray v. Cosme. From Cir. Ct., City of Hampton. Respondent seeking to overturn lower court's granting of writ.

National Freight, Inc. v. Virginia Employment Comm'n. From Cir. Ct., City of Richmond. Section 60.1-70; determination of tax liability as to employer or independent contractor.


O'Dell v. Circuit Ct., City of Norfolk. From Cir. Ct., City of Norfolk. Petition for writ of prohibition seeking to prohibit court from transferring venue to Circuit Court for the City of Virginia Beach.

O'Dell v. Commonwealth. From Cir. Ct., City of Virginia Beach. Death penalty case challenging reliability of electrophoretic evidence.

P & G Oil Co. v. Commonwealth. From Cir. Ct., Nottoway County. Appeal of decision upholding defendants' plea of sovereign immunity in tort claim for damages to truck which hit concrete median.

P & H Inv. v. Commonwealth. From Cir. Ct., Fairfax County. Interpretation of lease term.

Pope v. Commonwealth. From Cir. Ct., City of Portsmouth. Constitutional challenges to death penalty statutes; defendant's right to bench trial; right to court-appointed defense investigator; change of venue; defendant's right to personally view physical evidence; jury selection; challenge to evidentiary rulings and sufficiency of evidence.

Poyner v. Bair. From Cir. Ct., Cities of Hampton, Newport News, Williamsburg. Habeeb corpus claims of constitutional violations and ineffective assistance of counsel in three separate death penalty cases.

Richlands Medical Ass'n v. Commonwealth. From Cir. Ct., City of Richmond. Appeal from granting of petition for writ of mandamus.


Smith v. State Comp. Bd. From Cir. Ct., City of Martinsville. Appeal of circuit court decision for Compensation Board denying jurisdiction by resident judge in appeal of Compensation Board budget decision.

Solem v. Kenley. From Cir. Ct., Albemarle County. Appeal of adverse ruling to action seeking declaratory judgment whether sale of interest in goat constitutes violation of Department of Agriculture regulations prohibiting sale of unpasteurized milk.


Taylor v. Circuit Ct., City of Richmond. Petition for writ of mandamus to have court return property seized to petitioner.

Terry v. Mazur. Petition for mandamus, testing constitutionality of statute authorizing highway user revenue bonds.

Townes v. Commonwealth. From Cir. Ct., City of Virginia Beach. Petitioner claims improperly sentenced to death.

Townes v. Murray. From Cir. Ct., Mecklenburg County. Appeal of action against Corrections officials for removing plaintiff from religious diet.


Waller v. Gilbert. From Cir. Ct., Campbell County. Appeal of decision in wrongful death action.

Westmoreland Coal Co. v. Department of Taxation. From Cir. Ct., City of Richmond. Application for correction of income tax assessment.

Wilkins v. Circuit Ct. of Buckingham County. From Cir. Ct., Buckingham County. Petition for writ of mandamus to direct lower court to respond to petition.

Williams v. Circuit Ct. of Tazewell County. From Cir. Ct., Tazewell County. Petition for writ of mandamus to command court to transfer petitioner back to jail pending appeal.

Williams v. Commonwealth. From Cir. Ct., City of Danville. Challenge to capital murder conviction and death sentence.
Wilson v. Terry. From Cir. Ct., City of Lynchburg. Appeal of lower court's dismissal of petition to separate trustees and trust of library.


CASES IN THE SUPREME COURT OF THE UNITED STATES


Beaver v. Commonwealth. From Cir. Ct., Prince George County. Petitioner claims improperly sentenced to death. Petition denied.

Brock v. WMATA. From D.C. Cir. Ct. App. Assessment against WMATA for D.C. Workmen's Compensation Second Injury Fund. Appeals court affirmed lower court decision characterizing it as user fee; WMATA's immunity from local tax not applicable. Writ of certiorari denied.


Clozza v. Bair. From Cir. Ct., City of Virginia Beach. Petitioner claims improperly sentenced to death. Pending.


McElroy v. Middleton. From Cir. Ct., Fairfax County. Petition for writ of mandamus against judge for alleged wrongful interpretation of Supreme Court decision that affected petitioner's case. Settled.


The Honorable Robert E. Russell
Member, Senate of Virginia


I. Director of Department of Corrections Implements Regulations Promulgated by Board of Corrections

Parts I and II of your August 27, 1986 letter agree with the conclusions in my earlier Opinion regarding the relative responsibilities of the Board of Corrections (the "Board") and the Department of Corrections (the "Department"), but raise questions as to the authorities cited.

You first ask whether § 53.1-10(2) of the Code of Virginia is proper authority for the Director of the Department to implement the regulations of the Board. While you agree that the authority of the Director to implement the policies of the Board is self-evident from the Code, you ask specifically whether § 53.1-10(2) is cited in error because it has, in your opinion, no application to State correctional facilities.

There is ample authority in the Code, both in § 53.1-10(2) and elsewhere, to support the proposition that the Director implements the regulations of the Board. For example, § 53.1-8 also provides, in part, that "the Director shall carry out his management and supervisory powers in accordance with standards and goals of the Board" without any specification of the application of that responsibility to either State or local facilities. This section, combined with § 53.1-10(1), which provides that the Director shall "supervise and manage the Department and its system of state correctional facilities," makes it manifest that he shall implement the standards and goals of the Board with respect to all facilities, State or local.

While §§ 53.1-8 and 53.1-10(1) support my conclusion, § 53.1-10(2) does as well. "Local and community correctional programs" and "lock-ups" do not embrace State correctional facilities. The term "facilities" used in § 53.1-10(2), however, is an undefined, generic term which includes not only local but also State facilities. See § 53.1-1.

II. Guideline 854 Authorizes Wardens and Superintendents to Implement Visitation Programs

You next question the appropriateness of my reference to Guideline 854 and make inquiry as to its validity. The specific question in your first letter was:

Does the authority granted to the State Board of Corrections pursuant to Section 53.1-5 of the Code of Virginia encompass the power to make, adopt and promulgate rules and regulations governing visitation privileges--including contact visitation[8]--for persons imprisoned pursuant to a sentence of death?
I responded that the Board is authorized by § 53.1-5(6) to make, adopt and promulgate rules and regulations to carry out the laws administered by the Director or the Department and that the Director implements those rules and regulations. As I understand your second letter, you agree that the Board and the Department have these respective responsibilities.

I then indicated that:

The Department of Corrections' Guideline 854,[3] which establishes policy and standardized procedures for visitation in adult institutions, was adopted by the Board, and this guideline delegates to the wardens/superintendents the responsibility for implementing that visitation policy.

I reiterate that there is no doubt that Guideline 854 is valid and that the development and implementation of a visitation program for adult institutions was properly delegated by the Board and the Department to the wardens and superintendents of State correctional institutions.

My earlier Opinion used "adopted" as a shorthand reference for the complex process by which Guideline 854 became the manifestation of the Board's policy. That process, which was not relevant to your earlier inquiry as to whether the Board had the authority to adopt such a policy, now warrants further discussion in light of your follow-up question.

The original version of Guideline 854 (originally numbered 819) was first promulgated by the Department in 1974; its content is essentially the same as current Guideline 854, which was promulgated in 1984. Subsequent to becoming a policymaking board on July 1, 1982, the Board, on November 9, 1983, adopted "Operational Standards for Adult Institutions" ("Operational Standards"). These standards direct that visitation programs at adult institutions will be governed by "Institutional Operating Procedures" ("IOPs"), which are promulgated by the wardens and superintendents of the Department's institutions.

Sections 16-11 through 16-13 of the Operational Standards embody the general principles of the 1974 version of Guideline 854. Section 16-11, for example, states that IOPs will "provide visiting privileges for inmates and specify the time, frequency, number of visitors, and make provisions for special visits." Section 16-12 requires that "[e]ach institution shall provide facilities and supervision for inmate visiting." Section 16-13 indicates that an "[i]nstitutional operating procedure specifies the conditions by which the visiting program shall be administered and the circumstances under which visitors may be searched." Guideline 854 subsequently was amended and reissued by the Department on March 1, 1984, to implement the Operational Standards adopted by the Board in November 1983, as required by §§ 53.1-8 and 53.1-10.5

III. Settlement Involved Numerous Difficult Issues

The questions in Part III of your August 27, 1986 letter relate to a suit by inmates at Mecklenburg Correctional Center ("MCC") against the Director of the Department and other Department officials. The case, which was filed in September 1981, is still in litigation after five years and has twice resulted in a settlement. A federal court order, dated April 5, 1985, incorporated a settlement agreement of the same date between the Director of the Department and certain inmates at MCC. See Brown v. Siela/ff, C.A. No. 81-0853-R (E.D. Va. filed April 5, 1985) (Order and Settlement Agreement). This consent decree modified an April 8, 1983 consent decree between the parties. Id. In both instances, the court retained jurisdiction over the case to enforce or modify its order and the accompanying settlement agreement. The court still has jurisdiction over the case today.

Essential to an understanding of the nature of the litigation and the position of this Office in representing the various defendants is an understanding of the context in which
the 1985 settlement agreement was reached and the issues addressed in that agreement.

Subsequent to the consent decree of April 8, 1983, numerous serious problems arose at MCC. Some of the more significant problems included:

1. The escape of six death row inmates on May 31, 1984;

2. The "shakedown" (detailed search) of inmates and cells on July 26, 1984, resulting in several lawsuits alleging brutality by correctional officers against inmates, some of which lawsuits are still in litigation;

3. The hostage crisis on August 4, 1984;

4. The litigation culminating in a preliminary injunction on October 2, 1984, arising from alleged interference by MCC officials with visits by attorneys to meet with their clients at MCC;

5. The filing of the plaintiffs' motion in December 1984, asking the federal district court to hold the Department in contempt for failing to comply with numerous provisions of the 1983 consent decree; and

6. The discovery in January 1985 that MCC officials had monitored confidential telephone communications between inmates and their attorneys.

Furthermore, during this same period of time, the Department had been subject to public criticism for problems at MCC involving many of the issues eventually addressed in the 1985 settlement agreement, and for noncompliance with the 1983 consent decree. In addition to the attorney access and wiretap issues raised in the fall of 1984 and January 1985, the most significant areas of criticism involved allegations of problems with the implementation of the MCC "phase program" for dealing with disruptive inmates; difficulties created by having vastly different inmate populations housed at MCC; physical security problems; problems with the MCC mental health unit; manpower and management problems; isolated staff disciplinary problems; staff morale problems; staff attitudinal problems involving implementation of the 1983 consent decree; reports of abusive correctional officer behavior toward inmates at MCC; and training deficiencies. See, e.g., Commonwealth of Virginia Board of Corrections, Report of the Mecklenburg Correctional Center Study Committee 41-57, 63-78, 81-92, 94-108, 110-31, 134-48, 154-61, 164-68, 194-215 (Nov. 7, 1984).

The 1985 settlement agreement itself consists of 17 pages with 38 numbered paragraphs and deals with such issues as: (1) elimination of the MCC "phase program" for dealing with disruptive inmates after their arrival from other State institutions; (2) transfer of inmates to other institutions; (3) elimination of the Special Management Unit (segregation with special restrictions); (4) classification of inmates in the general prison population; (5) furnishings in cells, including lights, desks, stools and window knobs; (6) interrupted operation of toilets and consumption of meals in cells with nonflushed toilets; (7) use of physical restraints and the availability of psychiatric or psychological help; (8) elimination of segregation facilities on death row for purposes of protective custody or disruptive behavior control for inmates on death row; (9) the number of hours per week devoted to indoor and outdoor "recreation" (i.e., "out-of-cell" time); (10) eating of meals outside of, as opposed to within, cells; (11) use of "excessive or unnecessary force" by correctional officers, as well as use of chemical agents; (12) videotapes of prison disturbances and the investigation of complaints of the use of excessive force; (13) training to develop staff skills in problem resolution without the use of force; (14) development of a comprehensive plan for medical and psychiatric care, including face-to-face examinations as opposed to those conducted through the cell door; (15) screening of persons being considered for correctional officer positions to uncover "propensities for violence," such as prior assault convictions; (16) consideration of the development of programs in the areas of work, correspondence courses, educational and vocational training programs, psychological counseling, alcohol and drug treatment, program counseling, and religious
programs; (17) access to the law library and the availability of the assistance of a trained library assistant as well as photocopying services; (18) attorney visitation in places other than the visiting room; (19) daily access to newspapers and magazines; (20) Saturday mail service; (21) a review of the food services plan, including the availability of dietary substitution for inmates whose religious practices require certain dietary restrictions and the preparation and serving of nonpork products in such a manner as to ensure noncontamination by pork products; (22) provision of group religious services, including Ramadan observances; (23) limitations on strip searches, including the use of metal detectors in lieu of strip searches where feasible; (24) limitations on personal telephone calls; (25) limitations on searches of motor vehicles of visitors to MCC; (26) installation of padding inside transportation vehicles to prevent accidental injuries to inmates; (27) access to a general reading library; (28) limits on whom death row inmates may have as visitors; (29) procedures for visitation of inmates on death row; (30) limitations on strip searches of visitors to MCC; (31) cessation of alleged interference with visits between attorneys and their clients at MCC, including unreasonable delays in producing inmates after an attorney's arrival at MCC, unreasonable time limits on attorney interviews of clients, the use of restraints during such interviews, and the circumstances under which confidentiality during attorney-client visits and telephone calls must be maintained.

In short, the litigation has been before a federal court for five years, is still before that court, and has involved a large number of difficult and sensitive issues which require a balancing of interests.

IV. Request to Disclose Information on Litigation Before Federal District Court Must Be Declined

Your earlier request asked me to resolve a factual dispute appearing in various conflicting newspaper accounts. Because official Opinions of the Attorney General are limited to questions of law, I did not have the authority, and therefore declined, to render an official Opinion on that factual issue. You now ask that I disclose information relevant to litigation still under the jurisdiction of a federal district court. For the reasons set forth below, I must once again decline to render the official Opinion you request.

In support of your insistence that I furnish an answer to your factual questions, you suggest that "[u]nder our system of government, the executive branch does not--and should not--have the prerogative of keeping the legislative branch, press and public in the dark about agreements that may have the effect of limiting the authority of the General Assembly." This suggestion and the questions posed in your first request and Part III of your second request reflect a significant misunderstanding of the functions of this Office, both in the Opinions process itself and in its role as an attorney representing the agencies of the Commonwealth.

A. Office Has Distinct "Representative" and "Quasi-Judicial" Functions

The Attorney General has two major, distinct functions:

(1) To represent, as an attorney and the Commonwealth's chief legal officer, the client-agencies of the Commonwealth in all civil matters, "including the conduct of all civil litigation in which any of them are interested." Section 2.1-121. This function is governed by certain legal and ethical duties which are applicable to all attorneys.

(2) To render advisory opinions, in a quasi-judicial capacity, on certain questions of law when requested to do so by designated governmental officials, regardless of whether such officials also are clients. See § 2.1-118. This function is essentially public in nature and is limited to questions of law.

Your questions confuse these two functions. The distinction between them, however, is critical to an accurate understanding of both the two functions themselves and the wall that separates them. I will address first this Office's role as an attorney repre-
senting State agencies as clients, and then its role in the official advisory opinion process.

B. "Representative" Role as Attorney Places Restrictions on Office

"Information a lawyer learns from or about a client during his or her representation of that client is presumed to be confidential by every state in the country." ABA/BNA Lawyers' Manual on Professional Conduct 55:101 (1986). Canon 4 of the Virginia Code of Professional Responsibility requires an attorney to preserve all such confidential client information. See Virginia Code of Professional Responsibility Canon 4, DR 4-101(B), EC 4-1, 4-4 (1986).

This duty is not a matter of discretion. It is an ethical requirement for all lawyers. See Virginia Code of Professional Responsibility EC 4-1 (1986). This professional ethical responsibility of the Attorney General is of particular importance when the factual matters about which you inquire relate to sensitive issues which remain the subject of litigation under the continuing supervision of a federal court and which, if disclosed, could jeopardize the ability of this Office to defend the Commonwealth in that litigation.

In order to appreciate fully the important public interest served by this Office's unyielding adherence to accepted ethical standards prohibiting disclosure of confidential client information, one must understand the roles properly played by attorney and client in any contested case. Whenever a particular matter in dispute results in contested litigation, there exists a substantial disagreement regarding either the law or the facts giving rise to the dispute. And, in deciding whether to take such a contested case to trial, each side must evaluate its position and face some risk that it will lose the case after all the evidence has been heard.

It is the attorney's duty in such circumstances to describe completely and accurately to the client the strengths and weaknesses of the client's position and to evaluate fairly and objectively for the client the risk that the other party will prevail. It is then the client's responsibility to decide whether to go to trial, accepting whatever risk of loss there is, or to request counsel to seek settlement of the case before trial, because the risk of loss is too great.

This Office cannot disclose any confidential communications with a client regarding a settlement agreement or the assessment of a case without breaching our ethical duty to that client and potentially being forced to disclose to the other party—in this case the inmate plaintiffs and their attorneys, the ACLU National Prison Project—all relevant discussions about the case and our evaluation of the Commonwealth's position. See ABA/BNA Lawyers' Manual on Professional Conduct 55:304 (1986). When a court still has jurisdiction over a case, it is certainly possible—and in many cases quite likely—that the disclosure of confidential information could have significant adverse financial and other consequences for the defendant.

Clearly, then, it is my responsibility here to abide by my professional ethical duty and to preserve the professional integrity of the Office and the long-term best interests of Virginia and its citizens. The questions in Part III of your August 27, 1986 letter seek to use the official advisory opinion process—the quasi-judicial function—to require this Office, in its role as an attorney representing a client, to divulge information relevant to litigation before a federal district court in violation of our ethical duty as lawyers under the Virginia Code of Professional Responsibility. Accordingly, I must again refuse to breach my professional ethical duty to my client by "render[ing] the opinion—and mak-[ing] the disclosure—that [you] seek," as you request at the conclusion of your August 27, 1986 letter.

C. "Quasi-Judicial" Opinions Process Limited to Questions of Law

In your first letter of July 23, 1986, you cited several conflicting newspaper accounts describing a factual dispute over the existence of an alleged prior agreement
between the Commonwealth and certain MCC inmates or the ACLU to provide contact visits for inmates on death row and asked that this Office resolve which of those several sets of conflicting newspaper accounts was correct.

I indicated in my earlier Opinion that, pursuant to § 2.1-118 of the Code of Virginia, this Office answers only those questions which involve the interpretation of constitutional or statutory provisions or the application of such provisions to a specific set of facts. Your questions with regard to the existence of an alleged prior agreement involved, instead, an attempt to resolve a factual dispute. Thus, the questions were indeed "factual" rather than "legal" in nature. The authority of this Office to issue official advisory opinions under § 2.1-118 is limited, as you note, to "legal" questions. See 1977-1978 Report of the Attorney General at 31; II A. Howard, Commentaries on the Constitution of Virginia 668 (1974). Nothing has occurred to change my disposition of your earlier request. For all the reasons cited in my earlier Opinion, I must, therefore, continue to decline to address questions which seek to resolve a factual dispute.

D. Opinions Not Rendered on Matters in Litigation

Your two letters--and in particular your letter of August 27, 1986, requesting that I disclose confidential client information in violation of my professional ethical duty to preserve such information--would require me to violate a long-standing practice of this Office which holds that no official advisory opinion shall be rendered on matters relating to issues in litigation. See 1977-1978 Report of the Attorney General, supra. The case in question is, of course, still under the jurisdiction of the United States District Court for the Eastern District of Virginia, and it certainly is possible that the plaintiffs in this litigation will return to the court to have the court resolve a variety of issues, including those addressed in this Opinion.

Because this Office is the attorney of record for the defendants in the litigation in question, the questions you ask, if answered, would tend to disclose the work product of this Office, thus compromising the ability of this Office to put forth the strongest defense possible on behalf of the Commonwealth. To divulge prematurely the Commonwealth's case would place this Office in an untenable position and work a serious injustice to the interests of the Commonwealth. Thus, I am further bound by these additional considerations to decline to answer your factual questions.

V. General Assembly May Adopt Legislation Prohibiting Contact Visits

You indicate that you intend to introduce legislation prohibiting, or severely restricting, contact visits for death row inmates. You then suggest at the beginning of the second paragraph of Part III of your letter of August 27, 1986, that in my earlier Opinion I declined to answer your question whether a lawfully enacted statute, such as the one you intend to propose, would be invalidated by a settlement agreement incorporated in a consent decree.

This question was in fact answered. The concluding paragraph of Part III of my earlier Opinion reads as follows:

Based on the above, it is my opinion that (1) the General Assembly would not be precluded by a federal consent decree from acting within its authority; (2) a change in state law inconsistent with such a decree would not, of itself, deprive the decree of its force and effect; and (3) to obtain relief from the terms of the consent decree, state officials must seek modification of the decree pursuant to Fed. R. Civ. P. 60(b) and, if unsuccessful, must pursue their appellate remedies.

I fail to comprehend how it can reasonably be said that the quoted question was not answered. This question was answered as a matter entirely apart from the factual dispute over the existence or nonexistence of any alleged prior agreement concerning contact visits. I respect your right to find it necessary that you "must advise [me] that [you
are unable to accept [my] conclusion." The grounds for your disagreement are, I submit, ill-founded. Your legal questions were answered; your factual questions were not.

1The conclusion that § 53.1-10(2) applies to State as well as local correctional facilities is also supported by rules of statutory construction. The Virginia rule concerning the interpretation of "and" as being used in the conjunctive or the disjunctive is found in the case of South East Pub. Service Corp. v. Com., 165 Va. 116, 181 S.E. 448 (1935). Applying the Supreme Court's analysis to a review of current and former laws encompassing the State's policy on the issue of management of State correctional facilities, I conclude that the phrase "and facilities" appearing in § 53.1-10(2) may be construed in the disjunctive to embrace both State and local facilities.

2I would take this opportunity to clarify the meaning of the term "contact visits" as used in your two letters and my earlier Opinion. I accepted your use of the term "contact visits" with the assumption that there was a common understanding of the meaning of the term. It has since become apparent that there is a misconception on the part of some that the term "contact visits" means "conjugal visits," i.e., the opportunity for sexual relations. As I am certain you know, that is not the case.

Routine visitation between death row inmates and members of their immediate families occurs in a setting where there is a solid physical barrier from floor to ceiling completely separating the prisoner and the visitor. The principal difference in a contact visitation program would be that the death row prisoner and the visitor would be separated by a barrier which would be of lower design. No opportunity, however, would be afforded for conjugal relations.

3Your letter of August 27, 1986, misquotes my earlier Opinion of August 12, 1986. I did not, as you state, refer to "Board of Corrections Guideline No. 854." I referred instead to the "Department of Corrections' Guideline 854." This discrepancy, alone, may account for your concern.


In your letter of August 27, 1986, you rely on § 53.1-30 as authority for the Board to adopt regulations concerning inmate visitation. Your reliance on § 53.1-30 is, in my opinion, misplaced. That section requires the Director, with the approval of the Board, to prescribe rules for public access into State correctional facilities; it does not attempt to regulate inmate visiting conditions. That is, § 53.1-30 applies only to the circumstances under which persons may enter a State correctional facility. It does not apply to policies and procedures for regulating inmate visitation after a person has entered the interior of a facility. Simply stated, § 53.1-30 relates to visits to prisons, not with prisoners.

5A court order incorporating a settlement agreement is commonly called a "consent decree."

I use the term "confidential information" to embrace all attorney-client communications which come within the definitions in Virginia Code of Professional Responsibility DR 4-101(A) (1986).

6See Part III of this Opinion for a description of the substantial number of sensitive issues involved in this case.

By its terms, the 1985 court order provides that "the Court will retain jurisdiction for such time as may be necessary to enforce or modify this Order and settlement."

ADMINISTRATION OF THE GOVERNMENT GENERALLY - ATTORNEY GENERAL AND DEPARTMENT OF LAW. COMMONWEALTH NOT LEGALLY OBLIGATED TO PERMIT CONTACT VISITS FOR DEATH ROW INMATES.

December 2, 1986

The Honorable Robert E. Russell
Member, Senate of Virginia

Your letter of August 27, 1986, asks the question on page 3, "Is Virginia legally
obligated to allow contact visits for inmates on death row?" The comparable questions in your letters of July 23, 1986 and August 27, 1986 pertained to the effect of the Settlement Agreement entered into April 5, 1985, relating to federal litigation on the issue of conditions at the Mecklenburg Correctional Center ("MCC").

I. Relevant Statute

Section 2.1-127 of the Code of Virginia prescribes the method by which litigation such as the MCC prisoners' law suit may be settled. This statute provides, in part:

The Attorney General shall have the authority to compromise and settle disputes, claims and controversies involving the interests of the Commonwealth, and to discharge any such claims, but only after the proposed compromise, settlement or discharge, together with the reasons therefor, have been submitted in writing to the Governor and approved by him.

Accordingly, any agreement to allow contact visits must have been approved by the Governor in order for the Commonwealth to be legally obligated to permit such visits.

II. Evidence of Precise Meaning of Settlement Agreement Not Heretofore Available

At the time of my earlier responses to your questions on August 12, 1986 (1986-1987 Report of the Attorney General at 252), and September 29, 1986 (1986-1987 Report of the Attorney General at 1), the documents in the public domain were, in my opinion, inconclusive on the question whether the Commonwealth is legally obligated to permit contact visits to death row inmates. In order to give a definitive answer to this question, it would have been necessary to base my conclusion upon material held by this Office in its role as counsel to State agencies and officials and not available to me for purposes of rendering official advisory opinions. For the reasons given in my prior letters to you, I continue to maintain that I am not permitted to disclose that material absent consent of my client, the Governor.

Since that time, I have received permission from Governor Gerald L. Baliles to disclose his communications while Attorney General with the Governor's Office pertaining to contact visitation for death row inmates. In addition, former Governor Charles S. Robb has been consulted and has provided a statement responding to questions posed by me concerning all communications with then-Attorney General Baliles or his staff concerning such visitation. There is now, therefore, sufficient information at my disposal to permit an Opinion on the question you pose.

III. Additional Facts Show No Legal Obligation Exists to Permit Contact Visits for Death Row Inmates

In a letter dated April 4, 1985, then-Attorney General Baliles, pursuant to § 2.1-127, submitted the proposed settlement, together with the reasons therefor, to Governor Robb for his approval. In his only reference to death row visitation, the Attorney General explained the significance of para. 29 of the Settlement Agreement with the following statement:

Paragraph 29 restates the provisions of ¶ 32 and 8 of the existing agreement concerning death row inmate visitation. Although no particular plan for visitation has been promised, the DOC has agreed to look into the possibility of non-barrier visitation provided there is adequate security.

The return letter of the same date from the Governor stated:

Thank you for your letter of April 4, 1985, regarding your recommendation for settlement of the issues in the above matter.
I approve the settlement on the basis you outlined. Please take appropriate
action to conclude this matter.

This letter approved the Settlement Agreement only upon the basis outlined by the
Attorney General.

Finally, a statement recently furnished to me by Governor Robb, declares that in
deciding whether to approve the proposed settlement, he received advice from Attorney
General Baliles, but he did not discuss with Attorney General Baliles, or with anyone
else, the issue of contact visits for death row inmates. Governor Robb also states that
he did not approve any agreement to permit such contact visits. ¹

IV. Conclusion: The Commonwealth Is Not Legally Obligated
to Permit Contact Visits for Death Row Inmates

In sum, neither those documents previously in the public domain, nor that material
now available, nor the statement provided by Governor Robb supports the conclusion that
the Commonwealth is legally obligated to permit contact visits for death row inmates. Thus, your question is answered in the negative. Because this question is answered in the
negative, it is unnecessary to address questions 2, 3 and 4 in your August 27, 1986 letter
or to answer further the questions in your letter of July 23, 1986.

¹ I refer you to my two earlier responses for a more complete statement of the back-

² The documents in the public domain were: (1) the Court Order of April 5, 1985;
(2) the Settlement Agreement of April 5, 1985; and (3) the April 17, 1985 letter from
Allyn R. Sielaff, then-Director of the Department of Corrections ("Department") and a
named defendant in the suit, to Alvin J. Bronstein, Director of American Civil Liberties
Union ("ACLU") National Prison Project in Washington, D.C., and lead counsel represent-
ing the plaintiffs in the suits.

Based solely on the Order, the Settlement Agreement and the Sielaff-Bronstein let-
ter, I could not determine whether the Commonwealth is legally obligated to provide
contact visits for death row inmates. At the most, the documents reflect nothing more
than an agreement to develop, sometime in the future, a plan for improved security
which would provide more flexible visitor arrangements, including direct communication
between death row prisoners and their visitors.

I note in passing that policies announced by the Department, effective July 1, 1986,
provide security arrangements and procedures for contact visits at the MCC facility, and
hence such visitations are presently permitted.

² Nothing in this Opinion represents a departure from my earlier Opinions dated August
note 1), on the issue whether this Office is limited in its "quasi-judicial" opinions process
to answering questions of law. I reaffirm that it is inappropriate for this Office to re-
solve factual disputes in its role of providing official advisory opinions.

ADMINISTRATION OF THE GOVERNMENT GENERALLY - COMPREHENSIVE CON-
FLICT OF INTERESTS ACT. CONTRACT PROHIBITION OF § 2.1-605(A) DOES NOT
APPLY TO FAMILY MEMBERS WHO DO NOT RESIDE IN SAME HOUSEHOLD.

February 23, 1987

Mr. E. W. Murray
Director, Department of Corrections

You ask whether the Comprehensive Conflict of Interests Act, §§ 2.1-599 through
2.1-634 of the Code of Virginia (the "Act"), prohibits the appointment of an assistant
warden as warden at a Department of Corrections ("Department") facility when the sis-
ter and brother of the assistant warden are employed at the facility.
I. Facts

The assistant warden at the Virginia Correctional Center for Women has been recommended to fill the vacant warden's position. The assistant warden's brother and sister, however, are employed by the Department at that facility as a grounds supervisor and a corrections captain respectively. You plan to transfer both the brother and sister to equivalent positions at nearby facilities to avoid any appearance of impropriety or possible conflict of interests. You ask whether the Act would prohibit the assistant warden's appointment as warden of the facility in these circumstances. Your assistant has also advised a member of my staff by telephone that the assistant warden does not reside in the same household with either her brother or sister.

II. Applicable Definitions and Statutory Provision

A. Applicable Definitions

Department employees are subject to the Act's prohibitions and restrictions. See § 2.1-600 ("employee"). Section 2.1-600 defines "personal interest" as "a personal and financial benefit or liability accruing to an officer or employee or to such person's spouse, or any other relative who resides in the same household." (Emphasis added.) A "personal interest in a contract" is defined as "a personal interest which an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in the firm, corporation, partnership or other business entity which is a party to the contract."

B. Contract Prohibition

Section 2.1-605(A) provides that "[n]o officer or employee of any governmental agency of state government shall have a personal interest in a contract with the governmental agency of which he is an officer or employee, other than his own contract of employment."

The threshold question presented is whether the assistant warden would have a personal interest in the employment contracts of her brother and sister with the Department.

III. Assistant Warden Does Not Have "Personal Interest" in Employment Contracts of Brother and Sister

As a matter of definition, a "personal interest" is established by a personal and financial benefit or liability accruing to an employee, the employee's spouse, or any other relative who resides in the same household. See § 2.1-600. Because the assistant warden does not share a household with either her brother or sister, she does not, by definition, have a "personal interest" in the employment contracts of her brother or sister. See § 2.1-600. Accordingly, the contract prohibition in § 2.1-600(A) would not be triggered by the assistant warden's current employment or her future appointment as warden. It is my opinion, therefore, that the Act does not prohibit the appointment of the assistant warden as warden at the correctional facility.1

1The Act does not require the transfer of the brother and sister to positions at another facility. Obviously, this is your decision, based on your assessment of what might cause an appearance of impropriety.

I would also suggest that you review the applicable Department personnel policies and the policies of the Department of Personnel and Training to ensure that the contemplated appointment is consistent with those policies.
You ask whether the professional or business activities of certain members of the Senate of Virginia would establish a conflict of interests under the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"), if the senators vote on certain proposed tort reform legislation and related insurance matters. The bills in question have been introduced as a result of an interim legislative study and are identified as S.B. Nos. 402, 403, 404, 405, 406, 407, 408, 409, 411, and H.B. Nos. 1234 and 1235. Due to the nature of your inquiry, I can only respond generally. I caution, therefore, that more particular, individual circumstances may alter the legal conclusions set out below. I have noted those areas of particular concern where individual circumstances have a pivotal effect on the conclusions expressed.

I. Classes of Legislators Whose Professional or Business Activities May Be Affected

Your request sets out four classes of legislators whose professional or business activities may be affected by the proposed legislation:

1. Attorney-senators who primarily represent plaintiffs in personal injury and related litigation.

2. Attorney-senators who primarily represent casualty or other insurance companies in the defense of liability or other litigation or defendants in such litigation.

3. Attorney-senators who primarily represent corporations and officers and directors thereof.

4. Senators who serve as officers or directors of stock or nonstock corporations.

You have also supplemented your inquiry by telephone and added the following three classes:

1. Senators who serve on advisory boards of banks or savings and loan associations.

2. Senators who are insurance agents.

3. Senators who are independent small businessmen.

You state that each of the attorney-senators earns more than $10,000 annually from his practice. Some senators earn more than $10,000 annually as officers or directors of corporations. I assume that the senator-insurance agents and senator-businessmen earn $10,000 annually from their agency or business. All of the proposed legislation is effective prospectively.

II. Nature and Anticipated Effect of Proposed Legislation

The cumulative effect of the proposed tort reform legislation is intended to increase the availability of liability insurance generally and to lower the rates consumers and businesses must pay for this coverage. See S.J. Res. 22, 1986 Va. Acts 2064. The tort reform "package" includes the following bills:
1. Senate Bill No. 402 limits the dollar recovery available to litigants for noneconomic damages. This bill is intended to affect insurance companies and their rates, as well as the potential recovery by plaintiffs.

2. Senate Bill No. 403 would eliminate many of the traditional exemptions from jury duty. This bill is intended to broaden the base of available jurors and result in juries which are more representative of the community.

3. Senate Bill No. 404 would limit the liability of corporate officers and directors for other than intentional and willful acts and knowing criminal violations. This bill would benefit corporations, to an extent, by reducing the cost of providing officers' and directors' coverage and limiting the potential liability of persons serving in those positions.

4. Senate Bill No. 405 would reduce the statute of limitations for medical malpractice actions brought on behalf of minors. This bill would benefit those insurance companies providing medical malpractice coverage in Virginia.

5. Senate Bill No. 406 would authorize alternatives to commercial insurance for pest control license applicants and waste management permit holders.

6. Senate Bill No. 407 would authorize the imposition of appropriate sanctions on attorneys and/or parties to litigation based on the filing of frivolous claims or defenses. The impact of this bill would, for the most part, be limited to the conduct of attorneys.

7. Senate Bill No. 408 would extend "good samaritan" immunity for emergency obstetrical services rendered by certain persons in good faith. This bill would benefit certain health care providers and would, to an extent, limit the class of potential defendants in litigation resulting from such emergency care.

8. Senate Bill No. 409 would grant limited immunity to members of local governing bodies and other local governmental agencies and commissions.

9. Senate Bill No. 411 would require courts to order the payment of future damages exceeding $250,000 in periodic payments unless manifest injustice would result from such a structured settlement. This bill would primarily benefit insurance companies by limiting the frequency and reducing the severity of large lump-sum awards.

10. House Bill Nos. 1234 and 1235 set out standards for an administrative review of competition among insurance providers, proposals for rate regulation and insurance company reporting, and proposals for notice to insurance purchasers of reductions in coverage or rate increases.

III. Applicable Definitions and § 2.1-610

Section 2.1-610 requires that an "officer" of a "governmental agency" 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."

As a member of the General Assembly, each senator is an "officer" of a State "governmental agency" and, therefore, subject to the Act's prohibitions and restrictions. See § 2.1-600.

A "personal interest" is defined in § 2.1-600 as

a personal and financial benefit or liability accruing to an officer or employee or to such person's spouse, or any other relative who resides in the same household. Such 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) personal liability on behalf of a corporation, firm, partnership or other business entity; however, unless the ownership interest in an entity exceeds 3% of the total equity of such entity, or the liability on behalf of an entity exceeds 3% 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 and may reasonably be anticipated to exceed $10,000, such interest shall not constitute a 'personal interest' within the meaning of [the Act].

A "transaction" is defined as "any matter considered by any governmental or advisory agency on which official action is taken or contemplated." Section 2.1-600.

A "personal interest in a transaction" is defined as

a personal interest of an officer or employee in any matter considered by his agency. Such personal interest will be deemed to exist where an officer or employee of an agency, or the spouse, or other relative of the officer or employee who resides in the same household, has (a) a personal interest in property or in a firm, corporation, ownership or business entity that (i) is the subject of the transaction, or (ii) will benefit or suffer from the action of the agency considering the transaction, or (b) a personal interest in a firm, corporation, partnership, or business entity that represents any entity which (i) is the subject of the transaction, or (ii) will benefit or suffer from the action of the agency considering that transaction.

Section 2.1-600.

IV. Application of Definitions

A. "Personal Interest" Test

A "personal interest" in a business entity is established by annual income from an entity in excess of $10,000, the reasonable anticipation of receiving such income, or an ownership interest in an entity exceeding 3% of the entity's equity. For example, if a member of the General Assembly earns more than $10,000 annually by practicing law or conducting a business, the member would have a "personal interest" in his law practice or business. If an attorney-legislator receives $10,000 in annual income, or reasonably anticipates receiving such income, whether by retainer, hourly fee, or other billing method, the attorney would also have a "personal interest" in the entity that is the source of that income. Similarly, if a legislator has an ownership interest exceeding 3% in a law firm, insurance agency or business, the legislator would have a "personal interest" in that entity.

Applying the definition of "personal interest" in § 2.1-600 to the classes of legislators you set out, I reach the following conclusions:

1. Attorney-senators would have a personal interest in their law firm or practice whether based on income or ownership.

2. Attorney-senators who represent personal injury plaintiffs would have a "personal interest" in any current client from whom they had received $10,000 in annual income or reasonably anticipate receiving such income. In my opinion, an attorney-legislator could not, as a matter of definition, have a "personal interest" in a future client.

3. Attorney-senators who represent insurance companies would have a "personal interest" in any company from which they had received $10,000 in annual income or reasonably anticipate receiving such income. In my opinion, a historical and ongoing relationship between an attorney and an insurance company resulting in the attorney's reasonable anticipation of receiving $10,000 in fees from the company would establish the
attorney-legislator's "personal interest" in the payor company. On the other hand, it is my opinion that an attorney-legislator could not, as a matter of definition, have a "personal interest" in an individual defendant who becomes a future client.

4. Attorney-senators who represent corporations would have a "personal interest" in any corporation from which they received $10,000 in annual income or reasonably anticipate receiving such income.

5. Senators who serve as officers or directors of stock or nonstock corporations would have a "personal interest" in any corporation from which they received $10,000 in annual income or reasonably anticipated receiving such income.

6. Senators who serve on an advisory board of a bank or savings and loan institution would have a "personal interest" in that bank or savings and loan institution if they received $10,000 in annual income or reasonably anticipated receiving such income as a result of such service.

7. Senators who are insurance agents would generally have a "personal interest" in their agency whether based on income or ownership. Also, such senators would have a "personal interest" in any insurance company from which they received $10,000 in annual income or reasonably anticipated the receipt of such income.

8. Senators who are independent small businessmen would generally have a "personal interest" in their business whether based on income or ownership.

B. "Personal Interest in a Transaction" Test

The second element governing the application of the disqualification requirement of § 2.1-610 is whether an officer or employee has a personal interest in the relevant transaction. In interpreting the statutory definition of "personal interest in a transaction," the Supreme Court of Virginia has stated:

If, at the time the transaction is pending, it is reasonably foreseeable that the public servant's personal interest could benefit or suffer from his participation in that transaction, the conflict and the danger it poses to the public interest arise at the moment the transaction occurs. Hence, according the Act a liberal construction in aid of its stated purpose, we conclude that the General Assembly intended the word 'will' [as used in the definition of 'personal interest in a transaction' in § 2.1-600] to carry the same import as the word 'may.'

West v. Jones, 228 Va. 409, 415, 323 S.E.2d 96, 100 (1984)\(^1\) (emphasis added). It is important to note that the test of reasonable foreseeability is to be applied at the time of the transaction.

In applying this test, the Court concluded that Mayor West of the City of Richmond, a member of city council and a middle school principal in the Richmond public school system, had a personal interest in the city council's consideration of appointments to the city school board. This conclusion was based on two factors: first, that the school board had the power to alter existing compensation policies, negotiate salaries on an individual basis, and alter unilaterally the employment status of principals; and second, that a change in policies was reasonably foreseeable in that city council was considering the appointment of four of the seven school board members. See id. at 416, 323 S.E.2d at 100.

As noted above, an attorney-legislator cannot, by definition, have a "personal interest" in a future client. Accordingly, it is my opinion that an attorney-legislator cannot have a "personal interest in a transaction" involving a future or prospective client.
A final factor to be considered in determining whether a "personal interest in a transaction" exists is the extent to which the effect of the transaction is speculative, remote, or contingent on factors beyond the attorney-legislator's control. Compare advisory opinions to the Honorable S. Vance Wilkins, Member, House of Delegates, and to the Honorable Richard L. Saslaw, Member, Senate of Virginia, both dated September 22, 1986. In circumstances where the effect of the transaction is speculative, remote, or contingent on factors beyond the attorney-legislator's control, it is my opinion that it is not reasonably foreseeable that the officer's "personal interest" will benefit or suffer as a result of the pending transaction.

C. Factors Governing "Specific Application" Test

The final element governing the application of the disqualification requirement of § 2.1-610 is whether the pending transaction has "specific application" to the officer's or employee's personal interest. In discussing the "specific application" test in West, the Court stated that "[a]s 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 (emphasis added). The Court's construction of the "specific application" test severely restricted the application of the group or class based analysis provided in the text of § 2.1-610 and undermining the conclusions reached in past Opinions of the Attorney General. See, e.g., Reports of the Attorney General: 1984-1985 at 51, 1983-1984 at 49; 1982-1983 at 100.

A number of additional factors, however, are relevant in determining whether the broad "specific application" test in West applies in any given situation or whether the circumstances presented are distinguishable from those considered by the Court in West and, therefore, call for a more narrow "specific application" test. These factors include the following:

1. The size of the relevant group or class affected by the pending transaction. For example, in West, Mayor West was one of 53 principals employed by the school board. Notwithstanding the Court's sweeping language in West, it is my opinion that the size of the class affected remains a relevant factor in determining the applicability of the "specific application" test. In situations where the class affected is significantly larger than the 53-member class considered by the Court, the applicability of the "specific application" test is less likely.

2. The presence or absence of the possibility that the officer or employee, or the entity in which the officer or employee has a personal interest, could be singled out for preferential or adverse treatment by those bodies charged with implementing or enforcing new legislation. Compare Wilkins and Saslaw advisory opinions, supra. In West the school board had the immediate power, for example, to unilaterally alter Mayor West's employment status and/or compensation on an individual basis. In the absence of such a possibility, the applicability of a "specific application" test is less likely.

3. The nature of the impact of the proposed legislative action on the entity in which an officer or employee has a personal interest and the relationship, if any, between that impact and the type of services rendered to the entity by the officer or employee. In West, there was a close relationship between the pending legislative act (school board appointments) and Mayor West's employment as a principal. In the absence of such a relationship, the applicability of a broad "specific application" test is less likely.

4. The extent to which the proposed legislation will affect the entity in which an officer or employee has a personal interest. For example, if the proposed legislation will have a severe impact on the entity, then, despite the legislation's application to other entities, the officer or employee is more likely to have an interest in the transaction that is qualitatively different from that of the general public. In such circumstances, a broad "specific application" test is more likely to be applied.
V. "Personal Interest in a Transaction" and "Specific Application" Tests as Applied to Classes of Senators

Considering the "personal interest in a transaction" and "specific application" tests in light of the factors set out in Part IV(A) above, I reach the following conclusions:

1. Senators in all of the seven classes you set out may vote on S.B. Nos. 403, 406, 408 and 409, because none of the classes of senators would have a personal interest in those transactions. The effect of these proposed bills on the professional and business activities of the senators, or on entities in which the senators may have a personal interest (see Part IV(A) above) would be speculative, remote and contingent on factors beyond the control of the senators.

2. Attorney-senators who represent personal injury plaintiffs may vote on the tort reform package's insurance bills (S.B. Nos. 402, 405, 411, and H.B. Nos. 1234, 1235) because of the lack of any personal interest in those transactions. The potential impact of these bills on the attorney's law firm or future clients is speculative, remote and contingent on factors beyond the attorney's control. Similarly, an attorney-senator who practices in this area may also vote on S.B. Nos. 404 and 407 because of a lack of any personal interest in those transactions. Any impact S.B. No. 407 may have on an individual attorney's practice in the future is speculative and remote. Senate Bill No. 404, limiting the liability of officers and directors, has only a tangential relationship with attorneys who practice in this area and, accordingly, this class of senators may vote on S.B. No. 404 as well.

3. Attorney-senators who represent insurance companies and defendants, notwithstanding any personal interest they may have in an insurance company (see Part IV(A) above) generally may vote on the package's insurance bills (S.B. Nos. 402, 405, 411, and H.B. Nos. 1234, 1235) because, in my opinion, those bills do not have specific application to the senator-attorney's personal interest. This conclusion is based on the absence of any of the aggravating factors set out in Part IV(C) above and the size of the class of insurance companies affected. If a particular insurance company is affected in a unique manner by one of these bills, however, the bill could easily have specific application to a senator's personal interest in that insurance company. The absence of specific facts prevents my rendering a definitive opinion on this point. Also, an attorney-senator who practices in this area may also vote on S.B. Nos. 404 and 407 for the same reasons as are set out in Part V(2) immediately above.

4. Attorney-senators who represent corporations may vote on all 11 of the bills. Of those 11 bills, only S.B. No. 404, dealing with the liability of corporate officers and directors, is of any direct relevance to senators in this class. Notwithstanding any personal interest an attorney-senator may have in a corporation, the impact of this bill on any particular corporation is speculative, remote and contingent on factors beyond the attorney's control.

5. Senators who serve on advisory boards of banks and savings and loan institutions may vote on all 11 bills, notwithstanding any personal interest they may have in the bank or savings institution by reason of their service. Members of such advisory boards are not covered by the provisions of S.B. No. 404. None of the other ten bills would have any apparent impact on banks and savings and loan institutions.

6. Senators who are insurance agents may vote on all 11 bills, notwithstanding any personal interest they may have in an insurance agency or a particular insurance company, because the bills would not, in most circumstances, have any specific application to a senator-insurance agent's personal interest. This conclusion is based on the absence of any of the aggravating factors set out in Part IV(C) above and the number of insurance companies affected by the proposed legislation.

7. Senators who operate small, independent businesses may vote on all 11 bills because of the lack of any personal interest in those transactions. Any impact the tort re-
form package will have on any given small business is speculative, remote and beyond the control of the legislator-businessman.

8. A senator-attorney who represents insurance companies who provide medical malpractice coverage in Virginia and whose representation involves defending such claims, in my opinion, may not vote on S.B. No. 405, dealing with a reduced statute of limitations for certain medical malpractice actions. This conclusion is based on limited number of insurance companies presently providing such coverage in Virginia and the relationship between the bill's provisions and the type of services provided by the senator-attorney.

9. Senators who serve as officers and directors of corporations and have a personal interest in a given corporation by reason of their service may vote on all of the bills you specify except S.B. No. 404. This conclusion concerning S.B. No. 404 is based on the close relationship between the bill's potential impact and the services provided by the legislator as an officer or director. Despite the size of the class of persons affected by S.B. No. 404, it is my opinion that § 2.1-610 requires senators who serve as officers or directors of corporations and have a personal interest in a particular corporation by reason of this service disqualify themselves from voting on S.B. No. 404.

VI. Conclusion

I reiterate that the conclusions reached in this Opinion are based on general facts. Specific circumstances related to the impact a bill may have on a particular insurance company or other entity in which a senator has a personal interest or the details of a senator's relationship with such an entity could alter the results. My conclusions concerning the speculative impact various bills may have in various circumstances would, of course, yield to a senator's personal knowledge indicating that the impact of a given bill may be more direct than is readily apparent. Finally, I note that my review of the tort reform package and related insurance matters is limited to the provisions of those bills as they have been introduced. Subsequent amendments may, in certain circumstances, alter the conclusions I have reached with respect to such amended bills.

1The Court's interpretation of a "personal interest in a transaction" in West, in the context of the effect of an official transaction on an officer's or employee's financial interests, is significantly different from the test applied in similar situations in past Opinions of the Attorney General. Prior Opinions of this Office, interpreting the repealed Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358, held that there must be a "causal connection" between the official transaction and a material financial effect on the public official's financial interests before the disqualification requirement was triggered. See Reports of the Attorney General: 1981-1982 at 421; 1980-1981 at 381. The Court's interpretation of a "personal interest in a transaction," of course, supersedes the prior Opinions of this Office on that issue.

ADMINISTRATION OF THE GOVERNMENT GENERALLY - COMPREHENSIVE CONFLICT OF INTERESTS ACT. HOUSING - UNIFORM STATEWIDE BUILDING CODE. ACT SUPERSEDES CONFLICT OF INTERESTS PROVISION OF USBC.

March 3, 1987

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

You ask whether § 102.10 of the Virginia Uniform Statewide Building Code (the "USBC") is superseded by the provisions of the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the Code of Virginia (the "Act"), by virtue of the supersession clause of § 2.1-599.
I. Applicable Provisions of the Act and the USBC

A. Applicable Provisions of the Act

Section 2.1-599 provides, in part, as follows:

For the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts [the] Act so that the minimum standards of conduct of such officers and employees may be uniform throughout the Commonwealth.

* * *

This chapter shall supersede all general and special acts and charter provisions which purport to deal with matters covered by this chapter, except that the provisions of §§ 15.1-73.4 and 15.1-486.1 and ordinances adopted pursuant thereto shall remain in force and effect.

Section 2.1-610 requires that an officer or employee of governmental and advisory agencies disqualify himself from participating in official transactions "when (i) he has a personal interest in the transaction and (ii) the transaction has specific application to his personal interest." The manifest purpose of the disqualification requirement of § 2.1-610 is to prohibit public officers and employees from participating in official transactions when the performance of their duties could be influenced by inappropriate conflicts. See § 2.1-599. Section 2.1-602 details prohibitions against unethical conduct which would, in certain circumstances, restrict the private financial activities of public officers and employees.

B. Applicable Provision of the USBC

Volume 1, Board of Housing and Community Development, New Construction Code of the USBC § 102.10 (1984 ed.) provides:

The building official and other technical assistants shall not be engaged in or directly or indirectly connected with the furnishing of labor, materials or appliances for the construction, alteration or maintenance of a building, or the preparation of plans or specifications thereof, unless that person is the owner of the building. Such officer or employee shall not engage in any work which conflicts with official duties or with the interests of the department within the jurisdiction in which they work. They may perform ordinary repairs for which a permit is not required by the USBC. In addition, they may perform maintenance work on buildings owned, operated or leased by the local government by whom they are employed.

The manifest purpose of USBC § 102.10 is to prohibit building officials and technical assistants from having financial interests in building sites or suppliers when the building official or technical assistant may be asked to perform on-site inspections. Section 102.10 also prohibits such officials and assistants from engaging in any type of activity incompatible with their duties or the interests of the local building department.

Section 102.10 of the USBC was promulgated pursuant to Va. Code §§ 36-98 and 36-99. Section 36-105 places responsibility for enforcing the USBC in the local building department. Section 36-106 provides that any violation of the USBC shall be a misdemeanor.

II. Section 102.10 of the USBC Superseded by Applicable Provisions of the Act

Section 2.1-599 of the Act does not expressly repeal the conflict of interests provision of USBC § 102.10. Any repeal of § 102.10, therefore, must be by operation of the
supersession clause of § 2.1-599. In considering the question of repeal by implication, all
the circumstances surrounding the enactment of the statutes in question should be con-
dismissed, 368 U.S. 4 (1961). This rule is equally applicable, in my opinion, when consid-
ering a regulation promulgated by an administrative agency.

Section 2.1-599, as interpreted by a prior Opinion of this Office, generally pre-
ccludes the enactment of standards or procedures dealing with conflict of interests mat-
52, 53.2 Moreover, if USBC § 102.10 is to be given full force and effect, it would subject
building officials and technical assistants to a different and stricter standard of conduct
regarding conflict of interests than all other local officers and employees. This result, in
my opinion, would be inconsistent with the legislative intent that the Act establish a uni-
form minimum standard governing the conduct of public officers and employees in the
area of conflict of interests.3 See § 2.1-599.

III. Conclusion: Act Supersedes USBC Provisions on Conflict of Interests

Based on the above, it is my opinion that the Act supersedes USBC § 102.10 to the
extent that § 102.10 regulates the conduct of building officials and technical assistants in
matters related to conflict of interests.

1The USBC supersedes all building maintenance codes and regulations of counties,
municipalities, political subdivisions and State agencies that have been or may be en-
cacted or adopted. See Va. Code § 36-98.
2Section 2.1-599, however, authorizes ordinances and regulations by local governments
to govern the conduct of the officers and employees of those localities.
3I distinguish this result from the conclusion reached in a recent Opinion on the basis
that § 12.1-10 operated as a condition of employment, and its supersession by the Act
would have been inconsistent with the legislative history of § 12.1-10. See 1986-1987

ADMINISTRATION OF THE GOVERNMENT GENERALLY - COMPREHENSIVE CON-
FLICT OF INTERESTS ACT. PAYMENT OF MILEAGE SUPPLEMENT TO SPOUSES AND
FAMILY MEMBERS OF EMPLOYEES OF DEPARTMENT FOR THE VISUALLY HARDI-
CAPPED SUBJECT TO CONTRACT PROHIBITION OF § 2.1-605(A); SMALL CONTRACT
EXCEPTION OF § 2.1-608(A)(6) PERMits PAYMENT OF UP TO $500 ANNUALLY.

March 30, 1987

Mr. John A. McCann
Commissioner, Department for the Visually Handicapped

You ask whether the Department for the Visually Handicapped (the "Department")
may pay a supplement to the normal mileage reimbursement to volunteer drivers who
provide transportation services to blind and visually impaired Department staff without
violating the Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 of the
Code of Virginia (the "Act"), when the volunteer drivers are family members of Depart-
ment staff.

I. Facts

The Department supplements the normal mileage reimbursement for the use of pri-
ivate vehicles for volunteer drivers who provide transportation services for visually im-
paired Department staff. The current supplement is 15 cents per mile. The supplement
is paid directly to the volunteer drivers from the endowment funds of the Department.
The Department has refrained from paying the supplement to volunteer drivers who are
members of a Department employee's family because of a concern that such payments
might violate the Act.

II. Applicable Definitions and Contract Prohibition

A. Definitions

As employees of a State agency, Department staff members are State "employees" subject to the Act's prohibitions and restrictions. See § 2.1-600. The payment of the supplement to volunteer drivers would be a "contract" under the Act because the payment is part of an agreement to which the Department is a party. See § 2.1-600.

A "personal interest" is defined in § 2.1-600 as "a personal or 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."

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

B. Contract Prohibition

Section 2.1-605(A) provides that "[n]o officer or employee of any governmental agency of state government shall have a personal interest in a contract with the governmental agency of which he is an officer or employee, other than his own contract of employment."

The question presented under the above statutes is whether the payment of the supplement to family members would establish a Department employee's personal interest in a contract with the Department within the prohibition of § 2.1-605(A).

III. Payment of Mileage Supplement to Spouse or Relative Residing in Same Household Would Constitute Prohibited Personal Interest in Contract

Under the Act's definition of "personal interest," any financial benefit or liability accruing to an employee, the employee's spouse or other relative living in the same household is imputed to the employee. See § 2.1-600. In this instance, the payment of the supplement to a Department employee's spouse or relative living in the same household would constitute a financial benefit to the person receiving the payment and would be imputed to the Department employee. It is my opinion, therefore, that the payment of the supplement to a Department employee's spouse or relative living in the same household would establish the employee's personal interest in a contract with the Department, in violation of § 2.1-605(A), unless one of the Act's exceptions applies.

IV. Small Contract Exception of § 2.1-608(A)(5) Permits Payment of Supplement Up to $500

I have reviewed the exceptions to the prohibition of § 2.1-605(A) detailed in § 2.1-605(C) and find that none applies in these circumstances. It is possible, however, that the provisions of § 2.1-608(A) would apply.

Section 2.1-608(A) provides:

The provisions of §§ 2.1-604 through 2.1-607 shall not apply to:

* * *

(6) Contracts for the purchase of goods or services when the contract does not exceed $500.
Any payments of a supplement which do not exceed a total of $500, therefore, would not be subject to the prohibition of § 2.1-605(A). Intermittent payments of the supplement to an employee's spouse or relative living in the same household, therefore, would not violate § 2.1-605(A), provided the payments do not exceed $500 in a given year. If a Department employee's spouse or relative living in the same household is expected to provide regular volunteer driving services, in my opinion, payments of the supplement should not exceed $500 annually.

To summarize, it is my opinion that (1) the payment of the supplement to spouses and relatives of Department employees living in the same household is subject to the contract prohibition of § 2.1-605(A), and (2) the small contract exception in § 2.1-608(A)(6) authorizes the payment of the supplement to such persons in amounts not exceeding $500 in a given year.

I recognize that the limited amount of compensation available to spouses and family members will in some circumstances result in hardship or uncompensated services. I am bound, however, by the limitations imposed by the Act on the ability of an employee to have a financial interest in contracts with his own agency.

ADMINISTRATION OF THE GOVERNMENT GENERALLY - DEPARTMENT OF GENERAL SERVICES - DIVISION OF RISK MANAGEMENT. COMMISSIONS, BOARDS AND INSTITUTIONS - VIRGINIA MUSEUM OF FINE ART. MUSEUM COUNCIL VOLUNTEERS COVERED BY STATE SELF-INSURANCE.

October 27, 1986

Mr. Paul N. Perrot
Director, Virginia Museum of Fine Arts

You ask whether members of an unincorporated organization of volunteers rendering services to the Virginia Museum Council (the "Council") of the Virginia Museum of Fine Arts (the "Museum") are covered under the Commonwealth's liability insurance plan administered by the Department of General Services, Division of Risk Management, pursuant to § 2.1-526.8 of the Code of Virginia.

I. Volunteers Working in State Agencies Generally Are Covered by State Liability Self-Insurance Plan

Volunteers are an integral component of the work force in many agencies of the Commonwealth. Under the Virginia State Government Volunteers Act (§ 2.1-554 et seq.), State agencies are authorized and encouraged to explore utilization of volunteers. State agencies are authorized to reimburse their volunteers for certain incidental costs, such as transportation, lodging and meals. See § 2.1-558. Liability insurance for such volunteers is specifically authorized by § 2.1-558(D), which provides:

Liability insurance may be provided by the department utilizing their services both to regular-service and occasional-service volunteers to the same extent as may be provided by the department to its paid staff. Volunteers in State and local service shall enjoy the protection of the Commonwealth's sovereign immunity to the same extent as paid staff.

State agencies currently insure their regular employees through the Commonwealth's self-insurance plan. See 1985-1986 Report of the Attorney General at 150. The Plan insures:

[Emphasis added.]
The Plan, at 1, ¶ I(B). Clearly, therefore, volunteers working for and subject to the control and supervision of State agencies generally are covered by the Plan.

II. Volunteers Working in Museum as Members of Council Are Covered By the Plan

The Museum is an agency and educational institution of the Commonwealth. See § 2.1-1.5; § 9-78 et seq. The Museum benefits substantially from the service of many volunteers, some of whom have attained special volunteer status through membership in the Council. Council volunteers staff the Council Shop at the Museum. Further, Council volunteers conduct children's programs at the Museum, prepare decorations for the Museum, serve as docents and gallery hostesses, staff information desks, staff the Museum library, perform office tasks, and participate in the Museum's Speakers Bureau. These functions would have to be performed by paid Museum staff if it were not for the time and dedication of highly-trained and competent volunteers.

It is my opinion, therefore, that Council volunteers are covered to the same extent as State employees under the Plan administered by the Division of Risk Management when performing authorized volunteer services for the Museum.

1Under § 2.1-526.8(A), the Office of Risk Management is directed to "establish an insurance plan . . .

1. To provide protection against liability imposed by law for damages resulting from:
   a. any claim made against any department, agency, institution, board, commission, officer, agent, or employee thereof for acts or omissions of any nature while acting in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization . . . ."

Pursuant to this statutory provision, the Office of Risk Management established a "Self-Insured Liability Plan for the Commonwealth of Virginia" (the "Plan"), effective July 1, 1986. Prior to this date, a similar plan was in effect for the period July 1, 1985 through June 30, 1986.

The Council is not an incorporated entity or organization separate from the Museum. It is a group designation, begun in 1955, to encourage and recognize a special group of volunteers who were interested in furthering the Museum's offerings to the surrounding community. Persons who have been regular Museum volunteers for two years, have received special training, and have worked as volunteers in the Council Shop for one year are eligible to be recommended by the Museum staff to be members of the Council.

The primary activity of the Council volunteers is managing and staffing the Council Shop, which is located near the galleries. It offers for sale books, educational materials and art reproductions which relate to the Museum's collections, exhibitions and programs. The merchandise in the Council Shop is reviewed by the Museum staff for quality, artistic validity and relevance to the Museum's mission. The Museum itself buys all the items it offers for sale in the Council Shop. All revenues above expenses of the Shop are placed in the Museum's Commonwealth Special Revenues and Special Projects Accounts.

Absent such volunteers, the cost of such services to the Commonwealth would be substantial. I am advised that Council volunteers contribute over 27,000 hours of work each year in the Council Shop alone.

Necessarily, the specific activity being performed must be examined for coverage under the Plan and applicability of any exclusion.
You ask several questions pertaining to coverage under the Law Enforcement Liability Self-Insurance Plan ("Plan"), executed July 1, 1986, and administered by the Department of General Services, Division of Risk Management ("DRM"), pursuant to § 2.1-526.8:1 of the Code of Virginia. Your inquiries pertain to three major areas which I will address individually.

I. Plan Provides Coverage on Excess Basis

You first ask whether the coverage afforded by the Plan is primary or excess coverage. If it is primary, you also ask whether there is any deductible; if excess, you ask whether there is a minimum retention and whether there are limits of primary coverage.

The Plan provides coverage on an "excess" basis, and states as follows:

OTHER INSURANCE—The insurance afforded by this Plan is excess insurance. If the INSURED has other insurance or self-insurance which is stated to be applicable to the loss in an excess or contingent basis, this Plan will be excess of such insurance whether collectible or not.

Plan § VI(D). Because the coverage afforded by the Plan is excess coverage, the Plan is not responsible for payment of any loss within the limits of other insurance or self-insurance which is applicable. In such circumstances, the Plan would not become responsible for payment of a covered loss until the limits of the primary insurance have been exceeded. The Plan neither requires that an insured have primary insurance nor specifies that any primary insurance covering the insured shall have any particular limits of coverage. The Plan also does not require that any retention or deductible be paid by the insured. Therefore, in the absence of any other applicable insurance coverage, the Plan would be liable for a covered loss as if it were primary insurance.

II. Plan Covers Punitive Damages to Extent Consistent with Public Policy

You also ask whether the Plan would pay punitive damages if awarded, since the Plan is silent concerning these damages. The Plan provides that it will pay on behalf of the insured, "all sums which the INSURED shall become legally obligated to pay as damages because of any WRONGFUL ACT(S)" resulting in personal injury, bodily injury or property damage caused by an occurrence for which coverage is provided by the Plan. Plan § i(A) (emphasis added). The Plan does not limit the coverage provided to compensatory damages only. Because punitive damages, if awarded, would be a sum which the insured is legally obligated to pay as damages, the Plan would be liable for punitive damage awards unless the particular loss is otherwise excluded by the Plan or prohibited by law. See Lipscombe v. Security Ins., 213 Va. 81, 84-85, 189 S.E.2d 320, 323 (1972).

Arguments have been raised in some jurisdictions, including Virginia, that insurance coverage for punitive damages violates public policy. In Virginia, the Supreme Court has declined to address this issue, believing that it is "a matter best left to the General Assembly." Lerner v. Safeco, 219 Va. 101, 103, 245 S.E.2d 249, 251 (1978). Although not expressly applicable to self-insurance plans established under § 2.1-526.8:1, the General Assembly has articulated the public policy of the Commonwealth with respect to the purchase of insurance affording coverage for punitive damages:

It is not against the public policy of the Commonwealth for any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, including willful and wanton negligence, but excluding intentional acts. This section declares existing policy.
Section 38.2-227. It is my opinion that the foregoing declaration of public policy applicable to purchased insurance also applies to coverage for punitive damages under the Plan, inasmuch as it is, like purchased insurance, a method of risk sharing. Where public policy would prohibit coverage for punitive damages in the case of purchased insurance, the same considerations apply under the Plan. I am of the opinion, therefore, that the Plan would cover punitive damages awarded as the result of negligence, including willful and wanton negligence, but not punitive damage awards based on intentional acts.

III. Plan Covers Awards of Attorney's Fees in Certain Circumstances

You next inquire whether the Plan would cover the award of attorney's fees against an insured. By way of example, you ask who would pay attorney's fees under 42 U.S.C. § 1988 "if someone filed a class action suit seeking injunctive relief or was awarded nominal damages."

The Plan states that it will pay "all costs taxed against the INSURED in any suit defended by the Plan." Plan § II(C)(1). Since attorney's fees awarded under 42 U.S.C. § 1988 are taxable as costs, such award would be covered by the Plan if the suit is one which is covered by the Plan. Whether coverage is afforded by the Plan is based upon the allegations of a particular suit and the relief demanded in the suit. See Travelers v. Obenshain, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978); Lerner, 218 Va. at 104, 245 S.E.2d at 251-52.

The Plan sets forth numerous exclusions in § IV and specifically does not apply in the following situation:

To any actions, claims, suits or demands seeking relief or redress in any form other than money damages, nor shall the Plan have any obligation to indemnify the INSURED for any costs, fees or expenses which the INSURED shall become obligated to pay as a result of an adverse judgment for injunctive or declaratory relief; however, the Plan will afford defense to the INSURED for such actions, claims, suits or demands, if not otherwise excluded, where compensatory damages are requested.

Plan § IV(J) (emphasis added). A suit seeking only injunctive or declaratory relief, but not money damages, would not be covered and, therefore, would not be defended by the Plan. If an adverse judgment is entered in such a suit and attorney's fees are awarded, the Plan would not be liable for the award of attorney's fees. If, however, the foregoing suit also raises claims covered by the Plan and makes demand for compensatory damages, the Plan would afford coverage and would defend the suit, even though injunctive or declaratory relief is sought in addition to the money damages. Moreover, if such suit ultimately results in a judgment in favor of the plaintiff for injunctive or declaratory relief, but not for compensatory damages, I am of the opinion that an award of attorney's fees would be covered by the Plan because the suit initially sought compensatory damages and, therefore, was defended by the Plan. This result also applies to your second hypothetical situation, i.e., where the suit initially seeks nominal damages, whether or not such damages ultimately are awarded, together with attorney's fees. Coverage for attorney's fees is determined, therefore, based upon whether the Plan affords coverage for the allegations raised in a particular suit.

1Ultimately, any determination of whether coverage is applicable must be made on a case-by-case basis and depends upon the facts presented in a specific claim. Accordingly, nothing contained in this Opinion shall be binding upon DRM's determination of coverage for a particular claim or be considered as an admission by DRM or the Commonwealth as to the scope of coverage under the Plan in specific cases.

2A policy of insurance providing coverage on an excess basis covers a claim only for liability above the maximum coverage of a primary policy or policies. The excess clause of a policy does not apply where there is no primary insurance. See generally 8A J. Appleman, Insurance Law and Practice § 4909 (1981).

As noted supra, the Plan is obligated to pay "all costs taxed . . . in any suit defended by the Plan." Plan § II(C)(1) (emphasis added). By reason of this provision, the Plan would pay the award of attorney's fees.

ADMINISTRATION OF THE GOVERNMENT GENERALLY - INVESTMENT OF PUBLIC FUNDS. FIDUCIARIES GENERALLY - INVESTMENTS. OPEN-END FUND COMPRISED ENTIRELY OF U.S. GOVERNMENT OBLIGATIONS AND REPURCHASE AGREEMENTS OF SUCH OBLIGATIONS PERMISSIBLE INVESTMENT FOR CITY. NO AUTHORITY TO INVEST IN FUND CONTAINING COVERED CALL OPTIONS OR FUTURES CONTRACTS.

March 10, 1987

The Honorable Esther F. Cousins
Treasurer for the City of Colonial Heights

You ask whether a city may invest funds in an open-end investment fund comprised primarily of obligations of, or guaranteed by, the United States government but which also contains "repos," cover call rights, and futures contracts. If my response is qualified or negative to this question, you also ask whether the city may invest in such open-end investment funds composed entirely of, or guaranteed by, the United States government.

I. Applicable Statutes

Section 2.1-328 of the Code of Virginia provides:

The Commonwealth, all public officers, municipal corporations, political subdivisions and all public bodies of the Commonwealth may properly and legally invest any and all moneys or other funds belonging to them or within their control other than sinking funds in securities that are legal investments for fiduciaries under the provisions of clauses (1), (2), (3), (4), (5) and (24) of § 26-40 . . . . [Emphasis added.]

Section 2.1-328.9 provides:

Notwithstanding any provision of law to the contrary, every county, city and town and all political subdivisions and public bodies of the Commonwealth may invest unexpended or excess moneys in one or more open-end investment funds, provided . . . that the investment of such funds by political subdivisions is restricted to investments otherwise permitted by law as set forth in Chapter 18 (§ 2.1-327 et seq.) of Title 2.1 . . . . [Emphasis added.]

Section 26-40 describes the fiduciary investment appropriate to your inquiry and provides, in part:

Executors, administrators, trustees, and other fiduciaries, both individual and corporate, may invest the funds held by them in a fiduciary capacity in the following securities, which are and shall be considered lawful investments:

***

(2) Obligations of the United States, etc.--Stocks, bonds, treasury notes and other evidences of indebtedness 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.]

With regard to repurchase agreements, § 2.1-328.8 provides:

Notwithstanding any provision of law to the contrary, the State Treasurer and every county, city and town, as well as all political subdivisions and public bodies of the Commonwealth, may invest unexpended or excess moneys in any fund or account over which custody and control is exercised, in overnight, term and open repurchase agreements which are collateralized with securities that are approved for direct investment. [Emphasis added.]

II. Investment May Be in Open-End Investment Fund, Provided Fund Is Limited Entirely to United States Obligations

Sections 2.1-328 and 2.1-328.9 authorize cities, and others, to invest in securities and open-end investment funds. The latter statute restricts investments in open-end funds to "Investments otherwise permitted by law as set forth in Chapter 18 (§ 2.1-327 et seq.) of Title 2.1."

Obligations of the United States are investments specifically approved for direct investment by cities and others in § 26-40(2), which is referenced in § 2.1-328. Section 26-40(2) permits United States government obligations to be held in the form of securities of any open-end management type investment company, "provided that the portfolio of such investment company or investment trust is limited to such evidences of indebtedness." (Emphasis added.)

Based on the above, it is my opinion that § 26-40(2) authorizes a city to invest in an open-end investment fund which is limited entirely to obligations of the United States government.

III. Fund May Contain Repurchase Agreements of United States Government Obligations

Section 2.1-328.8 authorizes investment in repurchase agreements "which are collateralized with securities that are approved for direct investment." Section 26-40(2) requires that, when United States government obligations are held in the form of securities of an open-end investment company, the fund must be limited to United States obligations. After reading §§ 26-40(2) and 2.1-328.8 together, it is my opinion that a city may invest in an open-end fund comprised entirely of United States obligations and repurchase agreements of these obligations.

IV. Investment in Fund Containing Covered Call Options and Futures Contracts Not Permitted

The General Assembly has not extended the authority of cities and others to invest in funds containing covered call options and futures contracts. Since the authority for investment in repurchase agreements has been granted in § 2.1-328.8 and many other forms of investments are set out in § 26-40 and other statutes, none of which includes covered call options and futures contracts, it is my opinion that investments may not be made by a city in an open-end investment fund containing either of these two investment alternatives. Statutes which limit the manner in which something may be done also evince the intent that it shall not be done otherwise. "Expressio unius est exclusio alterius." Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982), quoting Christiansburg v. Montgomery County, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976).
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V. Conclusion: City Investment in Open-End Fund Containing Covered Call Options and Futures Contracts Prohibited

Both the investments you question involve funds that are "hedged" by including repurchase agreements, covered call options and futures contracts. The fund described in your first inquiry also is not limited to United States government obligations. Based on the above, it is my opinion that neither fund is an authorized investment for a city under existing statutes.

1A "repo," also known as a repurchase agreement, is an agreement between a seller and a buyer, usually of U.S. government securities, whereby the seller agrees to repurchase securities at an agreed price and, usually, at a stated time. Barron's Dictionary of Finance and Investment Terms 336 (1985).

2A cover call right, also known as a covered call option, is the right to buy securities from an owner at a predetermined price before a preset deadline, in exchange for a premium. Barron's, supra note 1, at 51.

3A futures contract is an agreement to buy or sell a specific amount of a commodity or financial instrument at a particular price on a stipulated future date. The price is established between buyer and seller on the floor of a commodity exchange, using the open outcry system. A futures contract obligates the buyer to purchase the underlying commodity or instrument, and the seller to sell it, unless the contract is sold to another before the settlement date, which occurs if the trader waits to take a profit or cut a loss. Barron's, supra note 1, at 152.

4You ask that I assume, for the purpose of this Opinion, that the investment funds are registered, as required by § 26-40(2) of the Code of Virginia.
Hinderliter v. Humphries, 224 Va. 439, 444, 297 S.E.2d 684, 686 (1982). Consistent with these principles, the Act authorizes agencies to "collect, maintain, use, and disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency." Section 2.1-380(1).

The Act requires that an agency collecting such information maintain it "with accuracy, completeness, timeliness, and pertinence as necessary to assure fairness in determinations" relating to the employee. Section 2.1-380(4). To assure this, the Act requires that the employee be advised of his right to examine, challenge, correct or explain information maintained by the agency, and that the agency investigate such personal information. See § 2.1-382(A)(5)(a). If, after the investigation, such information is found to be incomplete, inaccurate, not pertinent, not timely, or unnecessary to be retained, it must be corrected or purged promptly. See § 2.1-382(A)(5)(b). If the investigation does not resolve the dispute, the employee may file a statement of his position. See § 2.1-382(A)(5)(c).

II. Local School Board Has Broad Authority over Employees and May Receive Employee Information

School boards have broad general supervisory authority over their employees. See §§ 22.1-28, 22.1-78, 22.1-79, 22.1-308(C). See also School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978); Gwathmey v. Atkinson, 447 F. Supp. 1113 (E.D. Va. 1978). The proper purpose of a local school board is the supervision of schools in the school division. See Art. VIII, § 7 of the Constitution of Virginia (1971). Consistent with the Act, therefore, it is possible for a school board to collect and receive a wide array of information relating to its employees and to the functioning of its educational system. Such information might include anonymous or unfounded complaints. It is incumbent, however, upon the school board to investigate such complaints.

III. Conclusion: Complaints May Be Retained if Information Is Necessary, Has Been Investigated, and Employee Is Afforded Rights Under Act

Based on the above, it is my opinion that a school board may include anonymous or unfounded complaints made against a school board employee in the personnel files of that employee, only if, consistent with the Act, the school board determines that the information is necessary, is investigated as to its completeness, accuracy and timeliness, and the employee is afforded all applicable rights provided under § 2.1-382 of the Act.¹

¹A local school board is an "agency" governed by the Act. See § 2.1-379(6). An employee about whom information may be collected is a "data subject" as defined in the Act. See § 2.1-379(3).

²Certain types of information related to child abuse complaints, however, are made confidential and may not be subject to complete examination under the Act. See 1985-1986 Report of the Attorney General at 225.

³After investigation, any complaint determined by the school board to be unfounded should be corrected or purged from the personnel file of the employee.

⁴I reach this conclusion without consideration of any local school board regulations or policies which may exceed the minimum requirements and protections of the Act.


May 30, 1987
You ask whether certain records held by Fairfax County are subject to the mandatory disclosure of official records requirement of § 2.1-342(a) of the Code of Virginia, a portion of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "Act").

I. Facts

You state that Fairfax County has made offers to purchase certain residential and commercial property for a proposed office building pursuant to § 25-46.5, a portion of the Virginia General Condemnation Act, §§ 25-46.1 through 25-46.36. The county has denied a community association's request for access to records associated with the offers and responses. The request was denied by the county based upon the exception to the Act's mandatory disclosure requirement set out in § 2.1-342(b)(5).

You further state that without the specific data on offers and related responses, the community association cannot effectively prepare itself for public hearings or eventual condemnation proceedings. You ask, therefore, whether records related to bona fide offers for land purchases made pursuant to § 25-46.5 and related responses are excepted from the Act's mandatory disclosure requirement.

II. Applicable Statutes

The Act's requirement of mandatory disclosure of official records is set out in § 2.1-342(a). Among the exceptions to this requirement are "[m]emoranda, working papers and records compiled specifically for use in litigation or as a part of an active administrative investigation concerning a matter which is properly the subject of an executive or closed meeting under § 2.1-344 and material furnished in confidence with respect thereto." Section 2.1-342(b)(5). Section 2.1-344(a)(2) authorizes executive or closed meetings of public bodies for the purpose of

[d]iscussion or consideration of the condition, acquisition or use of real property for public purpose, or of the disposition of publicly held property, or of plans for the future of a state institution of higher education which could affect the value of property owned or desirable for ownership by such institution.

Section 25-46.5 provides, in part, that "[n]o proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned."

III. Requested Records Excepted from Mandatory Disclosure Requirement

It is clear that the requested records are "official records" subject to the Act's mandatory disclosure requirement unless one of the Act's exceptions applies. See § 2.1-341(b). It is also well established that the acquisition of real property for a public purpose is a valid purpose for a closed meeting of a public body. See § 2.1-344(a)(2); see also Reports of the Attorney General: 1983-1984 at 443; 1981-1982 at 439; 1980-1981 at 386, 387; 1978-1979 at 315. The questions presented by your inquiry, therefore, are whether the requested records were compiled "specifically for use in litigation" or "as part of an active administrative investigation."

The records in question, the county's offer-to-purchase letters and related responses, are created as part of the administrative process necessary to determine whether condemnation will be necessary to acquire land for a proper public purpose. The requirement in § 25-46.5 that a potential condemnor make a bona fide offer to purchase is mandatory and jurisdictional prior to the initiation of judicial condemnation proceedings. See Charles v. Big Sandy R. Co., 142 Va. 512, 129 S.E. 384 (1925). Although such
records are not, therefore, compiled exclusively for use in litigation, the records are, in my opinion, compiled specifically for use in litigation should the offer to purchase be refused. I note also that the records requested are compiled as part of the administrative procedure necessary to determine whether condemnation must be initiated. It is my opinion, therefore, that § 2.1-342(b)(5) excepts the requested records from the mandatory disclosure requirement of § 2.1-342(a).

ADMINISTRATION OF THE GOVERNMENT GENERALLY - VIRGINIA FREEDOM OF INFORMATION ACT. HEALTH - HEALTH CARE PLANNING. MEETINGS BETWEEN PRIVATE PARTY AND EMERGENCY MEDICAL SERVICES ADVISORY BOARD SUBJECT TO ACT, BUT NOT MEETINGS WITH STAFF OF DIVISION OF EMERGENCY MEDICAL SERVICES. APPOINTEES TO BOARD MAY NOT DESIGNATE ALTERNATE.

August 30, 1986

The Honorable John G. Dicks, III
Member, House of Delegates

You ask for my opinion on two issues. First, you ask whether meetings between the Virginia Association of Volunteer Rescue Squads, Inc. (the "Association"), a private organization, and either the Division of Emergency Medical Services (the "Division"), a State agency, or the Emergency Medical Services Advisory Board (the "Board"), a State advisory board, are required to be open to the public. Second, you ask whether an individual appointed by the Governor to the Board as a representative of the Association may have an alternate designated by the Association attend, and vote at, the Board meetings when he is unable to attend.

I. Relevant Statutes

The Virginia Freedom of Information Act, § 2.1-340 et seq. of the Code of Virginia (the "Act"), requires that, except as otherwise provided by law, all meetings of public bodies shall be open to the public. See § 2.1-343. The term "meetings" is defined, in pertinent part, by § 2.1-341(a) as

meetings, when sitting as a body or entity, or as an informal assemblage of (i) as many as three members, or (ii) a quorum, if less than three, of the constituent membership . . . of any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth . . . .

Under the Act, therefore, a "meeting" is a gathering of "constituent members" of a legally constituted public or governmental body. The term does not include a gathering of employees of the Commonwealth, even if the latter are employed by the same agency. See Roanoke School Bd. v. Times-World, 226 Va. 185, 307 S.E.2d 256 (1983); 1981-1982 Report of the Attorney General at 437.

II. Meetings with Three or More Members of Board Must Be Open to Public; Meetings with Employees May Be Closed

To the extent your first inquiry relates to a meeting between the Association and three or more members of the Board, such a meeting, even if intended to be an informal gathering, clearly would be subject to the Act since the Board is a public body created pursuant to § 32.1-114, and the gathering would qualify as a "meeting" under § 2.1-341(a). As a result, the meeting would have to be open to the public unless it had expressly been closed in accordance with the conditions and procedures set forth in §§ 2.1-343 and 2.1-344 of the Act.
If, however, the Association members meet with a group of officials or staff of the Division who are employees of the Virginia Department of Health and not appointees or "constituent members" of a public body, it is my opinion that such a meeting is not subject to the Act.

III. Appointment of Alternate to Attend Meetings Not Permitted

Members of the Board are appointed by the Governor pursuant to § 32.1-114. Although appointments from the groups listed therein usually are made from lists of nominees submitted by those organizations, the Governor appoints a named individual, not a group, to any vacancy which exists. A commission is issued to the person appointed. There is no authority to permit either the appointee or the group represented by the appointee to designate an alternate to attend or vote in the appointee's stead. Accordingly, your second question must be answered in the negative.

ADMINISTRATION OF THE GOVERNMENT GENERALLY - VIRGINIA FREEDOM OF INFORMATION ACT. SCHOOL BOARD MAY NOT MEET IN EXECUTIVE SESSION TO DISCUSS PROPOSED ANNEXATION.

December 16, 1986

The Honorable Madison E. Marye
Member, Senate of Virginia

You request my opinion concerning the legality of an executive session called by the School Board of Montgomery County.

I. Facts

You state that the Town of Christiansburg has begun proceedings against Montgomery County to annex a portion of the county. The Board of Supervisors of Montgomery County is opposing the annexation action. In connection with recent public hearings held in the county by the Commission on Local Government (the "Commission"), the Chairman of the Montgomery County School Board wrote a letter to the Commission stating his personal support for the town's annexation effort. In the introduction to his letter, the school board chairman mentioned his background, including his position as school board chairman. Upon learning of the letter, the county board of supervisors met in executive session to discuss the matter. The board of supervisors decided to send its chairman and the county attorney to meet with the school board regarding the letter with which the board of supervisors fundamentally disagreed. The school board voted to convene in executive session to hear from the two representatives of the board of supervisors. The school board cited "legal matters" as its reason for convening in executive session.

The legality of the school board's executive session has been challenged on the grounds that the school board is not a party to the annexation action and that annexation is not within the scope of the school board's authority.

II. Applicable Statutes

The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "FOI Act"), requires that public bodies conduct open meetings. See § 2.1-343. Section 2.1-344 provides for certain exceptions to the Act's open meeting requirement and establishes procedures regarding the conduct of executive sessions. Section 2.1-344 provides, in part:
(a) Executive or closed meetings may be held only for the following purposes:

   * * *

(6) Consultation with legal counsel and briefings by staff members, consultants or attorneys, pertaining to actual or potential litigation, or other legal matters within the jurisdiction of the public body, and discussions or consideration of such matters, without the presence of counsel, staff, consultants, or attorneys.

Section 2.1-344(b) provides, in part:

No meeting shall become an executive or closed meeting unless there shall have been recorded in open meeting an affirmative vote to that effect by the public body holding such meeting, which motion shall state specifically the purpose or purposes hereinabove set forth in this section which are to be the subject of such meeting and a statement included in the minutes of such meeting which shall make specific reference to the applicable exemption or exemptions as provided in subsection (a) or § 2.1-345. A general reference to the provisions of this chapter or to the exemptions of subsection (a) shall not be sufficient to satisfy the requirements for an executive or closed meeting. The public body holding such an executive or closed meeting shall restrict its consideration of matters during the closed portions only to those purposes specifically exempted from the provisions of this chapter.

III. Prior Opinions Establish Scope of "Legal Matters" Exception to FOI Act

Prior Opinions of this Office have considered the scope of the "legal matters" exception to the FOI Act's open meeting requirement. See Reports of the Attorney General: 1985-1986 at 103; 1982-1983 at 716; 1981-1982 at 432; 1980-1981 at 389. These Opinions conclude that § 2.1-344(a)(6) requires more than a desire to discuss general legal matters. Rather, § 2.1-344(a)(6) requires that there be a specific legal dispute or specific legal inquiry. The Supreme Court of Virginia has also noted this requirement of specificity. See Marsh v. Rich. Newspapers, Inc., 223 Va. 245, 254-55, 288 S.E.2d 415, 420 (1982); City of Danville v. Laird, 223 Va. 271, 276, 288 S.E.2d 429, 431 (1982). Section 2.1-344(a)(6) may not, therefore, be used as a catch-all exception to the FOI Act's open meeting requirement and does not justify the discussion of general policy matters in executive session, absent an appropriate legal issue. See 1982-1983 Report of the Attorney General at 717. On the other hand, the specificity requirement of § 2.1-344(a)(6) does not require that the details of the legal problem to be addressed in executive session be disclosed. In considering the sufficiency of a motion to convene in executive session, the Supreme Court of Virginia has stated:

A governing body is entitled to make the initial determination that an executive or closed meeting is necessary under a specified exemption to consider a subject or subjects on the agenda. The decision whether to convene in executive session must be made by members of the responsible entity who often possess information as to the subject matter that is not necessarily possessed by others. It is neither necessary nor in the public interest to require as a prerequisite to closing a meeting pursuant to § 2.1-344(a)(6) that the governing body disclose in detail the legal matters or the legal issues to be considered. To do so would tend to defeat the very confidentiality that the exemption safeguards.

Marsh, 223 Va. at 255, 288 S.E.2d at 420.
In the absence of specific facts relating to the actual wording of the motion by a member of the school board to meet in executive session, I cannot express an opinion concerning the sufficiency of that motion.

IV. Discussion of Annexation Matters Not a Legal Matter Within School Board's Jurisdiction

The issue presented by your inquiry, therefore, is whether the proposed annexation is a "legal matter" within the school board's jurisdiction.

As noted above, the school board is not a party to the annexation proceedings. Similarly, there is no express school board role in the conduct of such proceedings. Although annexation often has an impact on school divisions' pupil populations, finances and other administrative matters, these factors do not generally relate to legal matters. Accordingly, it is my opinion that annexation matters are not "legal matters" within the school board's jurisdiction.

V. Conclusion: FOI Act Does Not Authorize School Board Executive Session Solely to Discuss Annexation Matters

Section 2.1-344(a)(6) would not, therefore, authorize the school board in this instance to convene in executive session solely to discuss annexation matters.¹

¹Section 15.1-945.7(D), authorizing executive sessions of "local governing bodies" to discuss certain annexation matters, does not apply to school boards because school boards are not "local governing bodies" within the meaning of § 15.1-945.7.

BANKING AND FINANCE - NONPROFIT DEBT COUNSELING AGENCIES. PROFESSIONS AND OCCUPATIONS - ATTORNEYS-AT-LAW. CREDIT REPAIR CLINICS. SALE OF SERVICE TO AID CONSUMER CHALLENGES TO CREDIT FILES UNDER FAIR CREDIT REPORTING ACT.

November 21, 1986

The Honorable Walter A. Stosch
Member, House of Delegates

You request my opinion on a matter on which this Office opined in February 1985. That Opinion, found in the 1984-1985 Report of the Attorney General at 75, concluded that certain businesses known as "credit repair clinics" were not categorically unlawful in Virginia. In your letter of October 27, 1986, you request that I reevaluate the prior Opinion, taking into account certain legislative history of § 6.1-363.1 of the Code of Virginia. That legislative history does not, in my opinion, require a different conclusion than that reached previously.

I. Background

In material accompanying your prior Opinion request, credit repair clinics were described as new businesses which had developed as a result of the federal Fair Credit Reporting Act. See 15 U.S.C.A. § 1681(f) (1982). The essence of a credit repair clinic is to charge a fee for services rendered to aid a debtor in challenging, under federal law, information on which the debtor's credit rating is based. It is my understanding that credit repair clinics do not necessarily provide advice or services connected with debt-
pooling arrangements in which a debtor deposits funds to be distributed among his creditors by the third-party advisor.

II. Section 6.1-363.1 Exempts Certain Credit Counseling Services from Unauthorized Practices of Law Under § 54-44.1; Does Not Prohibit Other Debt Counseling Activities

Quoting a recommendation in the Interim Report of the Consumer Credit Study Commission, S. Doc. No. 15 at 5 (1972) ("1972 Report"), you state that the adoption of § 6.1-363.1 was intended by the General Assembly to limit the conduct of debt counseling in Virginia to nonprofit entities. Section 6.1-363.1 was adopted pursuant to a similar recommendation in the final Report of the Consumer Credit Study Commission, S. Doc. No. 20 at 6 (1974) ("1974 Report"). With utmost respect for your opinion, I must, nonetheless, disagree with your reading of this legislative history.

The Study Commission Reports both describe the purpose of § 6.1-363.1. Referring to credit counseling designed to "advise debtors on how to handle their credit problems, and if necessary gain the creditors' cooperation and devise debt liquidation plans" (emphasis added), the 1972 Report at 5 also stated:

In Virginia such credit counseling service has been impossible because of a provision in the Code (§ 54-44.1) to the effect that it constitutes the unauthorized practice of law. The Commission proposes that legislation be enacted permitting debt counseling by qualified people who are not licensed to practice law. Because debt adjusting for profit has, in the past, been a source of difficulty, the Commission proposes that such counseling be permitted on a non-profit basis only, be licensed by and subject to regulation by the State Corporation Commission, and be subject to rules to prevent conflicts of interest. [Emphasis added.]

The 1974 Report at 6 contains nearly identical language. This language makes clear that the purpose of § 6.1-363.1 is to exempt certain credit counseling services from the definition of the unauthorized practice of law contained in § 54-44.1, as long as the services are conducted on a nonprofit basis by an organization meeting the requirements of § 6.1-363.1. Thus, the credit counseling services to which § 6.1-363.1 refers are those described in § 54-44.1.

The definition in § 54-44.1 of the debt counseling services prohibited to all but attorneys and nonprofit debt counselors is specific. That section provides:

The furnishing of advice or services for compensation to a debtor in connection with a debt-pooling plan pursuant to which the debtor deposits funds for the purpose of distributing them among his creditors, except as authorized for nonprofit agencies pursuant to the provisions of § 6.1-363.1, shall be deemed to be the practicing of law. Any person or agency not so authorized or who is not a member of the Virginia State Bar who furnishes or offers to furnish such advice or services for compensation shall be guilty of a misdemeanor.

The credit repair clinic activities described in your 1985 Opinion request do not necessarily also involve advice on services in connection with a debt-pooling plan as described in § 54-44.1. The provisions of § 6.1-363.1 are tied to the same debt-pooling definition and cannot, therefore, be read as a prohibition of other activities that might be classified as debt counseling, but which do not involve advice or services in connection with liquidation of a debt.

III. Conclusion

Read as a whole, the legislative history which you have brought to my attention does not show a legislative intent to prohibit all debt counseling services for profit. It is
my understanding that the term "credit repair clinics" may refer to businesses which pro-
vide advice and services in connection with obtaining modifications in a debtor's credit 
rating, but no services in connection with the payment of the debts themselves. Credit 
repair clinics are not, therefore, categorically prohibited by current Virginia law because 
they do not necessarily conduct debt-pooling and debt-liquidation activities contemplated 
in §§ 54-44.1 and 6.1-363.1.

In enacting Ch. 645, 1975 Va. Acts 1348 (§ 6.1-363.1), the General Assembly could 
not have specifically considered credit repair clinics, since such clinics apparently did 
not develop until about the time of your 1985 request. Rather, it was considering "debt 
adjusting for profit," which must refer to advice and services in connection with the 
payment of the debts themselves. Both §§ 54-44.1 and 6.1-363.1 make specific reference 
to services in connection with the liquidation of debts; neither refers to credit ratings. 

As recognized in the 1985 Opinion, activities of credit repair clinics might constitute 
the unauthorized practice of law or violate consumer protection statutes in some cases. 
Such conclusions are dependent, however, on the facts of each case, none of which is 
available here.

CHARTER PROVISIONS. CLERKS. INSURANCE 
COVERAGE. CITY OF ROANOKE 
AUTHORIZED TO PROVIDE LIABILITY INSURANCE COVERAGE FOR CLERK; AU-
THORITY DERIVED FROM CHARTER, DISTINGUISHED FROM § 15.1-506.1.

September 26, 1986

The Honorable Clifton A. Woodrum 
Member, House of Delegates

You ask whether the City of Roanoke may extend its liability insurance coverage or 
its self-insurance program to include the clerk of the circuit court, her office, and her 
employees.

I. No General Authority for Localities to Provide 
Liability Insurance Coverage for Constitutional Officers

You refer to a prior Opinion of this Office to the Honorable Geraldine Whiting, 
Commissioner of the Revenue for Arlington County, dated May 22, 1986, found in the 
1985-1986 Report of the Attorney General at 73, which concludes that § 15.1-506.1 of 
the Code of Virginia provides no general authority for a local governing body to extend 
its liability insurance coverage or its self-insurance program to include constitutional 
officers and their employees. Section 15.1-506.1 provides, in part:

The board of supervisors of any county and the governing body of any politi-
cal or governmental subdivision may provide liability insurance, or may pro-
vide self-insurance, for certain or all of its officers and employees ... to 
cover the costs and expenses incident to liability, including those for settle-
ment, suit or satisfaction of judgment, arising from the conduct of its offi-
cials [and] employees ... in the discharge of their duties. [Emphasis added.]

The conclusion of the Whiting Opinion was based upon (1) the fact that the local 
governing body was unable to exercise management or control over a constitutional offi-
cer or his employees, and (2) the existence of numerous statutes which distinguish be-
tween officers and employees of local governing bodies and constitutional officers and 
self-insure members of regional jail board because the appointing local governing bodies 
exercise control over such jail board members).

As noted in the Whiting Opinion, prior Opinions interpreting § 15.1-506.1 have held 
that this section is a grant of authority which a locality does not otherwise have, and
that if the situation presented in each case cannot be brought within the words of the statute, the locality may not provide the insurance coverage for the persons under consideration. See, e.g., 1983-1984 Report of the Attorney General at 83.

II. Charter Provision Provides that Expenses of Office to be Paid by Roanoke City

The answer to your particular question, however, proceeds on an analysis different from that occasioned by the Whiting Opinion, which relied upon § 15.1-506.1. In the case you present, a specific charter provision controls. Section 57(A) of the Charter for the City of Roanoke,1 enacted by Ch. 399, 1982 Va. Acts 653, provides that the expenses of the office of the clerk of the circuit court shall be paid out of the city treasury.2 Section 57(A) further provides that the fee income of the clerk's office shall be paid into the city treasury. Under general law and absent special charter provisions such as these, the salaries of a clerk's deputies and assistants and the expenses of office are fixed by the Compensation Board and funded by the fee income of the office. See § 14.1-136 et seq.; 1983-1984 Report of the Attorney General at 36. Any excess fee income is divided between the locality and the State. See § 14.1-140.1.

The question presented, therefore, is whether § 57(A), by granting the city the authority to fix the expense allowance of the clerk's office and imposing upon the city the obligation to pay those expenses, by implication, authorizes the city to extend its insurance liability coverage or self-insurance program to the clerk, her office, and her employees.

III. Roanoke City Authorized to Extend Its Liability Insurance Coverage or Its Self-Insurance Program to Clerk's Office

It is clear that the cost of providing liability insurance coverage is a proper expense of office. See, e.g., First Va. Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983). It is also clear that § 57(A) would authorize the city to pay the cost of liability insurance coverage if the clerk procured such insurance coverage independently. For purposes of this Opinion, I see no practical or legal distinction between insurance coverage purchased directly by the clerk and paid for by the city, and insurance coverage provided by the city itself at city expense. It is my opinion, therefore, that the city has the authority, derived from its obligation under § 57(A) to pay the expenses of the clerk's office, to extend its liability insurance coverage or its self-insurance program to the clerk, her office, and her employees.

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1Chapter 216, 1952 Va. Acts 258, provided for a new Charter for the City of Roanoke. The Act has been amended several times since 1952.

2Cf. § 14.1-144.1, providing that expenses of the clerks' offices of the Cities of Richmond and Newport News shall be paid from the cities' treasuries. The maximum amount of such expenses, however, is fixed by the Compensation Board.

3Roanoke City, like four other cities which have similar charter provisions (Newport News, Petersburg, Portsmouth and Richmond), pays all expenses of the clerk's office and retains all fees paid to that office. These cities are not subject to the general law provisions for payment of expenses. The Compensation Board does not fund any of the expenses of the clerks' offices in these cities and none of the excess fees is paid to the Commonwealth.
The Honorable Glenn B. McClanan
Member, House of Delegates

You ask whether a proposed amendment to the Charter for the City of Virginia Beach would violate either the Constitution of Virginia or the United States Constitution.

I. Proposed Charter Amendment

Your inquiry concerns H.B. No. 957, requested unanimously by the Council for the City of Virginia Beach, which would enact § 3.02:2 of the charter providing for the general election of the city's mayor and imposing a "resign to run" requirement on any council member who wishes to be a candidate for mayor. Proposed § 3.02:2 reads:

_Election of mayor._—The mayor shall be elected at the general election on the first Tuesday in May, 1988, and each fourth year thereafter, to serve for a term of four years. Candidates for mayor shall run for one of the at-large seats. A candidate running for mayor shall not run for any other seat.

In the event any councilman, other than the mayor, shall decide during his term of office to be a candidate for mayor, he shall tender his resignation as a councilman not less than ten days prior to the date for the filing of petitions as required by general law. Such resignation shall be effective on June 30, shall constitute the councilman's intention to run for mayor, shall require no formal acceptance by the remaining councilmen and shall be final and irrevocable when tendered.

The unexpired portion of the term of any councilman who has resigned to run for mayor shall be filled at the same general election.

Section 3.03 of the charter provides that vacancies on the council are filled by appointment made by the remaining council members. See text of H.B. No. 957.1

II. Qualifications in Article II, § 5 of Constitution of Virginia (1971) are Exclusive

Article II, § 5 of the Constitution of Virginia (1971) provides, in part, as follows:

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

* * *

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

The Supreme Court of Virginia has held that the qualifications on a person's eligibility to be elected imposed by Art. II, § 5 and its predecessors are exclusive, and the legislature may not enact additional qualifications. See Dean v. Paolicelli, 194 Va. 219, 233-35, 72 S.E.2d 506, 515-18 (1952); District Road Board v. Spilman, 117 Va. 201, 84 S.E. 103 (1915); Gwaltney v. Lyons, 116 Va. 873, 84 S.E. 103 (1914); Black v. Trower & Als., 79 Va. 123 (1884). See also I. A. Howard, Commentaries on the Constitution of Virginia 394-95 (1974).

The first question presented by your inquiry, therefore, is whether proposed § 3.02:2 of the charter imposes a prohibited qualification on the eligibility of a council member for election as mayor by conditioning his eligibility on the resignation of his council seat.
III. Weight of Authority Holds Resign to Run Requirement Does Not Establish Unconstitutional Qualification

A. Resign to Run Requirement Imposes Choice

If enacted, § 3.02:2 will require that a council member who wishes to be a candidate for mayor irrevocably resign his council seat regardless of whether he is later elected. This "resign to run" requirement imposes a choice - a council member must forsake running for mayor or give up the remainder of his current term. Some cases have held that the resign to run requirement could hinder a council member's willingness to become a candidate for mayor. As a result, the availability of otherwise qualified candidates could be restricted. See, e.g., Barry v. District of Columbia Bd. of Elections, 448 F.Supp. 1249 (D.D.C. 1978), appeal dismissed, 550 F.2d 695 (D.C. Cir. 1978).

B. Past Challenges Uphold Validity of Resign to Run Requirements in Other States

State and local officers have challenged applicable resign to run statutes as imposing a qualification in addition to those specified by the state's constitution. See, e.g., Oklahoma State Election Bd. v. Coats, 610 P.2d 776 (Okla. 1980) (statute requiring resignation of district attorney if officeholder runs for any office in which the terms overlap upheld); Holley v. Adams, 238 So.2d 401 (Fla. 1970) (statute requiring resignation of officeholder upheld); Burroughs v. Lyles, 181 S.W.2d 570 (Tex. 1944) (resign to run statute invalidated as imposing unconstitutional qualification). Similarly, state and local officers have challenged state statutes and constitutional provisions requiring resignation when an officer wishes to be a candidate to the Congress of the United States. These challenges have alleged that the resign to run requirement imposes a qualification beyond what is specified by the United States Constitution. See, e.g., Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983), cert. denied, 464 U.S. 1002 (1983) (state constitutional provision upheld); Signorelli v. Evans, 637 F.2d 853 (2d Cir. 1980) (state constitutional provision applicable to judges upheld); Adams v. Supreme Court of Pennsylvania, 502 F. Supp. 1282 (M.D. Penn. 1980) (statute applicable to judges upheld).

The key factors considered in the decisions upholding the validity of resign to run requirements are whether (1) the requirements serve the states' traditional interest in regulating the conduct of public officials; and whether (2) the restriction attaches to the office and not the officeholder. In such circumstances, a resign to run requirement imposes only an indirect burden insufficient to establish an unconstitutional qualification. See Joyner, 706 F.2d at 1531.

C. Proposed Resign to Run Requirement Does Not Establish Unconstitutional Qualification

In this instance, the proposed charter amendment would regulate the conduct of council members. The Commonwealth, of course, has a traditional interest in regulating the conduct of elected officials. Furthermore, the proposed restriction attaches to the office of council member and not to the individual serving in the office. A council member is not prohibited from running for mayor as long as he resigns from council. In these circumstances, it is my opinion that the resign to run requirement under the proposed charter provision imposes only an indirect burden on council members wishing to be candidates for mayor. This indirect burden, in my opinion, is insufficient to establish a prohibited qualification.

IV. Proposed Charter Amendment Does Not Violate Equal Protection Clause of Fourteenth Amendment

The second question presented by your inquiry is whether proposed § 3.02:2 of the charter establishes a classification between council members who wish to be candidates for mayor and all other persons who wish to be candidates for mayor, in violation of the Equal Protection Clause of the U.S. Const. Amend. XIV.
A. Clements v. Flashing Upheld Resign to Run Requirement

In Clements v. Flashing, 457 U.S. 957 (1982), the Supreme Court of the United States reversed the United States Court of Appeals for the Fifth Circuit and upheld the validity of a resign to run provision of the Texas Constitution. Texas Const. Art. XVI, § 65 required certain state and local officers to resign their offices if they became candidates for any other elected office. See id. at 970. The challenge to this resign to run provision was based on the classification among offices—some offices were subject to the requirement and some were not. See id. The plurality found that the challenged provision imposed only a minimal burden on candidacy and, therefore, needed only to rest on a "rational predicate" to survive a challenge under the Equal Protection Clause. See id. at 968, 970. The plurality further found that the resign to run requirement was rationally related to the state's interest in having officeholders faithfully perform their duties and preventing abuse or neglect of office. See id. at 968, 973. The applicability of the challenged provision to only certain offices was upheld as within a state's power to regulate "one step at a time" and to address itself to specific problem areas rather than impose sweeping regulations. See id. at 969, 970. The Court held that the resign to run provision was valid and did not serve "the invidious purpose of denying access to the political process to identifiable classes of potential candidates." Id. at 971. The Court dismissed the First Amendment challenge to the provision on the basis that the state's interest in the area warranted any de minimis interference with the challengers' candidacies. See id. at 971-72.

B. Proposed Charter Amendment Rationally Related to State Interest in Regulating Conduct of Council Members

In this instance, the proposed charter amendment would restrict a council member's ability to be a candidate for mayor by conditioning the member's eligibility on the member's resignation. This resign to run requirement is designed to promote the State's and the city's interests in preventing the abuse or neglect of office, promoting the fulfillment of the expectations of voters, and permitting foreseeable vacancies to be filled by election rather than by appointment. In accord with Clements, it is my opinion that the minimal restriction imposed on a council member's candidacy is warranted by these governmental interests.

The classification of council members which results from the proposed charter amendment is based on the office the members hold. The resign to run requirement is triggered only when a council member runs for mayor and would not be triggered if a member decides to run for some other office. The resign to run requirement, however, addresses a perceived problem where it is most likely to occur—a council member running for mayor during his term on council. The Equal Protection Clause does not require that the Commonwealth exercise its power to the full extent permitted. Rather, the Commonwealth is free to address "the phase of the problem which seems most acute." Id. at 969. It is my opinion, therefore, that the proposed charter amendment is rationally related to the legitimate governmental interests in regulating the conduct of council members. The minimal burden on a member's potential candidacy is, in my opinion, warranted by the governmental interests promoted by the resign to run requirement. It is my opinion, therefore, that the proposed charter amendment offends neither the First Amendment nor the Equal Protection Clause.

V. Conclusion

To summarize, it is my opinion that the proposed charter amendment does not either (1) establish an unconstitutional qualification on a council member's eligibility for election to the office of mayor, or (2) offend either the First Amendment or the Equal Protection Clause.

1I note that the provisions of H.B. No. 957 are similar to S.B. No. 367, concerning the Charter for the City of Chesapeake. Also, §§ 3.03(b1) and (b2) of the Charter for the
The Honorable Royston Jester, III  
Member, House of Delegates

You ask whether § 19.2-250 of the Code of Virginia takes precedence over §§ 24 and 26 of the Charter for the City of Lynchburg\(^1\) in light of an apparent conflict between the statute and the charter provisions regarding the jurisdiction of the city's corporate authorities in Amherst County.

### I. Applicable Statute and Charter Provisions

Section 19.2-250 of the Code provides:

Notwithstanding any other provision of this article, the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the State 1 mile beyond the corporate limits of such town or city; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town.\(^2\)

Section 24 of the Charter for the City of Lynchburg provides, in part, as follows:

The jurisdiction of the corporation and the circuit courts of the city shall extend to the corporate limits thereof and to a space of one mile without
and around said limits, except that the same shall not extend into the County of Amherst beyond the corporate limits ...[9]

Section 26 of the charter provides:

His [judge of municipal court\footnote{4}] territorial jurisdiction or venue shall extend throughout the corporate limits of the city and for one mile beyond those limits, except that the same shall not extend into the County of Amherst beyond the corporate lines of the city.[b]

II. General Statute and Charter Provisions Should Be Constrained to Avoid Apparent Conflicts

Article VII, § 2 of the Constitution of Virginia (1971) authorizes the General Assembly to provide, by special act, for the organization, government and powers of counties, cities and towns. See generally II A. Howard, Commentaries on the Constitution of Virginia 803-12 (1974). The Supreme Court of Virginia has developed certain principles which govern the resolution of apparent conflicts between statutes and charter provisions enacted pursuant to this constitutional authority. As stated in a prior Opinion of this Office:

Repeals by implication are not favored, and there is a presumption against a legislative intent to repeal a statute, in the absence of express terms to that effect, or where a later statute does not amend the former. Albemarle County v. Marshall, Clerk, 215 Va. 756, 761, 214 S.E.2d 146 (1975). The conflict between the two statutes must be clear and the provisions of the two so inconsistent with each other that both cannot prevail, before the prior statute will be held to be repealed or inoperative. City of Richmond v. County Board, 199 Va. 679, 685, 101 S.E.2d 641 (1958). The presumption against an intent to modify or repeal a prior statute applies with particular force in the case of general legislation enacted subsequently to special, local legislation on the same subject. Hamilton v. Commonwealth, 143 Va. 572, 577, 130 S.E. 383 (1925); City of Richmond v. Drewry-Hughes Co., 122 Va. 178, 194-195, 90 S.E. 635 (1918).

In instances such as the present one, where a general act and a special act on the same subject apply in the same locality at the same time, and are in apparent conflict, they should be so construed, if reasonably possible, to allow both to stand and to give force and effect to each. Scott v. Lichford, 164 Va. 419, 422-423, 180 S.E. 393 (1935); Kirkpatrick v. Bd. of Supervisors, 146 Va. 113, 125, 136 S.E. 186 (1926).


Applying these principles, the threshold question presented by your inquiry is whether § 19.2-250 of the Code and §§ 24 and 26 of the charter can be reasonably construed to give full force and effect to each.

III. Charter Provisions Restrict Only the Jurisdiction of the Circuit Court and the General District Court of the City of Lynchburg

As is noted in footnote 3 above, § 17-125 imposes a restriction on the jurisdiction of the circuit court of the city that parallels § 24 of the charter. Sections 24 and 26 appear in Ch. 5 of the charter, entitled "Courts Generally and Ball Commissioners." It is my opinion, based on the language of the charter provisions, that the limitations on the extraterritorial jurisdiction imposed by §§ 24 and 26 of the charter apply only to the circuit court and the general district court for the city. Accordingly, the charter provisions would not restrict the extraterritorial jurisdiction of nonjudicial "corporate authorities," as that term is used in § 19.2-250.
IV. Conclusion: Corporate Authorities of the City Have Extraterritorial Jurisdiction as Authorized by § 19.2-250

In discussing the purpose of the statutory predecessors of § 19.2-250, the Supreme Court of Virginia has stated:

Code, sections 15-560 [presently § 15.1-141] and 17-139 do not purport to extend the effect of municipal ordinances beyond the corporate limits of a city. They are statutes of enforcement of the effective law within the area specified. Their purpose is plain, that is, to prevent the territory contiguous to a city from becoming a refuge for criminals, and to confer on the corporation courts of cities power to enforce the police regulations and law of the area involved.


The limitation on the extraterritorial jurisdiction of the circuit court of the city imposed by § 17-125 and §§ 24 and 26 of the charter would not, in my opinion, defeat the purpose of § 19.2-250. On the other hand, if the corporate authorities of the city, such as the police department, were prohibited from enforcing State criminal statutes in the area of Amherst County one mile outside the corporate limits of the city, the purpose served by § 19.2-250 would be defeated.

It is my opinion, therefore, that the nonjudicial corporate authorities of the city have jurisdiction in criminal cases involving offenses against the Commonwealth in those parts of Amherst County within one mile of the corporate limits, as authorized by § 19.2-250. In this way, the apparently competing provisions of §§ 24 and 26 of the charter and § 19.2-250 are harmonized, and full force and effect are given to each.

1 The Charter for the City of Lynchburg was first enacted by Ch. 343, 1928 Va. Acts 899, and has been amended repeatedly since that time. Sections 24 and 26 were originally enacted by the 1928 Va. Acts and were amended by Ch. 167, 1942 Va. Acts 209.
3 See also § 17-125 for a statutory provision paralleling § 24 of the charter regarding the extraterritorial jurisdiction of the Circuit Court for the City of Lynchburg. The provisions of § 17-125 date back to at least § 5904 of the Code of 1919.
4 The "municipal court" is now known as the general district court.
5 See also § 16.1-123.1(2)(b) (jurisdiction of general district courts in criminal matters).
6 The use of the phrase "corporation ... courts" in § 24 of the charter refers to the former corporation courts of the city. Compare text of § 17-125.
7 The conclusion reached in this Opinion should not be interpreted to limit the extraterritorial exercise of police authority under § 19.2-81 (statute authorizing warrantless arrests by law enforcement officers in various situations) in the proper circumstances.

CIVIL REMEDIES AND PROCEDURE - ACTIONS - EJECTMENT. WHERE PROPERTY REMOVED FROM PREMISES IN UNLAWFUL DETAINER, SHERIFF, IN ABSENCE OF DESIGNATED STORAGE AREA, MUST PLACE PROPERTY ON PUBLIC WAY.

April 17, 1987

The Honorable B. R. Overman
Sheriff for the City of Virginia Beach
You ask five questions concerning the execution of process by a sheriff pursuant to § 8.01-156 of the Code of Virginia and the status of personal property found during the execution of this process by the sheriff. Specifically, you ask:

1. [Is a sheriff] mandated by [§ 8.01-156 ... to cause the renter's personal property to be set in the public right-of-way?

2. If the answer to question one is yes, can [a sheriff] allow the landlords to change the lock leaving the property inside, without creating a problem concerning unlawful seizure?

3. If we allow the landlord to change the lock, leaving personal property in the premises, will this give rise to prima facie evidence that the tenant has abandoned the property?

4. If [a sheriff] allow[s] the landlord to change the lock without setting the property in the right-of-way, what liability does the sheriff's office incur?

5. If any liability attaches to the sheriff's office, can this liability be negated by having the landlord sign a document assuming all responsibility for the property of the tenant left in the premises and relieving the sheriff's office of all liability?

I. Section 8.01-156 Requires Placement of Property in Public Way, Absent Designated Storage Area; Sheriff May Not Permit Landlord to Change Lock and Leave Tenant's Property Inside

Section 8.01-156 provides, in pertinent part, as follows:

In any county or city, when personal property is removed from premises pursuant to an action of unlawful detainer or ejectment, or pursuant to any other action in which personal property is removed from premises in order to restore such premises to the person entitled thereto, the sheriff shall cause such personal property to be placed in a storage area, if such a storage area has been designated by the governing body of such county or city, unless the owner of such personal property then and there removes the same from the public way.

In construing this portion of § 8.01-156, this Office has previously concluded that

[a] writ of unlawful detainer is not properly executed by merely serving a copy thereof upon the defendant. It is the duty of the officer executing the writ to place the plaintiff in possession of his property; and this necessitates the physical removal of the defendant's property from the premises. Certainly, it is not necessary that the officer serving the writ personally remove the defendant's property and place it upon the public way; but it is his duty to make sure that this end is accomplished.


Based on the above, it is my opinion that, absent a storage area designated by the locality, a sheriff is obligated pursuant to § 8.01-156 to cause personal property removed from premises under authority of this statute to be placed in "the public way." This action by the sheriff should not, of course, be done in such a manner as to constitute a nuisance under § 15.1-867, or in violation of any applicable local ordinances. It is further my opinion that, in the absence of specific statutory authority, a sheriff may not allow a landlord to change the lock on the premises and leave a tenant's property inside.
II. Mere Presence of Property on Premises at Time of Execution Not Prima Facie Evidence of Abandonment

With respect to potential abandonment of personal property of a tenant, § 55-248.38:1 states:

If any items of personal property are left in the premises, or in any storage area provided by the landlord, after the rental agreement has terminated and delivery of possession has occurred, the landlord may consider such property to be abandoned.

Aside from this specific statutory language, the question whether or not personal property in this context is abandoned is essentially a factual one. "[T]wo elements are necessary to show abandonment: (1) vacation of the premises, and (2) a clear intent not to be bound by the lease." tenBraak v. Waffle Shops, Inc., 542 F.2d 919, 924 n.5 (4th Cir. 1976). See also County School Board v. Dowell, 190 Va. 676, 58 S.E.2d 38 (1950); Talley v. Drumheller, 143 Va. 439, 130 S.E. 385 (1925).

Entry onto the premises pursuant to § 8.01-156 contemplates the lawful retaking of the premises from the tenant who has arguably refused to depart and the presence of the tenant's personal property on those premises at the time of execution of the process by the sheriff. Regardless of notice to the tenant, since vacating of the premises by the tenant in these circumstances has not occurred, the first element of abandonment is lacking. More importantly, the plain language of § 8.01-156 requires that "personal property [be] removed from premises in order to restore such premises to the person entitled thereto." (Emphasis added.)

Removal of personal property occurs prior to restoration of the premises to the owner. At the time delivery of possession of the premises by the sheriff occurs under § 8.01-156, there should exist no personal property inside the premises from which an inference of abandonment may be drawn. Any such personal property already will have been removed to the storage facility or will have been placed on the public way. It is my opinion, therefore, that no conclusion regarding abandonment of personal property within the meaning of § 55-248.38:1 should be drawn under the facts you present.

III. Sheriff May Be Liable for Improper Execution of Process

Your next inquiry concerns whether a sheriff, in failing to perform his duty pursuant to § 8.01-156, is exposed to civil liability for his omissions. In Narrows Grocery Co. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933), an action was brought against the sheriff for his failure to perform his duty in the service of warrants. As a consequence, the plaintiffs were unable to recover certain sums of money from a third party whom the sheriff had served improperly. In entering judgment against the sheriff, the Court stated that "It is incumbent upon the officer to perform such duty in the mode prescribed by law, or else properly account for his non-performance of duty, if he would avoid liability for his misfeasance."

Based on the above, it is my opinion that a sheriff is exposed to liability for damages resulting from his failure to comply with his statutory obligations under § 8.01-156.

Since I have concluded that it is improper to permit a landlord to change locks on his premises and retain the tenant's property inside the premises, a response to your final question is unnecessary.

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1 This Opinion pertains only to process executed pursuant to § 8.01-156. It should not be construed to apply to other legal remedies available to lessors under Virginia law. See, e.g., § 55-227 et seq. (distress warrants).
You indicate that the City of Virginia Beach has not designated a storage area pursuant to § 8.01-156.

CIVIL REMEDIES AND PROCEDURE - ACTIONS - TORT CLAIMS AGAINST THE COMMONWEALTH OF VIRGINIA. NEITHER COUNTY NOR ITS AGENCIES LIABLE FOR NEGLIGENT OPERATION OF MOTOR VEHICLE BY COUNTY EMPLOYEE IN COURSE OF HIS EMPLOYMENT. LIABILITY OF COUNTY EMPLOYEE IN TORT FOR NEGLIGENT OPERATION OF MOTOR VEHICLE IN COURSE OF HIS EMPLOYMENT DETERMINED ON CASE-BY-CASE BASIS.

November 28, 1986

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

You ask what liability, if any, is incurred by the Franklin County Department of Social Services (the "Department") or a Department (county) employee for the negligent operation of a motor vehicle by that employee while acting within the scope of his employment.

I. Counties and Their Agencies Immune from Liability for Negligent Acts of Their Employees Acting Within Scope of Their Employment

The Department shares the tort immunity of the county. Franklin County, as a political subdivision of the Commonwealth of Virginia, enjoys the sovereign immunity of the Commonwealth and is, therefore, immune from liability for the negligence of its employees in the absence of a legislative waiver of such immunity. See 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).

The only waiver of the sovereign immunity of the Commonwealth in tort actions is found in the Virginia Tort Claims Act, § 8.01-195.1 et seq. of the Code of Virginia (the "Act"). The Act expressly provides that it is inapplicable to counties and, further, that it cannot be construed to "remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth." Section 8.01-195.3(6). Accordingly, it is my opinion that the doctrine of sovereign immunity shields the Department, as a county agency, from liability for damages proximately resulting from the negligent act of its employee acting within the scope of his employment.

II. County Employee Acting Within Scope of His Employment May Be Personally Liable for Negligent Operation of Motor Vehicle

Whether a county employee enjoys the immunity of his employer must be determined on a case-by-case basis. The Supreme Court of Virginia has held that, in determining whether a State employee is protected by sovereign immunity, a court should consider such factors as:

1. the nature of the function performed by the employee;
2. the extent of the state's interest and involvement in that 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.
Messina, 228 at 313, 321 S.E.2d at 663; James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980). Because Messina ruled that these considerations are equally applicable to county employees in determining their entitlement to sovereign immunity, they must be considered in this Opinion.

For purposes of your inquiry, I assume that the operation of a motor vehicle is merely incidental to the performance of the employee's duties. Under these circumstances, the activity of the driver is not uniquely a public function. The county employee, like any private employee, is merely using his employer's vehicle for job-related transportation. Similarly, the involvement and interest of the county is minimal in the incidental use of its vehicle by its employee. While operating a motor vehicle, the driver is subject to little or no direct control by the county. Finally, the operation of a motor vehicle on public roads is governed by clearly defined traffic regulations which leave very little to the discretion of the driver.

Based on this analysis, it is my opinion that, as a general rule, an employee of the Department may be personally liable for damages due to his negligent operation of a motor vehicle within the scope of his employment. It is important to remember, however, that the determination of whether the sovereign immunity of the county extends to its employee in the situation you pose must be made on a case-by-case basis after a consideration of the factors enumerated in the Messina and James decisions.

CIVIL REMEDIES AND PROCEDURE. COPY TESTE COPY OF ORDER ATTESTED BY CLERK OF COURT OF JURISDICTION IN WHICH ORIGINALLY ENTERED; COPY OF ORDER NOT PROPERLY ATTESTED MAY NOT BE ADMITTED TO RECORD IN ANOTHER JURISDICTION.

November 21, 1986

The Honorable Ronald P. Livingston
Clerk, Circuit Court of Chesterfield County

You ask (1) what constitutes "a copy teste" of an order of one circuit court to be admitted to record in another circuit court, and (2) whether an order not meeting the definition of "a copy teste" must be admitted to record by the clerk of the circuit court in another jurisdiction.

I. Attestation Verifies Genuineness
of Document; Seal Not Required

A prior Opinion of this Office distinguished between "attested copies," "certified copies" and "authenticated copies," and also addressed whether a court order, attested to by a clerk, may be admitted to record by the clerk of another jurisdiction. See 1982-1983 Report of the Attorney General at 202. In my opinion, "a copy teste" is an "attested copy" as defined in the 1982-1983 Opinion. Such a copy must bear an attestation or certification of the clerk or his duly authorized deputy verifying that the instrument is a genuine copy. It is not required that the clerk's seal be affixed unless the seal is required for the document to be recognized in a foreign jurisdiction.

II. Attested Copies Need Not Show Judge's Signature

I am further of the opinion that the signature of the judge is not a requisite for "a copy teste." Historically, when clerks of court would hand-copy orders, they could not also copy a judge's signature. Thus, there arose the practice of the clerk attesting copies as genuine.

The practice of including or excluding the judge's signature on a photocopy may vary from jurisdiction to jurisdiction. I am of the opinion, however, that "a copy teste" is legally sufficient even though the signature of the judge does not appear on the copy.
III. Improperly Attested Orders May Properly Be Refused for Admission to Record

I also agree with the 1982-1993 Opinion that a copy of a court order may be admitted to record in another jurisdiction so long as it has been attested as genuine by the clerk of the court of the jurisdiction in which it was originally recorded. An order that is not so attested, but is offered for admission to record in another jurisdiction, may be properly refused.

CIVIL REMEDIES AND PROCEDURE - JUDGMENTS AND DECREES GENERALLY. JUDGMENT MUST BE DOCKETED WITHOUT DELAY UPON RECEIPT IN CLERK'S OFFICE; TIME OF ACTUAL DOCKETING OF JUDGMENT SHOULD BE RECORDED IN JUDGMENT LIEN DOCKET BOOK.

November 21, 1986

The Honorable Ashby R. Pritchett
Clerk, Circuit Court for the City of Martinsville

You request my opinion regarding the meaning of the word "docket" as it is used in certain statutes. You also request my opinion as to the appropriate time to be entered in the judgment lien docket book when a judgment is "docketed."

I. Relevant Statutes

Section 8.01-446 of the Code of Virginia requires the clerk of the circuit court to keep a judgment docket book. It provides, in part:

The clerk of each circuit court . . . shall keep in his office, in a well-bound book, a judgment docket, in which he shall docket, without delay, any judgment for money rendered in his court, and shall likewise docket without delay any judgment for money rendered in this Commonwealth by any other court of this Commonwealth or federal court, when he shall be required so to do by any person interested, on such person delivering to him an authenticated abstract of it and also upon the request of any person interested therein, any such judgment rendered by a district court judge whose book has been filed in his office under the provisions of Title 16.1 or of which an abstract is delivered to him certified by the district court judge who rendered it . . . . [Emphasis added.]

The form of the judgment docket book is prescribed by § 8.01-449, which provides, in part:

In the judgment docket there shall be stated in separate columns the date and amount of the judgment [and] the date and the time of docketing it . . . . [Emphasis added.]

When docketed, § 8.01-450 provides, in part, that "[e]very judgment shall, as soon as it is docketed, be indexed by the clerk in the name of each defendant . . . ."

Lastly, the time a judgment becomes a lien on the real property of the defendant-debtor is fixed by § 8.01-458, which states, in part:

Every judgment for money . . . shall be a lien . . . from the time such judgment is recorded on the judgment lien docket . . . . [Emphasis added.]

II. "Docket" Means to Abstract and Enter in Docket Book

As used in statutes such as § 8.01-446, I am of the opinion that "docket" takes its usual meaning set forth in Black's Law Dictionary 431 (5th ed. 1979): "To abstract and
enter in a book." Section 8.01-446 requires each clerk to keep a judgment docket book in which he is to record certain information. Sections 8.01-449 and 8.01-450 instruct the clerk as to what information is to be docketed and how the names of the parties involved are to be indexed.

III. Practical Interpretation of Phrase "Without Delay"

Means No Appreciable Difference Between

Time of Receipt and Time of Docketing

The answer to your second inquiry requires a practical interpretation of the law. Section 8.01-446 requires that information be docketed "without delay." Judgment liens, of course, take priority from the date and time of their docketing. See § 8.01-458. Clerks are required to keep judgment lien docket books, to docket judgments therein without delay, and to index the judgment as soon as it is docketed so that a person performing a search for judgments can locate them quickly and easily. See Reports of the Attorney General: 1952-1953 at 40; 1950-1951 at 172.

It is clear from § 8.01-446 that docketing "without delay" means that in order to docket the judgment, something more than mere receipt needs to be done. Otherwise, there could not be any "delay." Section 8.01-449 requires the clerk to record "the date and the time of docketing it" which, as necessarily follows from § 8.01-446, must be an event which follows mere receipt.

The lien of the judgment is effective only from "the time such judgment is recorded on the judgment lien docket." Section 8.01-458. If the time the clerk records on the judgment lien docket book is the time the judgment is received, as opposed to the time it is recorded in such book, one would never be able to know when it was actually "recorded on the judgment lien docket."

This analysis of §§ 8.01-446, 8.01-449 and 8.01-458 makes a strong case for differentiating between the time of receipt of a judgment or an abstract of judgment and the time of docketing such judgment or abstract of judgment. On the other hand, some meaning must be given to the words "without delay." "Delay" is defined, in part, as follows:

To retard; obstruct; put off; postpone; defer; procrastinate; prolong the time of or before; hinder; [and] interpose obstacles . . . .

Black's Law Dictionary 383 (5th ed. 1979). Thus, to act "without delay" means that the clerk must docket the judgment without putting off, postponing, deferring, procrastinating or prolonging the time between receipt and docketing.

As noted in the prior Opinions cited, while "without delay" obviously does not mean instantaneous action, the clerk is under a duty to docket the judgment promptly, as soon as it is received. There should be no appreciable difference between the time of receipt and time of docketing. See 1952-1953 Report of the Attorney General at 40.

IV. Conclusion: Time Entered in Docket Book Should Be

Time Judgment Is Actually Recorded in Judgment Docket Book

Given the immediacy of the statutory mandate upon the clerk to docket the judgment "without delay," the time of docketing should be virtually the same as the time of receipt. It is my opinion, nevertheless, that the clerk is duty bound to docket the judgment upon receipt without further delay and that the time of docketing, not the time of receipt, should be recorded in the judgment lien docket book to reflect the actual time of docketing the judgment.1

1 There apparently is a division in the practice among clerks. A recent survey of the circuit court clerks' offices reveals that a majority of the clerks record in the judgment
lien docket book the time the judgment is received in the clerk's office. In the remaining clerks' offices, the time that the judgment actually is docketed is the time placed in the judgment lien docket book, even though that time is later than the time at which the judgment was actually received in the office.

The result of this Opinion should not unduly disturb the practice of those clerks who record in the judgment docket book the time of receipt of the judgment or abstract of judgment. I note with assurance that there should have been no appreciable difference between the time of receipt and time of docketing, and I assume that all such clerks have instituted some administrative procedure which was sufficient to ensure that all judgments or abstracts of judgment were docketed in the order in which received. Such a procedure may have been as simple as stamping the date and time of receipt as each such document was received.

Whether a given clerk's office has, in the past, recorded time of receipt, as opposed to time of docketing, should not have affected the common practice of title searchers and others who may be interested in the contents of the judgment docket book of examining all documents presented for admission to record up to the very last minute, including those received but not yet actually admitted to record.

CIVIL REMEDIES AND PROCEDURE - JUDGMENTS AND DECREES GENERALLY - JUDGMENTS BY CONFESSION. LAW FIRMS AND NONLAWYERS CAPABLE OF CONFESSIONING JUDGMENT PURSUANT TO POWER OF ATTORNEY.

October 27, 1986

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

You ask for my opinion concerning the capacity of (1) nonlawyers and (2) law firms to act as attorneys-in-fact for the purpose of confession of judgments under the provisions of §§ 8.01-432 and 8.01-435 of the Code of Virginia.

I. Applicable Statutes

When the word "person" is used in the Code, §§ 1-13 and 1-13.19 require it to have the following meaning, unless the context requires otherwise:

The word 'person' may extend and be applied to bodies ... corporate as well as individuals.

Section 8.01-432 authorizes confession of judgment and provides, in part:

Any person being indebted to another person, or any attorney-in-fact pursuant to a power of attorney, may at any time confess judgment in the clerk's office of any circuit court in this Commonwealth .... [Emphasis added.]

Section 8.01-435 prescribes who may confess judgment and provides, in part:

Confession of judgment under the provisions of § 8.01-432 may be made either by the debtor himself or by his duly constituted attorney-in-fact ... provided, however, that any power of attorney incorporated in, and made part of, any note or bond authorizing the confession of judgment thereon ... shall specifically name therein the attorney or attorneys or other person or persons authorized to confess such judgment .... [Emphasis added.]

A partnership is defined by § 50-6(1) as follows:

A partnership is an association of two or more persons to carry on as co-owners a business for profit. [Emphasis added.]
II. Attorney-in-Fact Need Not Be Attorney-at-Law

Your first question was addressed in Ins. Co. Valley of Virginia v. Barley's adm'r., 57 Va. (16 Gratt.) 363 (1863), in which the Court held that a nonlawyer could confess a judgment under a power of attorney. The Court also held that the confession of a judgment is an act which requires no professional skill and is not within the peculiar province of an attorney-at-law. I am therefore of the opinion that a nonlawyer may be appointed to confess a judgment.

III. Law Firm May Be Specifically Named as Attorney-in-Fact Under § 8.01-435

Your second question is whether a law firm or other entity, as opposed to an individual, may serve as an attorney-in-fact to confess a judgment. It is a generally accepted rule that corporations, partnerships and other associations have the capacity to act as agents for others. See Restatement (Second) of Agency § 21 (1958); 1 Mechem on Agency, 2d ed., §§ 173, 174 (1914); Miller & Rhoads v. West, 442 F. Supp. 341 (E.D. Va. 1977).

The general authority to confess judgments in § 8.01-432 requires only that the confession of judgment by an attorney-in-fact be exercised pursuant to a power of attorney. No limit is placed on the entity to which that power of attorney may be given.

Again, in § 8.01-435, confession of judgment is authorized to be given by the "duly constituted attorney-in-fact." The only further limitation is that a power of attorney to confess judgment incorporated in a note or bond must "specifically name therein the attorney or attorneys or other person or persons authorized to confess such judgment."

Where a statute such as § 8.01-435 uses the word "person," § 1-13.19 extends that term to corporations and, consequently, § 8.01-435 would include law firms organized as corporations as well as other corporations which are not law firms. Partnerships are defined by § 50-6(1) as "an association of two or more persons" (emphasis added) and, thus, would, in my opinion, come within the meaning of "persons" as used in § 8.01-435. If the partnership is a law firm, it is my further opinion that the partnership would also come within the meaning of "attorneys" as used in § 8.01-435.

I recognize that § 8.01-435 provides that in some situations the power of attorney must specifically name the "attorney or attorneys or other person or persons authorized to confess such judgment." I believe, however, that the purpose of this provision is to limit the former common practice of creditors to take from the debtor a general power of attorney which authorized any attorney to confess judgment in any court. I do not believe that the legislature, when it enacted this provision, intended to limit the ability of law firms to be "specifically named" as attorneys for the purpose of confessing judgment.

IV. Conclusion: Nonlawyer, Attorney, Law Firm and Other Entities May Confess Judgments

Section 8.01-435 should be construed "in such manner as will advance the intention of the act, prevent inconvenience, and avoid conflict with settled policy." Soble v. Herman, 175 Va. 489, 501, 9 S.E.2d 459, 464 (1940). I am therefore of the opinion that a nonlawyer, attorney, law firm or other entity, whether a corporation, a partnership or other association, has the capacity to act as an agent for the purpose of confessing a judgment. When the power of attorney is incorporated in the note or bond itself, the nonlawyer, attorney, law firm, or other person or entity must be specifically named in the instrument.
1See also Black's Law Dictionary, "attorney at law" and "attorney in fact," at 118 (5th ed. 1979).

CIVIL REMEDIES AND PROCEDURE - LIMITATIONS ON ENFORCEMENT OF JUDGMENTS AND DECREES. CRIMINAL PROCEDURE - RECOVERY OF FINES AND PENALTIES. FINES AND COSTS ENFORCEABLE UNTIL STATUTE OF LIMITATIONS HAS RUN, NOTWITHSTANDING PROVISION ALLOWING DESTRUCTION OF RECORDS AFTER TEN YEARS.

April 23, 1987

The Honorable Gary M. Williams
Clerk, Circuit Court of Sussex County

You ask (1) whether it is lawful for a circuit court clerk to collect fines and costs imposed in criminal cases more than ten years earlier even though § 19.2-346 of the Code of Virginia provides that the "warrants and summonses shall be maintained as public records for a period of ten years, after which they may be destroyed," and (2) whether a circuit court clerk may waive the collection of fines and costs on the grounds that "such a record can be destroyed, that such fines and costs are not consistently collected, and that the interests of equal justice under the law would justify such a waiver."1 (Emphasis in original.)

I. Fines and Costs Constitute Judgment in Favor of Commonwealth

Section 19.2-340 provides that "[f]ines imposed and costs taxed in a criminal prosecution for committing an offense against the State shall constitute a judgment in favor of the Commonwealth." Section 8.01-251 establishes a twenty-year statute of limitations for the enforcement of a judgment, "including a judgment in favor of the Commonwealth." This section also provides for an extension of the limitation period in certain instances.

II. Conclusion: Fines and Costs May Be Collected Until Expiration of Statute of Limitations

It is my opinion, therefore, that fines and costs which are susceptible of proof are enforceable until the running of the applicable statute of limitations period, notwithstanding the language in § 19.2-346, which permits warrants and summonses to be destroyed after ten years. The duties of a circuit court clerk are prescribed by general law or special act. Article VII, § 4 of the Constitution of Virginia (1971). I am unaware of any general law or special act which authorizes a circuit court clerk to waive the collection of an enforceable judgment for fines and costs.

1Your request also contains the conclusion that the payment of a fine and costs must be waived when the warrant or summons has been destroyed. You should note, however, that "secondary evidence is admissible to prove the contents of a lost document, or record." Cooper v. Commonwealth, 134 Va. 545, 551, 113 S.E. 863, 865 (1922).

2See supra note 1.

CIVIL REMEDIES AND PROCEDURE - PARTIES - SPECIAL PROVISIONS. COSTS, FEES, SALARIES AND ALLOWANCES - COSTS GENERALLY. FIDUCIARIES GENERALLY - INVENTORIES AND ACCOUNTS. PRISONS AND OTHER METHODS OF CORRECTION - ESTATES OF PRISONERS. REQUIREMENTS FOR APPOINTING AND PAYING FIDUCIARIES FOR STATE PRISONER LITIGANTS IN CIVIL ACTIONS.
June 4, 1987

The Honorable Talmage N. Cooley
Judge, General District Court for the City of Staunton

You ask several questions concerning the procedure by which a convicted felon incarcerated in a State prison may sue and be sued in a State court. Specifically, you ask (1) whether such a prisoner may institute a civil suit in State court without the appointment of a committee, as contemplated by § 53.1-221 et seq. of the Code of Virginia; (2) whether a prisoner may be sued as a defendant in State court without the appointment of a committee; (3) whether the appointment of a guardian ad litem for a person under disability pursuant to § 8.01-9 may be ordered in lieu of the appointment of a committee pursuant to § 53.1-223; and (4) from what source are costs related to the services of such committees and guardians paid.

I. Prisoner-Party to Civil Action in State Court May Waive Appointment of Committee

A prior Opinion of this Office has concluded that the appointment of a committee for a prisoner is subject to waiver by the prisoner, either as a civil plaintiff or defendant. See 1982-1983 Report of the Attorney General at 175. This Opinion was based upon the rulings of the Supreme Court of Virginia in Dunn v. Terry, 216 Va. 234, 217 S.E.2d 849 (1975), and Cross v. Sundin, 222 Va. 37, 278 S.E.2d 805 (1981). Amendments to the applicable statutes enacted since these decisions do not, in my opinion, justify a different conclusion.

II. Appointment of Guardian ad Litem for Prisoner Is Not Alternative to Appointment of Committee

The above Opinion also answers your inquiry whether the appointment of a guardian ad litem for a prisoner is a permissible alternative to the appointment of a committee in light of the Dunn decision. The Opinion concludes that the two procedures are not alternatives, noting that the appointment of a committee may be waived by a prisoner, while the appointment of a guardian may be waived only by the appointing court, and only if the prisoner is represented by a licensed attorney. See 1982-1983 Report of the Attorney General, supra, at 176.

III. Committees and Guardians May Be Compensated for Services and Expenses if Prisoner-Litigant Has Assets

Guardians ad litem for prisoners appointed pursuant to § 8.01-9 and committees appointed for prisoners pursuant to § 53.1-221 may be compensated for their services if the prisoner has sufficient assets. Section 8.01-9 provides that a guardian is allowed reasonable compensation for services and actual expenses. While the committee provisions of Title 53 do not specifically address this issue, § 53.1-221(C) states that a committee is subject to "all applicable provisions of Title 26." Section 26-30 provides procedures for payment of fiduciaries from assets entrusted to them.

If a prisoner for whom a guardian is appointed does not have sufficient assets to satisfy the guardian's fees and expenses, § 8.01-9(A) permits the court to tax all or a portion of such fees and expenses as costs. Section 14.1-183 authorizes court-ordered legal services upon a determination that a litigant is an indigent and has been a resident of Virginia for a period of six months. This section authorizes the court to order "all needful services and process" for an indigent, including the assignment of counsel who may recover no fees except what may be included in costs recoverable from the adverse party. This section appears sufficiently broad to include the necessary services of a fiduciary appointed for a prisoner-litigant.
IV. Conclusion

Based on the above, it is my opinion that although a prisoner litigant may waive the appointment of a committee in a civil action filed in a State court, the court may not appoint a guardian ad litem pursuant to § 8.01-9 in lieu of a committee pursuant to § 53.1-223. While there are circumstances under which court-appointed guardians and committees may receive reasonable compensation for their services and expenses, there is authority for a court to appoint the necessary fiduciaries for indigent prisoners even if there is no source of payment for the services and expenses of these fiduciaries.

CIVIL REMEDIES AND PROCEDURE - PROCESS. NEWSPAPERS. NOTICE. WEEKLY NEWSPAPER NOT INELIGIBLE FOR PUBLICATION OF LEGAL NOTICES UNDER § 8.01-324 BY VIRTUE OF BEING PUBLISHED ONLY FIFTY-ONE WEEKS EACH YEAR.

July 1, 1986

Mr. John C. Bennett
County Attorney for Culpeper County

This is in reply to your request for my opinion concerning the application of § 8.01-324 of the Code of Virginia, which relates to newspapers which may be used for legal notices and publications, to a weekly newspaper published in Culpeper County. Section 8.01-324 reads as follows:

Whenever any ordinance, resolution, notice, or advertisement is required by law to be published in a newspaper, such newspaper, in addition to any qualifications otherwise required by law, shall:

1. Have a bona fide list of paying subscribers;

2. Have been published and circulated at least once a week for six months without interruption for the dissemination of news of a general or legal character; and

3. Have a general circulation in the area in which the notice is required to be published, be printed in the English language and have a second-class mailing permit issued by the United States Postal Service. [Emphasis added.]

I. Facts and Question Presented

You advise that the newspaper in question has been in existence for ten years, and that it is the custom of the newspaper's staff to take the first week in January for vacation, with the result that the paper is published only fifty-one weeks each year. You specifically ask whether, under these circumstances, the newspaper is disqualified from being used for legal notices and publications by virtue of the requirement in the second paragraph of the statute quoted above that it shall have been "published and circulated at least once a week for six months without interruption."

II. Conclusion: Section 8.01-324(2) Applies to a Newspaper's First Qualification

The language of § 8.01-324(2) was enacted in Ch. 617, 1977 Va. Acts 1052, 1104, which recodified former Title 8 into Title 8.01. Since that time it has not been construed judicially or by any published Opinion of this Office, nor was it explained or otherwise commented upon in the report of the revisors. There being nothing in the statute which compels a different interpretation, the words in question here may be given the usual
meaning they express, including their proper grammatical effect. See, e.g., Gill v. Nickels, 197 Va. 123, 87 S.E.2d 806 (1955); Harris v. Commonwealth, 142 Va. 620, 128 S.E. 578 (1925). In that regard, I note that, by use of the phrase "shall have been," the General Assembly expressed its requirement of a condition precedent in the future perfect tense. This tense is used to indicate completed actions, either to become so in the future, the usual case, or, more inclusively, actions which either have been completed in the past or will become completed in the future. See, e.g., H. Shaw, McGraw-Hill Handbook of English 105 (3d ed. 1969); McCarthy v. Civil Service Com., 95 Cal.App. 749, 273 P. 98 (1928); Lo Russo v. Hill, 139 Conn. 554, 95 A.2d 698 (1953); Refining Co. v. Evatt, 148 OhioSt. 228, 74 N.E.2d 351 (1947).

Applying the above accepted usage to § 8.01-324(2), it is my opinion that the requirement there stated relates to the first qualification of a newspaper as being eligible for use for legal notices and publications. In other words, in order to meet the requirement of § 8.01-324(2), a newspaper need only demonstrate one time that it has been published and circulated once a week for a single six-month period without interruption. It does not thereafter become disqualified under the statute simply by virtue of being shut down for a single week out of each year for a staff vacation. Accordingly, I answer your inquiry in the negative.


Although not germane to your inquiry, I note that the qualification of the newspaper is only one requirement in effecting legal notice. For example, when notice is required to be published two successive weeks, it will be defective publication under the facts your present if the second week is the first week in January.

COLLEGES AND UNIVERSITIES. FOUNDATIONS. REPORTING AND AUDITS.

July 31, 1986

The Honorable Elmon T. Gray
Member, Senate of Virginia

You ask whether the State has authority to audit or supervise private foundations established to support the educational activities of State institutions of higher education in Virginia.

I. State Has No Authority to Audit Private Funds in Possession of Foundations Supporting State Institutions of Higher Education

The foundations to which you refer are customarily established, with some exceptions, as independent corporations under the Virginia Nonstock Corporation Act. See § 13.1-801 et seq. of the Code of Virginia. Such corporate bodies are governed chiefly by their individual articles of incorporation and bylaws, and by the general statutory provisions controlling nonstock corporations. There is no provision in the nonstock corporation statutes authorising periodic State audits of private foundations. Moreover, while the State Auditor of Public Accounts is legislatively authorized to audit the accounts of "every state department, officer, board, commission, institution or other agency in any manner handling state funds," the State Auditor has no independent legislative authority to subject the foundations to a State audit. 2 Section 2.1-155.

II. No State Authority to Supervise the Daily Affairs of Private Foundations

I am unaware of any legislative authorization in Virginia for the State to supervise
the daily affairs of private foundations. This is not to suggest that foundation funds legally may be spent irresponsibly. Such assets exist because of public spirited donations and publicly enacted tax policy. Fiduciary responsibilities of undivided loyalty and prudent management are imposed by law on the trustees and custodians of such assets so as to safeguard the public interest at stake. See, e.g., § 13.1-871, prohibiting conflicts of interests, and § 55-268.1 et seq., governing investments and uses of funds held for the benefit of educational institutions. Furthermore, as with all charitable trusts dedicated to a public purpose, the Attorney General is recognized at common law as having standing to take appropriate action against abuses of fiduciary responsibility. 3

III. Conclusion

There exists no legislation in Virginia authorizing the State to audit private funds administered by independent foundations supporting the public institutions of higher education in the Commonwealth. Likewise, there exists no such authority for the State to supervise foundation decision-making. Absent abuses of fiduciary obligations, the management of such funds and the supervision of the day-to-day affairs of a foundation properly reside in the sound discretion of its board of directors.

1 For purposes of this Opinion, it is assumed that the institution does not control the foundation as an agency of the institution, and that the foundation is not in control of State funds and operates as a separate entity independent of the institution supported. To the extent the facts are otherwise, a "private" foundation may be subject to the general laws applicable to agencies of the Commonwealth.

2 This Opinion is not intended to address those instances where such foundations are legally required to provide reports to the Commonwealth.

3 See Note, Charitable Trust Enforcement in Virginia, 56 Va. L. Rev. 716 (1970). The common law generally recognizes that members of the public may not sue to prevent fiduciary abuses. If the rule were otherwise, it would be possible to subject the charity to harassing litigation. 4 A. Scott, The Law of Trusts § 391 (3d ed. 1967).

4 It is within the authority of the governing board of each institution to establish policy with respect to the management of its endowment fund by the foundation and to give approval for the foundation to act publicly under its name and for its benefit. This Opinion is not intended to foreclose the possibility of such action.
lines the formal requisites of a financing statement and specifically provides that

[when a] financing statement covers ... goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner and, if the secured party desires it to be indexed against such real estate, an indication to that effect indicated in capital letters at the beginning of the financing statement as required by subsection (4) of § 8.9-403. [Emphasis added.]

Section 8.9-403(4) provides that the filing officer shall mark each financing statement with a file number and that, if the financing statement covers fixtures and the secured party has appropriately indicated a desire that such statement be indexed against the record owner of the real estate, "the local filing officer shall also index the statement according to the name of the record owner of the real estate together with a notation on the index to financing statements that clearly indicates that the same affects real estate."

II. Statutes Applicable to Filing of Financing Statements Permit Indexing with Notation Concerning Real Estate but Not Recordation

The statutes discussed above clearly permit the indexing of financing statements in the financing statement book in the name of the landowner, but they do not authorize the recodation of these statements in a deed book. In 1976, the General Assembly amended §§ 8.9-402 and 8.9-403 to permit fixture financing statements to be recorded against real estate. Chapter 563, 1976 Va. Acts 628, 631. These statutes were amended again in 1977 to substitute the word "indexed" for "recorded." It must be presumed that, in amending these statutes, the General Assembly had full knowledge of, and intended to change, the existing law on the subject. See 1985-1986 Report of the Attorney General at 237, 238. Thus, under the present language of §§ 8.9-402 and 8.9-403, only indexing is authorized.

Furthermore, if the General Assembly had intended that such statement be recorded and indexed in a deed book, there would have been no need for amending the above statutes to read "indexed," since any document which is recorded would normally be indexed. It must be assumed "that the legislature did not intend to do a vain and useless thing" in enacting or amending a statute. Williams v. Commonwealth, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949). The 1977 amendments, therefore, authorize the indexing of fixture financing statements and retract the authorization for the recordation of such statements in a deed book.¹

Finally, with respect to fixture financing statements, the provisions of § 8.9-401 et seq. set forth the explicit means for the documentation of such statements among the records in the clerk's office. When a debtor does not have a recorded interest in the real estate to which the fixture is attached, §§ 8.9-402 and 8.9-403 ensure that the financing statement will, at the option of the secured party, be indexed in the name of the record owner. The fixture financing statement, therefore, "will fit into the real estate search system." Section 8.9-402, Official Comment ¶ 5.

III. Conclusion: Fixture Financing Statements Not Subject to Recordation

As discussed above, it is my opinion that a fixture financing statement should be filed and indexed in the financing statement book retained in the office of the circuit court clerk, but may not be recorded in the deed books or the grantor or grantee index. Since I have reached this conclusion regarding your first question, a response to your second question is unnecessary.

¹The 1976 amendment to § 8.9-402 added "and, if the secured party desires it to be recorded against such real estate, an indication to that effect" to subsection (1). Chap-
ter 536, supra, at 628. The 1977 amendment substituted "indexed" for "recorded" in subsection (1). Chapter 539, 1977 Va. Acts 812, 813. Similar amendments were made to subdivisions (2) and (5) of subsection (3) of this statute (id. at 813-14), as well as in § 8.9-403(4) (id. at 816).

Section 17-60 requires the recordation of contracts in reference to real estate only if they are authorized to be recorded.

COMMISSIONS, BOARDS AND INSTITUTIONS - STATE CORPORATION COMMISSION - MEMBERS OF THE COMMISSION. APPLICATION OF § 12.1-10 TO COMMISSION EMPLOYEES. OWNERSHIP OF SECURITIES OF REGULATED CORPORATIONS. RECEIPT OF RETIREMENT INCOME FROM REGULATED CORPORATION.

December 8, 1986

The Honorable Preston C. Shannon
Commissioner, State Corporation Commission

You request my opinion concerning the application of § 12.1-10 of the Code of Virginia to an individual who is a candidate for a key position with the State Corporation Commission (the "Commission").

I. Facts

The Commission's concerns are related to the following aspects of the candidate's financial affairs:

1. The candidate owns individually or jointly with his wife securities of corporations, or subsidiaries of corporations, which are subject to supervision or regulation by the Commission. The candidate has proposed to convey his ownership interest to his wife to achieve compliance with § 12.1-10.

2. The candidate receives retirement annuity income from an insurance company doing business in Virginia.

3. The candidate receives additional unfunded retirement income from a corporation which, he is informed, owns one or more insurance companies doing business in Virginia.

4. The candidate is the sole trustee of two testamentary trusts with unrestricted investment powers. Both trusts own securities of corporations, or subsidiaries of corporations, which are subject to supervision or regulation by the Commission.

5. The candidate is a co-trustee of two other testamentary trusts under which the co-trustees have unrestricted investment powers. Both trusts own securities of corporations, or subsidiaries of corporations, which are subject to supervision or regulation by the Commission. The candidate has a remainder interest in one of the trusts.

You ask how § 12.1-10 applies to the candidate in this factual situation.

II. Applicable Statute

Section 12.1-10 provides, in part, as follows:

[...]

Employees [of the Commission] shall not, directly or indirectly, own any securities of, have any pecuniary interest in, or hold any position with any corporation whose rates, services, or financial ability to meet its obligations to the public are subject to supervision or regulation by the Commission...
III. Section 12.1-10 Not Superseded by Comprehensive Conflict of Interests Act

The threshold question presented by your inquiry is whether the Comprehensive Conflict of Interests Act, § 2.1-599 et seq. (the "Act"), supersedes § 12.1-10. Section 2.1-599 provides, in part, as follows:

This chapter shall supersede all general and special acts and charter provisions which purport to deal with matters covered by this chapter, except that the provisions of §§ 15.1-73.4 and 15.1-486.1 and ordinances adopted pursuant thereto shall remain in force and effect.


The manifest purpose of § 12.1-10 is to prevent a Commission employee from being influenced in the performance of his official duties by a personal financial interest in corporations regulated or supervised by the Commission. Section 12.1-10 is much broader than the Act's provisions in that § 12.1-10 prohibits any personal financial interest in such corporations by employees as a condition of employment with the Commission.

When enacting the original Virginia Conflict of Interests Act, the General Assembly expressly repealed two prohibitions against securities ownership and pecuniary interests in regulated corporations applicable to Commission employees. See Ch. 463, 1970 Va. Acts 895, 901-02 (repealing §§ 56-203 and 56-336). Those prohibitions, however, were reenacted in 1971 as § 12.1-10 as part of a general revision of Title 12. See Ch. 157, 1971 Va. Acts 298. This history indicates the intent of the General Assembly to preserve Commission employees as a subject of statutory regulation and to continue the prohibitive effect of § 12.1-10, notwithstanding the provisions of existing conflict of interests statutes. It is my opinion, therefore, that the supersession clause of the Act does not require the invalidation of § 12.1-10 by implication. To hold otherwise, in my opinion, would be contrary to the manifest aim of the legislature in reenacting the prohibitions in present § 12.1-10 after the earlier repeal discussed above. See Standard Drug v. General Electric, 202 Va. 367, 117 S.E.2d 289 (1960), appeal dismissed, 368 U.S. 4 (1961) (in considering question of repeal by implication, it is proper to consider all the circumstances surrounding the enactment of the statutes in question). Accordingly, it is my opinion that § 12.1-10 continues in force and effect, notwithstanding the supersession clause of § 2.1-599.

IV. Prohibition against Ownership of Securities Cannot Be Avoided by Conveying Securities to Spouse

The next question presented is whether the candidate can comply with § 12.1-10 by conveying prohibited securities to his wife. By its terms, § 12.1-10 prohibits more than personal ownership of such securities. In this instance, the candidate has proposed conveying legal title to the securities to his wife to avoid the prohibition. In my opinion, the prohibition against indirect ownership of such securities cannot be avoided simply by transferring legal title to the securities to a member of the employee's immediate family. Accordingly, it is further my opinion that the candidate would have a continuing indirect ownership interest in securities which were conveyed to his wife for the express purpose of avoiding the prohibition of § 12.1-10. Compare Remin v. D. of C. Rental Housing Com'n, 471 A.2d 275 (D.C. App. 1984) (ownership of rental unit by spouse constitutes indirect ownership within the meaning of local rental housing regulatory statute).

V. Receipt of Income from Insurance Company or Holding Company Does Not Necessarily Establish Pecuniary Interest in Payor Corporation

The third question presented is whether the receipt of "retirement annuity income"
from an insurance company or the receipt of "unfunded retirement income" from a corporation which owns one or more insurance companies constitutes a "pecuniary interest" in the payor corporation within the meaning of § 12.1-10. In a telephone conversation with a member of my staff, you indicated that no additional facts are available as to the nature of the two retirement payments or whether the right to receive a specific level of payment is vested in the candidate.

In similar circumstances, it has been held that a pension received by a public service commissioner from a supervised corporation did not establish a prohibited pecuniary interest. See Scharn v. Ecker, 218 N.W.2d 478 (S.D. 1974). In my opinion, the mere receipt of income from a regulated corporation does not establish a pecuniary interest in the payor corporation. If, on the other hand, the right to receive those payments is not certain or varies based on the profitability of the payor corporation, then, in my opinion, the payee would have a pecuniary interest in the payor corporation subject to the prohibition of § 12.1-10. You advise that my conclusion on this point is consistent with the Commission's long-standing administrative interpretation.

VI. Trustee Has Ownership Interest in Securities Owned by Trust

The final question presented by your inquiry is whether a trustee or co-trustee of a testamentary trust with unrestricted investment powers has a direct or indirect ownership interest in securities owned by the trust.

As a general rule, a trustee is the legal owner of the trust property and has absolute dominion over the property subject to limitations imposed by law or by the trust instrument. See 19 M.J. Trusts and Trustees § 2 (1979). The income of the trust and the beneficial interest in the trust property rests in the beneficiary of that trust. Id. Also, trustees are generally compensated for their services by operation of the trust instrument or by court allowance. Id., §§ 83 and 84. In this instance, the trustee(s) has(ve) unrestricted investment powers over the trust property.

In these circumstances, the candidate has a number of the attributes of ownership in the property of the trusts, including legal title, control over the corpus, and an interest in the income of the trusts as compensation. It is my opinion, therefore, that the co-trustee has an ownership interest in securities owned by the trusts subject to the prohibition of § 12.1-10 notwithstanding the beneficial interest of the beneficiary in the property and income of the trust.

VII. Summary

To summarize, it is my opinion that:

1. Section 12.1-10 is not superseded by the Act;

2. The candidate may not achieve compliance with § 12.1-10 by transferring legal title to prohibited securities to his wife;

3. The receipt of retirement income from a regulated corporation does not necessarily establish a pecuniary interest in the payor corporation; and

4. A trustee has an ownership interest in securities owned by a trust based on the trustee's legal title to, control over, and interest in, the trust property and income.

1A prior Opinion of this Office interpreting the scope of the supersession clause with reference to the Act's legislative history concluded that the Act superseded the provisions of § 15.1-73.4 imposing disclosure requirements on members of certain local governing bodies. See 1983-1984 Report of the Attorney General at 52. I note that the General Assembly amended the supersession clause of § 2.1-599 to reverse the effect of this prior Opinion with regard to § 15.1-73.4. See Ch. 122, 1984 Va. Acts 270.
I note the provision of Art. IX, § 1 of the Constitution of Virginia (1971), which provides that "[i]ts [the Commission's] subordinates and employees, and the manner of their appointment and removal, shall be as provided by law...." Under this provision, Commission employees are expressly identified as a proper subject of specific statutory provisions. See II A. Howard, Commentaries on the Constitution of Virginia 977-78 (1974).

COMMISSIONS, BOARDS AND INSTITUTIONS - VIRGINIA HEALTH SERVICES COST REVIEW COUNCIL. SPECIALTY HOSPITALS LICENSED BY DEPARTMENT OF HEALTH OR DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION SUBJECT TO REPORTING REQUIREMENTS OF COUNCIL.

October 30, 1986

Ms. Ann Y. McGee
Director, Virginia Health Services Cost Review Council

You ask whether a specialty hospital, such as a rehabilitation hospital, or a specialty unit of an institution which is licensed by the Department of Health, is required to provide budget and historical review data to the Virginia Health Services Cost Review Council pursuant to § 9-159 of the Code of Virginia.

I. Applicable Statutes

Section 9-159 requires that "[e]ach health care institution shall file annually with the Council" certain required financial documents and reports. (Emphasis added.) Section 9-156 defines a "health care institution" as follows:

'Health care institution' means (i) a general hospital, ordinary hospital, or outpatient surgical hospital licensed [by the Department of Health] pursuant to Chapter 5, Article 1 (§ 32.1-123 et seq.) of Title 32.1, (ii) a mental or psychiatric hospital licensed [by the Department of Mental Health and Mental Retardation] pursuant to Chapter 8 of Title 37.1 (§ 37.1-179 et seq.), and (iii) a hospital operated by the University of Virginia or Virginia Commonwealth University. In no event shall such term be construed to include any physician's office, nursing home, intermediate care facility, extended nursing care facility, nursing care facility of a religious body which depends upon prayer alone for healing, independent laboratory or outpatient clinic. [Emphasis in original.]

Except for the hospitals operated by the public universities listed, it is clear from the above definition that the status of a "health care institution" depends, in part, upon an institution's licensure status pursuant to § 32.1-123 et seq. of Title 32.1 or § 37.1-179 et seq. of Title 37.1. See 1978-1979 Report of the Attorney General at 252. When a statute is unambiguous, effect must be given to its plain meaning. See, e.g., School Board v. State Board, et al., 219 Va. 244, 247 S.E.2d 380 (1978).

II. Conclusion

Based on the foregoing, I am of the opinion that all specialty hospitals or specialty units of hospitals which are licensed by the Department of Health or the Department of Mental Health and Mental Retardation must provide budget and historical review data to the Virginia Health Services Cost Review Council.

CONSERVATION GENERALLY - FOREST RESOURCES AND DEPARTMENT OF FORESTRY. CITIES, NOT COUNTIES, REQUIRED UNDER § 10-62(d) TO CONTRACT WITH STATE FORESTER UNDER § 10-46.1 FOR FOREST PROTECTION SERVICES.

November 24, 1986
Mr. J. W. Garner
State Forester, Department of Forestry

You ask whether § 10-62(d) of the Code of Virginia requires the Commonwealth to have a contract with a county pursuant to § 10-46.1 in order for the county and the Commonwealth to be entitled to reimbursement for certain fire suppression expenses.

I. Applicable Statutes

Paragraphs (a) and (b) of § 10-62 impose certain restrictions upon the burning of woods, brush and other similar materials. In addition to making a violation of either provision a Class 4 misdemeanor, § 10-62(d) imposes upon the violator liability for the costs of suppressing any forest fire resulting from the violation. Section 10-62(d) provides, in pertinent part, that the responsible person is "liable to the Commonwealth and to each county or city which enters into a contract as provided in § 10-46.1 for the full amount of all expenses incurred by the Commonwealth and the county or city respectively in suppressing such fire." (Emphasis added.) The issue is whether the contract required by § 10-62(d) is required of a county, or only of a city, that wishes to be reimbursed pursuant to that section.

Section 10-46.1(b) authorizes the State Forester to enter into contracts with the governing body of any city which has "forest lands." The contract may provide that the State Forester will furnish "forest fire protection, prevention, detection, and suppression services together with enforcement of those provisions of state law applicable to forest fires on forest lands upon any such lands located within a city." Section 10-46.1(b) (emphasis added). The statute makes no mention of contracts with counties.

II. Legislative History Supports View That Contract Requirement in § 10-46.1(b) Applies Only to Cities

Prior to 1964, every county was afforded the State's forest protection services by statute. No contract with the State Forester was required. See former § 10-46 (Repl. Vol. 1958). Chapter 79, 1964 Va. Acts 113, 114, amended several sections of the forest protection law enabling cities to receive the same services, and added § 10-46.1 authorizing the State Forester to enter into contracts with cities for those services. For example, under former § 10-46(a), only counties were required to reimburse the State for expenses incurred in connection with forest protection. Chapter 79 imposed that requirement upon each city which enters into a contract with the State Forester under § 10-46.1. Also, under former § 10-47, counties were authorized to tax for forest protection purposes; Ch. 79 extended that power to "those cities entering into a contract as provided in § 10-46.1." Most importantly for present purposes, under former § 10-62(d), persons violating § 10-62(a) or (b) with a resulting forest fire were liable "to the State and to each county" for suppression costs incurred; Ch. 79 amended liability "to the State and to each county or city which enters into a contract as provided in § 10-46.1." (Emphasis in original.) These 1964 amendments are clear evidence that the General Assembly intended to allow cities to enjoy by contract the protections every county already enjoyed, and still enjoys, by statute.

"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," 1982-1983 Report of the Attorney General at 484, 485. I conclude, therefore, that the requirement for a contract in § 10-62(d) applies only to cities.

III. Conclusion

Based on the above, it is my opinion that § 10-62(d) does not require the Commonwealth to have a contract under § 10-46.1 with a county in order for the county and the Commonwealth to collect fire suppression costs from the person responsible for the fire.
CONSERVATION GENERALLY - VIRGINIA RECREATIONAL FACILITIES AUTHORITY ACT. ACREAGE LIMITATION OF H.B. NO. 519 (1986 SESS.) FOR EXPLORE PROJECT ACQUISITIONS APPLIES ONLY TO DIVISION OF PARKS AND RECREATION.

March 16, 1987

The Honorable Clifton A. Woodrum
Member, House of Delegates

You raise two questions concerning the acreage limitation in Ch. 354, 1986 Va. Acts 586 ("H.B. No. 519"). You ask whether H.B. No. 519 (1) limits the amount of real property which may be owned by the Virginia Recreational Facilities Authority (the "Authority") to no more than approximately 700 acres of land, or (2) places any limitation on the amount of real property the nonprofit River Foundation may own.

I. Applicable Law

Section 3 of H.B. No. 519 authorizes the Division of Parks and Recreation (the "Division") of the Department of Conservation and Historic Resources to acquire such lands, among other things, as determined necessary by the Authority to develop the EXPLORE Project. Section 3 then provides:

Such acquisition shall provide land for a site approximately 700 acres in size at the intersection of the Roanoke River and the Blue Ridge Parkway in Roanoke and Bedford Counties. . . . Title to such land as is deemed appropriate shall remain in the Commonwealth of Virginia and be designated as a state park.

Section 4 of H.B. No. 519 permits the Division, with the consent and approval of the Governor, to enter into a long-term lease with the Authority or its designee to maintain and regulate the State park referenced in § 3.

Chapter 360, 1986 Va. Acts 596, amends the Code of Virginia by adding Ch. 13.1 to Title 10, § 10-158.1 et seq., entitled the Virginia Recreational Facilities Authority Act, under which the Authority is created. The purpose of the Authority is to facilitate and coordinate development of a recreational area in the western portion of the Commonwealth, including setting aside and conserving scenic and natural areas along the Roanoke River and preserving open-space lands. For these purposes, the Authority is authorized:

[t]o acquire by gift, devise, purchase, or otherwise, absolutely or in trust . . . any property, real or personal, or any estate or interest therein . . . as may be necessary or desirable for carrying out the purposes of the Authority.

Section 10-158.5(3). The Authority is also granted the authority to lease property owned or controlled by the Commonwealth that will further the purposes described in Ch. 360. See §§ 10-158.5(4), 10-158.19.

II. Conclusions: 700-Acre Limitation of H.B. No. 519 Does Not Apply to the Authority or to the River Foundation

The language of H.B. No. 519 is clear. Only the property to be acquired by the Division for the EXPLORE Project is limited to approximately 700 acres under § 3 of H.B. No. 519. There is no limitation applicable to the Authority or to the River Foundation. With regard to the Authority, this conclusion is further supported by § 4 of H.B. No. 519, permitting the State park to be leased to the Authority, and by § 10-158.5(3), permitting the Authority to acquire real estate, absolutely or in trust, for carrying out its purposes. No acreage limitation is imposed on this latter grant of authority.
Based on the above, it is my opinion that H.B. No. 519 places no limitation on the amount of real estate which may be owned by either the Authority or the River Foundation.

1House Bill No. 519 authorizes the Department of Highways and Transportation to acquire property for a scenic parkway and the Division of Parks and Recreation of the Department of Conservation and Historic Resources to acquire property for a State park for the EXPLORE Project. EXPLORE is the name given to a proposal by the nonprofit River Foundation for development of a family oriented tourist attraction in the western portion of the Commonwealth.

CONSTITUTION OF VIRGINIA - DIVISION OF POWERS - LEGISLATURE. ADMINISTRATION OF THE GOVERNMENT GENERALLY - COMPREHENSIVE CONFLICT OF INTERESTS ACT. CIVIL REMEDIES AND PROCEDURE - COMMISSIONERS IN CHANCERY. FIDUCIARIES GENERALLY - INVENTORIES AND ACCOUNTS - COMMISSIONERS OF ACCOUNTS. APPOINTMENT OF MEMBER OF GENERAL ASSEMBLY AS COMMISSIONER OF ACCOUNTS OR AS COMMISSIONER IN CHANCERY NOT CONSTITUTIONALLY OR STATUTORILY PROHIBITED.

February 9, 1987

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

You ask whether there is any constitutional or statutory provision prohibiting a member of the General Assembly from serving as a commissioner in chancery or a commissioner of accounts. You state that you have been named a commissioner in chancery by the Circuit Court for the City of Norfolk to hear evidence and make reports in divorce cases referred to you by the court, and that you do not participate in these cases while the General Assembly is in session. My response to your inquiry requires review of various portions of the Constitution of Virginia and the Comprehensive Conflict of Interests Act, §§2.1-599 through 2.1-634 of the Code of Virginia (the "Act").

I. Relevant Constitutional and Statutory Provisions

The pertinent portion of Art. III, § 1 of the Constitution of Virginia (1971) provides:

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time....

Article IV, § 4 provides, in relevant part:

No person holding a salaried office under the government of the Commonwealth...shall be a member of either house of the General Assembly during his continuance in office....

In addition to these constitutional provisions, the Act proscribes certain "contracts" by members of the General Assembly as follows:

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....
Section 2.1-604(B).

II. Commissioner in Chancery

A. Commissioner in Chancery Appointed by Circuit Court

Section 8.01-607 provides that "[e]ach circuit court shall, from time to time, appoint such commissioners in chancery as may be deemed necessary for the convenient dispatch of the business of such court. Such commissioners shall be removable at pleasure." Each commissioner is directed by statute to examine and report upon matters referred to him by any court, and the conduct of proceedings before him are prescribed in Ch. 23 of Title 8.01 and the Rules of the Supreme Court of Virginia. See § 8.01-609 et seq.; Va. Sup. Ct. Rules 2:17, 2:18. Typically, the appointment of a commissioner in chancery is made by order entered by a circuit court judge, which remains in effect until a subsequent order of removal is entered. See § 8.01-607.

B. General Assembly Member Serving as Commissioner

In interpreting various constitutional provisions outlining the separation of powers doctrine, the Supreme Courts of the United States and of Virginia have consistently recognized that this doctrine is not absolute. "[T]he administration of the government would be wholly impracticable if that general maxim were strictly, literally and unyieldingly applied in every possible situation." Winchester, &c., R. Co. v. Com'th, 106 Va. 264, 268, 55 S.E. 692, 693 (1906). Both the federal and State governments abound "with illustrations of the intermingling of such powers in one person or body." Id.; accord Dreyer v. Illinois, 187 U.S. 71 (1902). See also Proceedings and Debates of the House of Delegates pertaining to Amendment of the Constitution at 18-19 (Ex. Sess. 1969) (Del. Gray, F. T.).

With the earlier and similar constitutional provisions and statute cited above in effect, a prior Opinion of this Office concluded that a member of the General Assembly is neither constitutionally nor statutorily prohibited from being appointed as a commissioner in chancery. See 1937-1938 Report of the Attorney General at 104(2). I am in agreement with that earlier Opinion and conclude that the appointment of a member of the General Assembly as a commissioner in chancery is not prohibited either by Art. III, § 1, or by Art. IV, § 4.

C. Appointment as Commissioner in Chancery Is "Contract of Regular Employment" Exempted by Act

Section 2.1-604(B) of the Act prohibits any member of the General Assembly from having a personal interest in a contract with any governmental agency of the executive or judicial branches of State government unless (i) such contract is awarded as a result of competitive sealed bidding or competitive negotiation as defined in § 11-37, or (ii) such contract is a "contract of regular employment."

The appointment of the General Assembly member as a commissioner in chancery is unquestionably a "contract," as this term is defined in § 2.1-606, since it is an "agreement to which a governmental agency (a component part of the judicial branch of State government) is a party." It is also my opinion that this appointment is a "contract of regular employment" within the meaning of § 2.1-604, thereby excepting it from the prohibition of § 2.1-604(B). As discussed above, an order appointing a commissioner in chan-
erior in a particular jurisdiction typically remains effective until a subsequent order of removal is entered. See § 8.01-607. Although the actual services rendered by a commissioner in chancery are not continuous, the tenure of his appointment (employment) is regular in that it is not casual or temporary, but a permanent appointment at the pleasure of the circuit court judge. See id. The fact that the commissioner in chancery performs other jobs during the term of his appointment does not mean that his "employment" as commissioner in chancery is not "regular." See Button v. Day, 204 Va. 547, 557-58, 132 S.E.2d 292, 299 (1963).

III. Commissioner of Accounts

A. Commissioner of Accounts Appointed by Circuit Court

Section 26-8 authorizes circuit court judges to appoint so many commissioners of accounts, as may be requisite to carry out the duties of that office, who shall be removable at pleasure and who shall have a general supervision of all fiduciaries admitted to qualify in such court or before the clerk thereof and make all ex parte settlements of their accounts.

When a commissioner of accounts acts under § 26-8, he implements a special statutory jurisdiction for the efficient administration of fiduciary accounts without resort, in ordinary cases, to a suit for direction in the administration of estates. See Carter v. Skillman, 108 Va. 204, 213, 60 S.E. 775, 779 (1908).

B. Commissioner of Accounts Occupies Position Similar to Commissioner in Chancery

The commissioner in chancery and commissioner of accounts occupy strikingly similar positions with regard to their relationship to circuit court judges. As discussed above, both are appointed by the circuit court and serve at its pleasure. Both conduct proceedings for the circuit court which normally would be brought before the court itself were it not for the commissioner. I find no basis, therefore, for distinguishing between the two offices for the purposes of the constitutional or statutory analysis detailed earlier in this Opinion for commissioners in chancery.

C. Appointment as Commissioner of Accounts Also Is "Contract of Regular Employment" Exempted by Act

As outlined above, "contract[s] of regular employment" are excepted from the contract prohibitions of § 2.1-604(B). The appointment of a commissioner of accounts by a circuit court is such a "contract of regular employment" for the same reasons discussed in Part II(C) of this Opinion. The commissioner of accounts, like the commissioner in chancery, is typically appointed by the circuit court through the entry of an order of appointment and serves at the pleasure of the court.

IV. Conclusion: No Constitutional or Statutory Prohibition Exists to Prevent Appointment of General Assembly Member as Commissioner in Chancery or Commissioner of Accounts

Based on the above, it is my opinion that the appointment of a member of the General Assembly as a commissioner of accounts or commissioner in chancery is not prohibited either by Art. III, § 1 or Art. IV, § 4 of the Constitution or by § 2.1-604(B) of the Act.

1 The term "contract" is defined as "any agreement to which a governmental agency is a party, or any agreement on behalf of a governmental agency which involves the pay-
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ment of money appropriated by the General Assembly or political subdivision, whether or not such agreement be executed in the name of the Commonwealth of Virginia, or some political subdivision thereof." Section 2.1-600.

CONSTITUTION OF VIRGINIA - EDUCATION - THE LITERARY FUND. MONETARY PENALTIES. ONLY CRIMINAL FINES PLACED IN FUND. DISPOSITION OF OTHER PENALTIES SUBJECT TO LEGISLATIVE DISCRETION.

September 2, 1986

Mr. Bernard L. Henderson, Jr.
Director, Department of Health Regulatory Boards

You inquire about the proper disposition of monetary penalties imposed pursuant to § 54-961 of the Code of Virginia or similar provisions of Title 54 for violation of licensing statutes or regulations of the various Health Regulatory Boards. You ask specifically whether Art. VIII, § 8 of the Constitution of Virginia (1971) requires such penalties to be paid into the Literary Fund.

I. Specific Statutes Govern Health Regulatory Boards

Title 54 prescribes the disposition of moneys collected by four of the Health Regulatory Boards within your Department:

1. Section 54-388 directs that monetary penalties imposed by the Board of Optometry be paid into the Literary Fund.

2. Section 54-165 provides that monetary penalties assessed by the Board of Dentistry shall be paid into the State treasury and used to pay the expenses of that Board.

3. Section 54-367.26 provides that moneys received by the Board of Nursing shall be paid into a special fund from which the expenses of the Board shall be paid.

4. Section 54-784.02 provides that penalties imposed by the Board of Veterinary Medicine shall be paid into a special fund and used for expenses of the Board.

The Code is silent as to the disposition of similar penalties imposed by the other Boards within your Department. Section 54-961 also is silent on this subject.

II. All "Fines" to be Paid into Literary Fund

The Literary Fund, established by Art. VIII, § 8, is a permanent and perpetual public school fund. The Constitution directs to be placed into this fund, inter alia, "all fines collected for offenses committed against the Commonwealth." (Emphasis added.) The General Assembly has implemented this provision by means of Ch. 10, Title 22.1, § 22.1-142 et seq.

A previous Opinion of the Attorney General reviewed the relevant law and held that only penalties for statutory and common law crimes are considered "fines" required by the Constitution to be paid into the Literary Fund. See 1977-1978 Report of the Attorney General at 162. That Opinion, citing Southern Express Co. v. Walker, 92 Va. 39, 22 S.E. 809 (1895), aff'd 168 U.S. 705 (1897), determined that the phrase "offenses committed against the Commonwealth" in Art. VIII, § 8 clearly refers only to criminal penalties. 1977-1978 Report of the Attorney General, supra, at 164. The Opinion further held that civil penalties or noncriminal monetary penalties, such as those imposed by Health
Regulatory Boards, are not "fines" and may, therefore, be appropriated to the Literary Fund or otherwise at the direction of the General Assembly.  

III. Absent Specific Statutory Direction, Penalties Assessed by Boards to Be Paid into State Treasury

Responding to your specific questions, it is my opinion that those Boards covered by specific statutes must follow their appropriate legislative mandates. It is also my opinion, however, that, absent specific direction, monetary penalties of other Boards are not required to be paid to the Literary Fund. Instead, such moneys should be paid into the State treasury to be further appropriated at the discretion of the General Assembly.

1Despite this initial conclusion, the cited Opinion further concluded that because certain civil penalties had been paid into the Literary Fund as a matter of past practice, such payment must continue in the absence of legislative direction. This conclusion, however, is specifically overruled by the current Appropriations Act which mandates the inclusion in the general fund of all "monies derived from all other sources as are not segregated by law to other funds." Chapter 643, 1986 Va. Acts 1594, § 1(C). To the extent that this earlier conclusion is in conflict with this Opinion, therefore, the earlier conclusion is hereby overruled.

CONSTITUTION OF VIRGINIA - LEGISLATURE - QUALIFICATIONS OF SENATORS AND DELEGATES. COSTS, FEES, SALARIES AND ALLOWANCES - SALARIES AND EXPENSES OF OFFICE - BOARDS OF SUPERVISORS. NO STATUTORY OR CONSTITUTIONAL PROHIBITION AGAINST SERVING AS MEMBER OF GENERAL ASSEMBLY AND ON COUNTY BOARD OF SUPERVISORS.

June 29, 1987

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

You ask whether an individual who is serving in the General Assembly may serve also as a member of a county board of supervisors.

I. Applicable Constitutional Provision

Article IV, § 4 of the Constitution of Virginia (1971) provides, in pertinent part, that

[n]o person holding a salaried office under the government of the Commonwealth, and no judge of any court, attorney for the Commonwealth, sheriff, treasurer, assessor of taxes, commissioner of the revenue, collector of taxes, or clerk of any court shall be a member of either house of the General Assembly during his continuance in office; and his qualification as a member shall vacate any such office held by him. [1]

A supervisor is not one of the seven local offices specifically mentioned in Art. IV, § 4. The question presented by your inquiry, therefore, is whether the office of supervisor is a "salaried office under the government of the Commonwealth" within the meaning of Art. IV, § 4.

II. Article IV, § 4 Derived from § 44 of 1902 Constitution

Article IV, § 4 is derived from § 44 of the Constitution of Virginia (1902). The relevant portion of § 44 read: "But no person holding a salaried office under the State gov-

III. Prior Opinions Interpret Scope of Prohibition in Art. IV, § 4

Prior Opinions of this Office have applied the prohibition against multiple officeholding in Art. IV, § 4 in a variety of circumstances. It has been concluded that a commissioner of the Hampton Roads Sanitation District does not hold a "salaried office" within the meaning of the prohibition. Since the commissioner did not serve in a salaried office, the Opinion did not address the question whether service as a commissioner was "under the government of the Commonwealth." See 1975-1976 Report of the Attorney General at 144. The positions of county attorney, school board attorney, and hearing officer have been considered not subject to the prohibition since the positions are not "under the government of the Commonwealth." Id. at 146. On the other hand, it has been concluded that the "salaried office" prohibition extends to the local office of town treasurer, notwithstanding the absence of that office from those local offices specifically mentioned in Art. IV, § 4. See 1974-1975 Report of the Attorney General at 540. Compare 1933-1934 Report of the Attorney General at 80 (no constitutional prohibition preventing town mayor from serving in General Assembly).

IV. Supervisor Not "Salaried Office Under the Government of the Commonwealth"

The office of supervisor is a local office created pursuant to Art. VII, § 5.2 Section 14.1-45 provides that supervisors are to be paid an annual salary and, therefore, makes that office a "salaried office." The office of supervisor, however, is an office of local government not clearly "under the government of the Commonwealth." Moreover, the office of supervisor is clearly not one of the seven local offices specifically mentioned in Art. IV, § 4.3 It is my opinion, therefore, that the office of supervisor is not a salaried office under the government of the Commonwealth. It is further my opinion that Art. IV, § 4 does not prohibit an individual who is serving in the General Assembly from also serving as a member of a county board of supervisors. I am unaware of any other statute or constitutional provision that would prohibit the dual officeholding in question.4 It is my opinion, therefore, that an individual who is serving in the General Assembly may also serve as a member of a county board of supervisors.

1 Although not directly applicable, I note that Art. IV, § 5 restricts members of the General Assembly from being appointed, during their terms, to any civil office of profit filled by the General Assembly. Article VII, § 6 also places restrictions on multiple officeholding by local officials. Section 15.1-50 of the Code of Virginia imposes restrictions on multiple officeholding by local officials which parallel those restrictions imposed by Art. VII, § 6. Pursuant to Art. VII, § 6 and § 15.1-50, therefore, a supervisor is prohibited from holding any other office mentioned in Art. VII. Prior to a 1980 amendment, § 15.1-50 imposed a much broader prohibition against dual officeholding by local officials, such prohibition extending to any office, elective or appointive. See Ch. 695, 1980 Va. Acts 1072. See also 1984-1985 Report of the Attorney General at 20, 21 (legislative history of § 15.1-50). Prior to the 1980 amendment, therefore, § 15.1-50 would have prohibited an individual's simultaneous service as a supervisor and a member of the General Assembly.


3 The Commission on Constitutional Revision, in its report, discussed the apparent lack of logic in the scope of the prohibition. In a footnote, the Commission posed a series of rhetorical questions pointing out that the prohibition applied to the enumerated local offices but did not appear to apply to a supervisor. See Report of the Commission on Constitutional Revision, supra, at 129 n.12.
I have also considered the potential applicability of the common law doctrine of incompatible offices. See Reports of the Attorney General: 1978-1979 at 209, 210; 1976-1977 at 214. In this instance, however, it is my opinion that the compatibility of the offices of supervisor and member of the General Assembly must be considered under the constitutional and statutory provisions discussed above. It would be inappropriate to apply the common law doctrine when the compatibility of the offices in question with other offices is the specific subject of both constitutional and statutory provisions.

CONSTITUTION OF VIRGINIA - LOCAL GOVERNMENT. COMMISSIONERS OF THE REVENUE. CONSTITUTIONAL OFFICERS NOT SUBJECT TO CITY PERSONNEL POLICIES AND NOT CONSIDERED PROBATIONARY EMPLOYEES INELIGIBLE FOR PARTICIPATION IN VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM.

July 1, 1986

The Honorable L. Wayne Carter
Commissioner of the Revenue for the City of Salem

You request my opinion on two issues related to your election as Commissioner of the Revenue for the City of Salem. You advise that the City of Salem has a six-month probationary period for its new employees, and that for six months after your election you were not permitted to participate in the Virginia Supplemental Retirement System ("VSRS").

I. Constitutional Officers Are Not Subject to Probationary Provision in City Personnel Policy

You first ask whether the city may require the commissioner of the revenue to serve a probationary period. The commissioner of the revenue is a "constitutional officer" required to be elected in each city and county by Art. VII, § 4 of the Constitution of Virginia (1971). The commissioner of the revenue is distinguished from other city officers in that, although he serves in a particular locality, his duties are not strictly local in nature, but are of a public or general nature. See, e.g., 1969-1970 Report of the Attorney General at 59 and authorities cited therein. As an officer elected by the people pursuant to the Constitution, the commissioner of the revenue must not be hindered in the performance of his duties by acts of dominion or control exercised by the locality over his office. See Reports of the Attorney General: 1985-1986, supra; 1984-1985 at 72; 1982-1983 at 107. No general law exists which authorizes a locality to exercise probationary authority over the commissioner of the revenue. Moreover, I find no special law which gives the city council such authority. Accordingly, it is my opinion that the city may not require the commissioner of the revenue to serve a probationary period.

II. Commissioner of the Revenue Eligible to Purchase VSRS Service Credit

Your second question is whether you may purchase retirement service credit for the probationary period that you served immediately following your election as commissioner of the revenue. The practice of purchasing service credit is governed by terms set by VSRS. I am advised that VSRS informed the Personnel Director of the City of Salem in a letter dated April 28, 1986, that service credit may be purchased for the six-month period in question if it is determined that constitutional officers are not subject to a probationary period. Having concluded that constitutional officers are not subject to the local probationary policy, I am of the opinion that the purchase of service credit is permissible in the present case.
CONSTITUTION OF VIRGINIA - LOCAL GOVERNMENT. COUNTIES, CITIES AND TOWNS - COUNTIES GENERALLY - BOUNDARY CHANGES OF TOWNS AND CITIES - TRANSITION OF TOWNS TO CITIES. ELECTIONS - APPOINTMENT OF REPRESENTATIVES. NO REQUIREMENT THAT COUNTY BOARD OF SUPERVISORS REAPPORTION MAGISTERIAL DISTRICTS PRIOR TO ELECTION WHICH PRECEDES EFFECTIVE DATE OF ANNEXATION; "ONE-MAN, ONE-VOTE" DOCTRINE; INCUMBENT SUPERVISOR LIVING IN AREA TO BE ANNEXED MAY RUN FOR REELECTION, MAY CONTINUE TO SERVE FORMER MAGISTERIAL DISTRICT AFTER EFFECTIVE DATE OF ANNEXATION.

May 30, 1987

The Honorable Charles R. Hawkins
Member, House of Delegates

You request my opinion on several questions concerning the impact of the annexation of a portion of Pittsylvania County by the City of Danville, effective January 1, 1988.

I. Facts

Last year, the City of Danville and Pittsylvania County concluded lengthy annexation litigation. By the terms of the final annexation decree, Danville will acquire 10,499 new residents from the county, effective January 1, 1988. County voters will elect seven members to the board of supervisors on November 3, 1987, for four-year terms commencing January 1, 1988. At the November 3, 1987 election, county voters also will elect the Commonwealth's attorney, sheriff, commissioner of the revenue, and treasurer.

The county had 66,147 residents according to the 1980 census. You state, therefore, that each magisterial district had approximately 9450 residents based on that census. Of the 10,499 inhabitants the county is losing as a result of the annexation proceeding, 4222 are in the Westover District, 4435 are in the Dan River District, and 1842 are in the Tunstall District. You also state that after annexation, each of these districts will be substantially below the "optimum population" for a magisterial district, with approximately 7950 residents each.

The county administrator of Pittsylvania County has advised a member of my staff that the county was last redistricted in 1980 according to 1980 census figures. To date, no new redistricting process has been initiated in the county.

You first ask whether the county board of supervisors is required to reapportion the magisterial districts prior to the November 3, 1987, election according to the new population figures, which will be effective January 1, 1988.

II. Applicable Constitutional and Statutory Provisions

Article VII, § 5 of the Constitution of Virginia (1971) provides, in part, as follows:

If the members of the governing body are elected by district, the district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. When members are so elected by district, the governing body of any county, city or town may, in a manner provided by law, increase or diminish the number, and change the boundaries, of districts, and shall in 1971 and every ten years thereafter, and also whenever the boundaries of such districts are changed, reapportion the representation in the governing body among the districts in a manner provided by law. Whenever the governing body of any such unit shall fail to perform the duties so prescribed in the manner herein directed, a suit shall lie on behalf of any
Section 15.1-571.1(A) of the Code of Virginia contains the statutory provisions paralleling the requirements of Art. VII, § 5. See also § 15.1-37.5. Section 15.1-571.1(B) provides:

Whenever redistricting of magisterial or election districts is required as a result of annexation, the governing body of such county shall, within a reasonable time from the effective date of such annexation, not to exceed ninety days, commence the redistricting process which shall be completed within a reasonable time thereafter, not to exceed twelve months.

The timing of elections following a reapportionment resulting from an annexation is controlled by §§ 24.1-17 and 24.1-88(b). See 1976-1977 Report of the Attorney General at 70. Any changes in the boundaries of existing election districts are subject also to the procedural requirements of § 24.1-40.9.

III. State Law Does Not Require Reapportionment Prior to Effective Date of Pending Annexation

The above statutes establish a method to control population adjustments within a county made necessary as a result of an annexation. The controlling statute in these circumstances is § 15.1-571.1(B), which requires that reapportionment be commenced after the effective date of the annexation. The effective date of Danville's pending annexation is January 1, 1988. It is my opinion, therefore, that State law does not require the county board of supervisors to reapportion the magisterial districts prior to the November 3, 1987, election according to the new population figures which will be effective January 1, 1988. See 1981-1982 Report of the Attorney General at 324.

IV. "One-Man, One-Vote" Doctrine Does Not Require Reapportionment Prior to November 1987 Election

The materials you provide suggest that the "one-man, one-vote" doctrine would require the reapportionment of the county's magisterial districts prior to the November 1987 election. The "one-man, one-vote" doctrine requires that, as a basic constitutional standard under the Equal Protection Clause of U.S. Const. Amend. XIV, representation in elected governmental bodies must be apportioned on a population basis. See Reynolds v. Sims, 377 U.S. 533, 567 (1964). This principle has been extended to require equal representation in local governments. See Avery v. Midland County, 390 U.S. 474 (1968). A greater percentage of deviation from strict equality in representation is permissible in local units of government, provided such deviation is justified by the particular circumstances and local needs. See Abate v. Mundt, 403 U.S. 182, 185 (1971). Similarly, the doctrine does not require overly frequent reapportionment, but rather that a state have a reasonably conceived plan for periodic readjustments of legislative representation to take into account population shifts and growth. See Reynolds, 337 U.S. at 583-84. Local government apportionment cases generally result from malapportionment that has developed over a number of years or challenges to proposed reapportionment plans.

In this instance, however, any malapportionment which may exist after the effective date of the annexation is not the result of incremental changes in the population of the magisterial districts but, rather, the result of the expansion of the boundaries of the City of Danville. At the time of the November 1987 election, the county's magisterial districts will be apportioned acceptably, and each person's vote in the election will have as nearly an equal effect as is practicable. It is only after the effective date of annexation that the malapportionment will result.

In analogous circumstances, federal courts, out of a judicial reluctance to disrupt the orderly conduct of official business, have permitted malapportioned legislative bodies

In this instance, the county will be required to reapportion the magisterial districts in 1988, but no election will be held under the new districts for those supervisors elected in 1987 until 1991. See §§ 15.1-571.1(B) and 24.1-17. At the time of the November 1987 election, however, the existing magisterial districts will be apportioned acceptably, and each person's vote will be as nearly equal as is practicable. At the time of the 1991 election, the magisterial districts will have been reapportioned to take into account the 1988 annexation. To attempt to reapportion the magisterial districts prior to the effective date of annexation would impose the difficult task of accommodating changes in the county's boundaries not yet in effect and the eligibility of voters in November who would be residents of Danville on January 1, 1988. Accordingly, it is my opinion that the "one-man, one-vote" doctrine does not require reapportionment of the county's magisterial districts prior to the November 1987 election.

V. Incumbent Supervisor May Run for Reelection

You next ask whether an incumbent supervisor who lives in the area to be annexed may run for reelection and continue to serve his former magisterial district after the effective date of annexation.

A. Applicable Statutes

Section 15.1-1053 provides that "[i]f a county or district officer resides in a territory annexed to a city, such officer may continue in office until the end of the term for which he was elected or appointed. The provisions of § 15.1-995 shall prevail with respect to successive reelections of such officer's reelection."

Section 15.1-995 provides:

Any county officer or judge of a county court of any county who resides in the county or in any town therein, and has an established home therein, which homesite has become or hereafter becomes a part of a city since such officer's election or appointment, shall not vacate his office by reason of his residence in such city, but shall continue to hold such office so long as he shall be successively elected or appointed to the office held by him at the time of such transition. Any such officer shall for such purposes be deemed to be a resident of the magisterial district wherein the homesite before becoming a part of a city was. The provisions of this section shall not be applicable to members of the school board of such county, who shall be governed by § 22-68.
B. Section 15.1-1053 Applicable to Supervisors

Section 15.1-1053 expressly preserves the ability of county officers who live in an area annexed to a city to continue to serve until the end of their term. Prior Opinions of the Attorney General have concluded that § 15.1-1053 applies to supervisors. See Reports of the Attorney General: 1973-1974 at 12; 1986-1987 at 34.

C. Incumbent Supervisor May Run for Reelection and Serve His Former District

In this instance, an incumbent supervisor would stand for reelection in November 1987 for a term to commence January 1, 1988. After the effective date of annexation, the incumbent supervisor would no longer be a county resident. In such circumstances, it is my opinion that § 15.1-1053 authorizes an incumbent supervisor who lives in the area to be annexed to run for reelection in the November 1987 election and to continue to serve his former magisterial district after the effective date of annexation. Section 15.1-1053 provides that the eligibility of the incumbent supervisor for reelection in elections after 1987 is controlled by § 15.1-995.

VI. Summary

To summarize, it is my opinion that (1) State law does not require the board of supervisors of Pittsylvania County to reapportion the magisterial districts prior to the November 1987 election; (2) the "one-man, one-vote" doctrine does not require reapportionment of the county's magisterial districts prior to the November 1987 election; and (3) an incumbent supervisor who lives in the area to be annexed may run for reelection in the November 1987 election and continue to serve his former magisterial district after the effective date of annexation.

1I note that § 24.1-17 was amended by Ch. 7, 1987 Va. Acts 9, which, as an emergency bill, became effective upon signature of the Governor on Feb. 16, 1987. Approval was given to this legislation by the U.S. Department of Justice under § 5 of the Voting Rights Act of 1965 on April 15, 1987.
2See, e.g., Abate v. Mundt; Cook v. Luckett, 735 F.2d 912 (5th Cir. 1984).
3See, e.g., Sutton v. Dunne, 881 F.2d 484 (7th Cir. 1982), cert. denied, 460 U.S. 1081 (1983); Lister v. Commissioners Court, Navarro Cty., 566 F.2d 490 (5th Cir. 1978).
4I note that if the pending annexation had been effective in 1987, rather than on Jan. 1, 1988, § 24.1-17, as amended by Ch. 7, would require the reapportionment of the county prior to the November 1987 election. See supra note 1.
5I note that § 15.1-995 is a portion of Ch. 22 of Title 15.1, which generally concerns the transition of towns to cities. Section 15.1-995, therefore, is applicable to these circumstances only because of the express provisions of § 15.1-1053.
6The postannexation redistricting required by § 15.1-571.1(B) raises the question of whether the privilege accorded by § 15.1-995 would apply following such redistricting. Compare 1975-1976 Report of the Attorney General at 287.

CONSTITUTION OF VIRGINIA - LOCAL GOVERNMENT. COUNTIES, CITIES AND TOWNS - COUNTY, CITY AND TOWN OFFICERS. WELFARE - LOCAL BOARDS OF PUBLIC WELFARE. NEITHER ART. VII, § 6, NOR § 15.1-50 PRECLUDES APPOINTMENT OF TOWN COUNCIL MEMBER TO LOCAL WELFARE BOARD BY COUNTY BOARD OF SUPERVISORS FOR COUNTY IN WHICH TOWN LOCATED.

July 28, 1986

Mr. Bruce D. Jones, Jr.
County Attorney for Accomack County
for the county in which the town is located makes appointments. Specifically, you ask whether Art. VII, § 6 of the Constitution of Virginia (1971) and § 15.1-50 of the Code of Virginia preclude such an appointment.

I. Applicable Constitutional and Statutory Provisions

Article VII, § 6 states, in part, as follows:

[N]o person shall at the same time hold more than one office mentioned in this Article. 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.]

Section 15.1-50 states, in part, that "[n]o 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 or councilman shall hold any other office mentioned in Article VII of the Constitution at the same time." (Emphasis added.) These two provisions control dual officeholding by certain local officials, including a councilman. See 1982-1983 Report of the Attorney General at 394.

Section 63.1-40 describes generally how a local board of welfare is to be constituted and provides, in part, that "[t]he local board... shall be... appointed by the governing body of the county."

II. A Town Councilman May Serve on a Local Board of Welfare

Article VII of the Constitution makes no mention or reference to membership on a local board of welfare. It is my opinion, therefore, that neither Art. VII nor § 15.1-50 precludes the appointment of a town councilman to a local welfare board by the county board of supervisors. 1 Nothing in § 63.1-40 would prohibit such an appointment.


CONSTITUTION OF VIRGINIA - TAXATION AND FINANCE. COUNTIES, CITIES AND TOWNS - GENERAL. CREDIT CLAUSE DOES NOT PROHIBIT SECURING OF PRIVATE LOAN WITH CERTAIN RIGHTS TO LOAN PAYMENT FROM PREVIOUS URBAN DEVELOPMENT ACTION GRANT LOAN RECIPIENT.

December 15, 1986

Mr. Thomas J. McCarthy, Jr.
County Attorney for Pulaski County

You ask whether a proposed financing arrangement for the purchase of a manufacturing facility by a group of employees is within the confines of Art. X, § 10 of the Constitution of Virginia (1971) (the "credit clause").

I. Facts

In order to preserve 113 jobs in the area, the Town of Pulaski and the County of Pulaski are currently working together to foster the purchase of the magnetic oxide pro-
duction facilities of Hercules Incorporated (the "manufacturing facility"), located in the town and the county, by a group of employees of the manufacturing facility.

To assist in the acquisition, the county, through its Industrial Development Authority, has acquired a Community Development Block Grant and loan from the Virginia Revolving Loan Fund for the benefit of the purchasers. The town, as an incentive for a private lender to finance this transaction, wishes to secure the timely payment of principal and interest to the financing institution by pledging certain rights to the $2,000,000 principal repayment amount of a Pulaski Furniture Corporation ("PFC") note issued in connection with the town's Urban Development Action Grant ("UDAG"). The town has also secured a new $1,000,000 UDAG which it proposes to loan to the new company.

The United States Department of Housing and Urban Development ("HUD") has approved the pledge of the PFC payments as additional security for the primary financing for the purchasers of the manufacturing facility. The UDAG funds are segregated from town funds and, accordingly, retain their federal character.

Your concern is limited to the act of securing the primary financing for the purchasers of the manufacturing facility with the PFC payments on the UDAG note. The question presented, therefore, is whether the credit clause permits the town to secure the primary financing for the purchasers of the manufacturing facility with the PFC payments on the UDAG note.

II. Applicable Constitutional and Statutory Provisions

Article X, § 10 provides, in part, as follows:

Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation.... This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority.

Section 15.1-29.7 of the Code of Virginia provides:

Any county, city or town may participate in a program under Title I (Community Development) of the United States Housing and Community Development Act of 1974, as amended. Any such county, city or town may undertake the community development activities specified in Title I of that act, unless such activities are prohibited by the Constitution of Virginia. Any county, city or town may appropriate its own moneys for the same purposes for which federal funds may be employed under the provisions of such federal legislation unless prohibited by the Constitution of Virginia. Any federal funds, or portion thereof, received by a county, city or town under a Title I program may be deposited in a special fund which shall be established separate and apart from any other funds, general or special; such funds shall be deemed to be federal funds and shall not be construed to be part of the revenues of such county, city or town.

III. Prior Opinions Conclude Credit Clause Does Not Apply when No Local Government Funds Involved

This Office has twice considered the application of the credit clause in analogous factual situations. See Reports of the Attorney General: 1983-1984 at 103; 1979-1980 at 72. These Opinions concluded that, under the statutory and regulatory scheme governing the use of federal community development funds, and given the arrangements among the parties in each instance by virtue of which the only public funds involved were federal funds which never lost their federal character, no violation of the credit clause resulted,
provided the activities financed were authorized under Title I of the Housing and Community Development Act of 1974 ("Community Development Act") and the funds were administered so as to preserve their federal character. The premise underlying this conclusion is that the credit clause does not apply when no local governmental funds or resources are involved in or pledged to the project.

IV. Conclusion: Proposed Transaction Would Not Violate Credit Clause

In this instance, the proposed employee purchase of the manufacturing facility is an eligible economic stimulus activity under the Community Development Act. See 42 U.S.C. § 5305(a)(14); 24 C.F.R. §§ 570.455, 570.203 (1986). HUD has approved the secondary use of the PFC payments to secure the purchasers' primary financing. Furthermore, you state that the UDAG funds have been administered so as to preserve their federal character and to satisfy the "special fund" requirement of § 15.1-29.7. See 1983-1984 Report of the Attorney General, supra note 2, at 106. In accord with the prior Opinions cited above, therefore, it is my opinion that, in these circumstances, the proposed transaction would not violate the credit clause.

1 The UDAG loan to PFC was the subject of a prior Opinion of this Office. See 1983-1984 Report of the Attorney General at 103. The UDAG program is provided for as a part of the Housing and Community Development Act of 1974. See 42 U.S.C. § 5318 et seq. Participation in the UDAG program by local governments in Virginia is governed by § 15.1-29.7 of the Code of Virginia. Section 15.1-29.7 imposes a "special fund" requirement on the administration of federal funds to preserve their federal character.

2 Subsequent and secondary uses of UDAG funds must be within HUD guidelines and are subject to HUD approval. See 42 U.S.C. § 5304(i) (Supp. 1986).

3 See 42 U.S.C. § 5301 et seq.

CONSTITUTION OF VIRGINIA - TAXATION AND FINANCE. PROVISION CONCERNING NONREVERSION OF FUND DOES NOT CAUSE APPROPRIATION TO FUND TO VIOLATE "TIME LIMITATION" CLAUSE OF ART. X, § 7.

November 21, 1986

The Honorable Frank W. Nolen
Member, Senate of Virginia

You ask whether the second enactment clause of H.B. No. 2, passed at the 1986 Special Session of the General Assembly, violates the "time limitation" clause of Art. X, § 7 of the Constitution of Virginia (1971), in view of other provisions that also were passed at that session. Those other provisions provide that the funds remaining in the newly created Transportation Trust Fund at the end of the biennium do not revert to the general fund.

House Bill No. 2 increases the Virginia retail sales and use tax one-half percent. The second enactment clause of the bill appropriates that one-half percent increase to the Commonwealth Transportation Board. You state that "[s]ince House Bill 2 Further provides that any funds remaining at the end of a biennium shall not revert to the general fund, this appears to be an appropriation in perpetuity." (Emphasis in original.)

1. Constitutional Provision

Article X, § 7 provides, in part, as follows:

No money shall be paid out of the State treasury except in pursuance of appropriations made by law and no such appropriation shall be made which is payable more than two years and six months after the end of the session of
II. Applicable Statutes

In addition to enacting a one-half percent increase in the retail sales and use tax, H.B. No. 2 also amends § 58.1-638 of the Code of Virginia, which prescribes the disposition of State sales and use tax revenue. Section 58.1-638(A)(1) of the bill provides:

The sales and use tax revenue generated by the one-half percent sales and use tax increase enacted by the 1986 Special Session of the General Assembly shall be paid, in the manner hereinafter provided in this section, to the Transportation Trust Fund as defined in § 33.1-23.03:1.

In several places in the language of H.B. No. 2 amending § 58.1-638(A), after allocating a portion of the Transportation Trust Fund to specific transportation-related funds, the bill states that "the funds remaining in such Fund at the end of a biennium shall not revert to the general fund but shall remain in the Fund."

House Bill No. 2 further provides, in its second enactment clause, the following:

2. That the amounts specified in subsection A1 of § 58.1-638 for distribution to the Transportation Trust Fund are hereby appropriated to the Commonwealth Transportation Board for transportation needs.

House Bill No. 5, among other provisions, establishes the Transportation Trust Fund by enacting § 33.1-23.03:1 which, in pertinent part, provides:

A. There is hereby created in the Department of the Treasury a special non-reverting fund to be known as the Transportation Trust Fund, consisting of:

* * *

3. The additional revenues generated by enactments of the General Assembly at its special session called for September 15, 1986, and designated for this fund.

* * *

E. The Transportation Trust Fund shall be established on the books of the Comptroller so as to segregate the amounts appropriated to the Fund and the amounts earned or accumulated by such trust fund. No portion of such trust fund shall be used for a purpose other than as provided herein. Funds remaining in the Transportation Trust Fund at the end of a biennium shall not revert to the general fund but shall remain in the trust fund . . . . [Emphasis added.]

III. Nonreversion Provisions Are Not Appropriations

The second enactment clause of H.B. No. 2 purports to appropriate the one-half percent sales and use tax increase to the Commonwealth Transportation Board. This appropriation will expire two years and six months from the end of the session at which it was enacted. See Art. X, § 7. As noted above, you state that "[s]ince House Bill 2 further provides that any funds remaining at the end of a biennium shall not revert to the general fund, this appears to be an appropriation in perpetuity." (Emphasis in original.)

In my opinion, however, the provisions concerning the nonreversion of the funds in H.B. Nos. 2 and 5 are not "appropriations" and therefore do not cause the second enactment clause of H.B. No. 2 to violate the "time limitation" clause of Art. X, § 7. The pro-
visions address only the segregation of certain funds and not an appropriation of such funds. The Constitution does not speak to the General Assembly's authority to designate funds on the books of the Comptroller so as to segregate the amounts in certain funds and to designate the lives of such funds. Thus, the nonreversion feature of the funds in the Transportation Trust Fund does not make the appropriation to the Commonwealth Transportation Board constitutionally infirm.

IV. Conclusion: Nonreversion Provisions Do Not Violate Art. X, § 7

All acts of the legislature are entitled to a presumption of constitutionality. It is only where a statute is plainly repugnant to a constitutional provision that it should be declared void. See City of Charlottesville v. DeHaan, 228 Va. 578, 323 S.E.2d 131 (1984).

The second enactment clause of H.B. No. 2 indicates an intent to appropriate to the Commonwealth Transportation Board the amount of the one-half percent increase in the sales and use tax revenue. House Bills No. 2 and 5 provide that the funds remaining at the end of the biennium will not revert to the general fund. They do not refer to any appropriations made from those funds. Only appropriations must be scrutinized under the "time limitation" clause of Art. X, § 7. In light of the foregoing, it is my opinion that, under the "time limitation" clause of Art. X, § 7, there is no infirmity in the second enactment clause of H.B. No. 2 caused by the nonreversion of the funds in the Transportation Trust Fund.

2A similar provision also appears in H.B. No. 5, Ch. 13, 1986 Va. Acts 19.

CONTRACTS - BURIAL, ETC., CONTRACT. PROCEEDS OF PRE-NEED BURIAL CONTRACT MAY NOT BE PLACED IN IRREVOCABLE TRUST. FUNDS RECEIVED PURSUANT TO CONTRACT UNDER § 11-24 MUST BE DEPOSITED INTO SEPARATE ACCOUNTS, MAY NOT BE COMMINGLED BY TRUSTEE. TRUST ASSETS MAY BE DEPOSITED ONLY INTO FEDERALLY INSURED ACCOUNTS.

May 5, 1987

The Honorable Donald S. Caldwell
Commonwealth's Attorney for the City of Roanoke

You ask three questions concerning the deposit and investment of money received pursuant to a pre-need burial contract. Specifically, you ask:

1. Would it be a violation of §§ 11-24 and 11-25 for a funeral director to enter into a pre-need agreement with, and receive money from, an individual in Virginia if, as part of the transaction, the funeral director has the individual sign a preprinted trust agreement in which agreement the grantor may elect to make the trust irrevocable with the funeral director named beneficiary contingent on the provision of services and property at the death of the subject party?

2. Would it be a violation of § 11-25 to commingle the funds of two or more trusts if the trustee or his agent, on a continuous basis, keeps exact records as to the amount of funds being held subject to each separate trust agreement, including accruals and expenses?

3. Would it be a violation of § 11-25 if the trustee invested the assets of the common fund in uninsured instruments if the trustee invested the fund assets solely in U.S. government obligations? [Emphasis in original.]
1986-1987 REPORT OF THE ATTORNEY GENERAL

I. Applicable Statutes

Section 11-24 of the Code of Virginia prohibits any person, firm or corporation doing business in Virginia from making an agreement for the furnishing of professional services of a funeral director, when the services are not to be rendered until the death of the person for whose funeral the services are to be furnished, unless "the person or persons who make ... such agreement shall be given an option to terminate the agreement at any time prior to the furnishing of such ... services ..."

Section 11-25 further provides:

Within thirty days following the receipt of any money paid pursuant to any contract described in § 11-24 or interest thereon or income accrued on or from any other consideration delivered pursuant to such agreement, the person, firm or corporation receiving it shall deposit the same in a special account in a banking institution or savings and loan association organized under the laws of this Commonwealth or of the United States of America the deposits or accounts of which are insured by an instrumentality of the federal government.

The funds shall be deposited in separate, identifiable trust accounts setting forth the names of the depositor, the trustee for the person who is the subject of the contract, and the name of the person, firm or corporation who will render the funeral services and the person who is the subject of the contract.

II. Proceeds of Pre-Need Burial Contract May Not Be Placed in Irrevocable Trust

It is a general rule of statutory construction that words in a statute are to be given their usual, commonly understood meaning. See Reports of the Attorney General: 1985-1986 at 65, 66; 1984-1985 at 14, 15, and 449, 450. Where the language of a statute is clear and unambiguous, rules of statutory construction are not required. Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982).

Section 11-24 requires that the person contracting for funeral services "be given an option to terminate the agreement at any time" prior to the furnishing of the funeral director's services. The funding of any such agreement by an irrevocable trust, therefore, is not permitted. I am of the opinion that it is a violation of § 11-24 for a funeral director, in providing a pre-need burial service contract, to offer a trust agreement in which the contracting party may elect to make the trust irrevocable with the funeral director named as beneficiary, contingent on the provision of services and property at the death of the party.

III. Statutory Requirement of "Separate, Identifiable" Trust Accounts Not Satisfied by Detailed Recordkeeping

Section 11-25 requires that funds received pursuant to a contract under § 11-24 "be deposited in separate, identifiable trust accounts." The commingling of trust funds, no matter how detailed the recordkeeping on the commingled account, is prohibited by the plain language in § 11-25. I am of the opinion, therefore, that funds received pursuant to a contract under § 11-24 must be deposited into separate accounts and may not be commingled by the trustee.

IV. Statutory Requirement of Federally Insured Account Not Satisfied by Investment in U.S. Government Obligations

You next ask whether it violates § 11-25 for a trustee to invest the assets of the common fund (as described above) in uninsured instruments, as long as the trustee

solely in U.S. government obligations. You comment that these instruments "accord the same safety of principal as insured accounts and should, therefore, satisfy the intent of the legislature." Since I have previously concluded that a "common fund" may not be established by commingling trust assets, I will address whether separate trust accounts may be invested in uninsured U.S. government obligations.

Again, the clear language in § 11-25 controls. This statute requires that the trust account be "in a banking institution or savings and loan association." Section 11-25, when read as a whole, also requires that the trust accounts received from contracts made pursuant to § 11-24 be "insured by an instrumentality of the federal government." I am of the opinion, therefore, that trust assets may be deposited only into federally insured accounts in a bank or savings and loan association, regardless of the relative safety of other investments, such as U.S. government obligations.\footnote{This conclusion is not affected by § 32.1-325(A)(2), permitting a maximum of $1,500 to be placed in an irrevocable trust designated solely for the burial of the trustor without it being regarded as a transfer of assets for purposes of determining eligibility for Medicaid benefits. While §§ 11-24 and 11-25 govern the funding of specific services covered in pre-need burial contracts, § 32.1-325(A)(2) does not address the funding of specific funeral services.

2 Other portions of the Code deal differently with the proceeds of pre-need contracts for personal property used in connection with burials and the perpetual care of cemetery lots. See §§ 57-39.8 through 57-39.18 and §§ 57-35.1 through 57-35.10. While the subjects of these sections are generally related to those addressed in §§ 11-24 and 11-25, they cannot be read to derogate the plain meaning of §§ 11-24 and 11-25, as the clear words of the latter statutes cannot be given new meaning in order to include that which the letter of the law excludes. See 1985-1985 Report of the Attorney General at 237, 238 n.1.}

CONTRACTS - VIRGINIA PUBLIC PROCUREMENT ACT. ADMINISTRATION OF THE GOVERNMENT GENERALLY - DEPARTMENT OF GENERAL SERVICES - PURCHASES AND SUPPLY. VIRGINIA STATE LIBRARY AND OTHER PUBLIC LIBRARIES SUBJECT TO ACT.

December 17, 1986

Mr. Wendell L. Seldon
Director, Department of General Services

You ask whether the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Procurement Act"), is applicable to purchases made by the Virginia State Library and other public libraries in the Commonwealth which are supported in whole or in part by State appropriations.

I. Applicable Statute

Your letter references § 2.1-451, which provides, in relevant part:

Unless otherwise ordered by the Governor, the purchasing of materials, equipment and supplies through the Division of Purchases and Supply is not mandatory in the following cases:

* * *

2. Manuscripts, maps, audiovisual materials, books, pamphlets and periodicals purchased for the use of the Virginia State Library or any other library in the Commonwealth supported in whole or in part by state appropriation . . . .
II. Conclusion: Purchases by Public Libraries Are Subject to Procurement Act

The foregoing exempts the Virginia State Library and other libraries supported in whole or in part by State appropriations from the requirement that certain purchases be made through the Division of Purchases and Supply.

There is no exception, however, in the Procurement Act itself relating either to library materials or public libraries.\(^1\) Compare §11-45 with §2.1-451(6). It is my opinion, therefore, that such libraries are subject to the Procurement Act. Notwithstanding this position, particular purchases may be exempt from certain requirements of the Procurement Act because of other relevant provisions. See, e.g., §11-41(C)-(F) (exceptions based on impracticability of competitive sealed bidding, sole source availability, emergency, or small purchases).

\(^1\) Whether a particular library is subject to the Procurement Act depends upon whether it is a "public body" as defined by §11-37.

COSTS, FEES, SALARIES AND ALLOWANCES - FEES. CIVIL REMEDIES AND PROCEDURE - ACTIONS - CHANGE OF NAME. DOMESTIC RELATIONS - DIVORCE, AFFIRMATION AND ANNULMENT. CLERK MAY CHARGE ONLY SPECIFIC FEE REQUIRED BY §14.1-112(20) FOR RECORDING IN DEED BOOK ORDER FOR NAME change OR DIVORCE DEGREE INCORPORATING RESTORATION OF FORMER NAME.

October 16, 1986

The Honorable Robert D. Snow
Clerk, Circuit Court of Carroll County

You ask what fees a clerk of court may charge for recording in the deed book an order for a change of name pursuant to §8.01-217 of the Code of Virginia or pursuant to a final decree of divorce changing a person's name in accordance with §20-121.4. You mention specifically the fees authorized under §§14.1-112(2), 14.1-112(20) and 14.1-113.

I. Applicable Statutes

Section 20-121.4 provides, in part, that the chancery court in a divorce action may "restore [a] party's former name either as part of the final decree or, upon request of such party, by separate order meeting the requirements of §8.01-217."

Section 8.01-217 prescribes the procedure for effecting name changes generally. It provides, in part, that "the clerk of the court shall spread the order upon the current deed book in his office [and] index it in both the old and new names."

Section 14.1-112 provides, in part, as follows:

A clerk of a circuit court shall, for services performed by virtue of his office, charge the following fees:

\[\text{**\text{**}}\]

(2) For recording and indexing in the proper book any writing and all matters therewith . . . or for recording and indexing anything not otherwise provided for, ten dollars, including the fee of one dollar set forth in subdivision (1) for up to four pages and one dollar for each page over four pages . . . .

\[\text{**\text{**}}\]
(20) For each matter under § 8.01-217 . . . the clerk shall receive ten dollars for all services required thereunder. [Emphasis added.]

Section 14.1-113 provides, in part, as follows:

In all chancery causes the clerk's fee chargeable to the plaintiff shall be forty dollars to be paid by the plaintiff at the time of instituting the suit, which shall include the furnishing of a duly certified copy of the final decree. . . .

* * *

Notwithstanding any other provision of law to the contrary, the provisions of this section shall control the fees charged by clerks of courts of record. [Emphasis added.]

II. Statute Provides Specific Fee for Change of Name Under § 8.01-217

Section 14.1-112(20) prescribes a specific clerk's fee of ten dollars for all services required for obtaining a change of name under § 8.01-217. Among the services required of the clerk by § 8.01-217 is recordation of the order for the name change in the deed book. Section 14.1-112(2) sets forth the fee generally required for recording and indexing any writing "not otherwise provided for." [Emphasis added.] Because § 14.1-112(20) provides a specific fee, however, for "all services required" for a change of name under § 8.01-217, the general fee authorized by § 14.1-112(2) is not applicable.

III. Fee for Change of Name Services Also Applies to Restoration of Former Name in Divorce Decree

A prior Opinion of this Office holds that pursuant to § 8.01-217, the clerk is required to record and index in the deed book a final decree of divorce changing a person's name. See 1985-1986 Report of the Attorney General at 21(1). That Opinion was in accord with a prior Opinion of this Office holding that the phrase in § 20-121.4, "meeting the requirements of § 8.01-217," refers to the restoration of a former name, either by the final divorce decree or by separate order requested by the party affected. See 1980-1981 Report of the Attorney General at 52.

In accordance with the 1985 Opinion, which determined that the clerk is required by § 8.01-217 to record and index in the deed book a divorce decree incorporating a name change, I am of the opinion that the specific fee provided by § 14.1-112(20) applies to those services. It is also my opinion that, in the case of a final divorce decree incorporating a name change, the fee required under § 14.1-112(20) is required, even though a chancery suit filing fee also was required under § 14.1-113. Section 14.1-113 is explicit in its language that the forty-dollar fee applies to the institution of a chancery suit and is payable by the plaintiff. Although the divorce decree is entered in a chancery suit, the restoration therein of a former name to one of the parties is a separate matter for which § 8.01-217 requires that the clerk perform the services of, and receive the separate fee for, recording and indexing the divorce decree in the deed book.

IV. Conclusion: Clerk May Charge Only Specific Fee under § 14.1-112(20) for Change of Name

Based on the above, it is my opinion that, whether a change of name is effected by application under § 8.01-217 or by incorporation in a divorce decree, the specific fee required under § 14.1-112(20) for recording such matters in the deed book is the only fee applicable.
CLERK ACTING AS GENERAL RECEIVER TREATED AS FEE AND COMMISSION INCOME SUBJECT TO MAXIMUM SALARY LIMITS OF § 14.1-143.2.

July 10, 1986

The Honorable Gerry J. Atkinson
Clerk, Circuit Court of Pulaski County

You ask whether, in light §§ 8.01-589 and 14.1-143.2(D) of the Code of Virginia, compensation received by a clerk of court for acting as a general receiver is to be treated as additional salary which may be retained by the clerk or as fee and commission income from which the clerk's salary as prescribed by § 14.1-143.2 is paid.

I. Applicable Statutes

Section 8.01-589 was enacted in 1977 and provides, in pertinent part, as follows:

A general receiver shall receive as compensation for his services such amount as the court deems reasonable ... and if such receiver be the clerk of the court, if compensation be allowed, it shall not be considered clerk's fees.

Section 14.1-143.2(D) was enacted in 1982 and states:

The annual salary herein prescribed shall be full compensation for services performed by the office of the circuit court clerk as prescribed by general law, and for the additional services of acting as general receiver of the court pursuant to § 8.01-582 of the Code of Virginia .... Pursuant to § 8.01-589 of the Code of Virginia, the court shall provide reasonable compensation to the office of the clerk of the circuit court for acting as general receiver of the court. Out of the compensation so allowed, the clerk shall pay his bond or bonds. The remainder of the compensation so allowed shall be fee and commission income to the office of the circuit court clerk. [Emphasis added.]

II. Later Enacted Statute Prevails over Prior Conflicting Statute

This Office has held that where statutes are in conflict, the last enacted statute must prevail. See 1980-1981 Report of the Attorney General at 329. Section 8.01-589 was enacted when salaries of clerks were determined in accordance with a fee structure. With the enactment of § 14.1-143.2 in 1982, however, this structure was changed from a fee to a salary basis, and this section now fixes the salary of the clerks. Furthermore, subsection (D) of this section refers to § 8.01-589 and specifically provides that, after payment of bonds, compensation received by a clerk acting as a general receiver shall be treated as fee and commission income of the office of the circuit court clerk. Pursuant to § 14.1-143.2(F), the prescribed salaries of clerks "shall be paid from fee and commission income of the office of the clerk."

III. Conclusion: Compensation Received by a Clerk When Acting in Capacity of a General Receiver is Fee and Commission Income Subject to Maximum Salary Limitations

Based on the above, it is my opinion that § 14.1-143.2 requires compensation received by a clerk of court acting in the capacity of a general receiver to be treated as fee and commission income from which the clerk's prescribed salary is paid.

COSTS, FEES, SALARIES AND ALLOWANCES - FEES. CLERK PRECLUDED FROM CHARGING FEE TO COMMONWEALTH FOR RECORDATION OF DEED OR DOCKETING OF JUDGMENT.
The Honorable George E. Holt, Jr.
Clerk, Circuit Court of Botetourt County

You ask whether § 14.1-87 of the Code of Virginia, which provides that "[n]o clerk, sheriff, or other officer shall receive payment out of the state treasury for any services rendered in cases of the Commonwealth, except when it is allowed by statute," includes the recordation of deeds, judgments and other costs not related to court cases.

I. Prior Opinions Conclude Fees Not Chargeable Against Commonwealth Absent Specific Authorization by Statute

This Office has dealt with this question in several prior Opinions. These Opinions have not limited the term "cases," as it is used in § 14.1-87, to include only "criminal and law cases," as you suggest.

The language of [§ 14.1-87] clearly states that the Commonwealth shall not be liable for fees for services in cases brought by the Commonwealth. This is the general rule. Exceptions to this rule may be made only by legislative action which specifically indicates that the Commonwealth is required to pay a fee. For example, § 14.1-112 sets out the fees to be charged by clerks of circuit courts generally. There is nothing in that section which authorizes the collection of a fee from the Commonwealth.


II. Conclusion: Fee Not Chargeable for Recordation of Deed or Docketing of Judgment

Based on the above, it is my opinion that § 14.1-37 precludes a clerk from charging a fee to the Commonwealth for the recordation of a deed or the docketing of a judgment.

COSTS, FEES, SALARIES AND ALLOWANCES - FEES. TEN-DOLLAR FEE AUTHORIZED FOR EACH APPLICATION FILED IN PROCEEDING TO APPOINT TRUSTEES OF CHURCH.

March 17, 1987

The Honorable Robert M. Morton, Jr.
Clerk, Circuit Court of Grayson County

You ask whether a second ten-dollar fee is authorized under § 14.1-112(25) of the Code of Virginia when, ten days after recording an order appointing trustees of a church pursuant to § 57-8, you are presented with a second order which changes one of the trustee appointments made by the first order. You have advised a member of my staff by telephone that a second application was filed pursuant to § 57-8, requesting the court to enter the second order.

I. Applicable Statute

Section 14.1-112 provides:

A clerk of a circuit court shall, for services performed by virtue of his office, charge the following fees:

* * *
(29) For all services rendered by the clerk in any proceeding pursuant to  
§ 57-8 or § 57-15 . . . ten dollars. [Emphasis added.]

II. Statute Authorizes Ten-Dollar Fee for Services Rendered in  
Any Proceeding; Second Application Constitutes New Proceeding

The term "proceeding" is defined generally as "the form and manner of conducting  
judicial business before a court or judicial officer; regular or orderly progress in form of  
law; including all possible steps in an action from its commencement to the execution of  
Law Dictionary 1368 (Rev. 4th ed. 1968). A proceeding under § 57-8 is commenced by  
filling an application with the circuit court. In the situation you present, the first appli-  
cation was filed and an order entered. When the second application was filed, a new  
"proceeding" was commenced.

III. Conclusion: Second Ten-Dollar Fee Is Authorized by § 14.1-112(29)  
Because Second Order Recorded as Part of New Proceeding

Based on the above, it is my opinion that a second ten-dollar fee is authorized under  
§ 14.1-112(29), since you have now been asked to render services in two distinct proceed-  
ings.  

1The second ten-dollar fee would not have been authorized if an amended order had  
been presented in the first proceeding. The circuit court would retain jurisdiction to  
enter the amended order for twenty-one days after entry of the first order. Va. Sup. Ct.  
R. 1:1.

COSTS, FEES, SALARIES AND ALLOWANCES - SALARIES AND EXPENSES OF  
OFFICE. COMMISSIONERS OF THE REVENUE. LOCAL GOVERNING BODY MAY RE-  
DUCE OR ELIMINATE SALARY SUPPLEMENTS WITHOUT CAUSE. CITY COUNCIL  
MAY DELEGATE MINISTERIAL DUTY TO CITY MANAGER TO MODIFY BUDGET BY  
WRITTEN OR ORAL DIRECTION IN RECORDING MINUTES OF OPEN MEETING.

October 31, 1986

The Honorable Willie H. Rountree  
Commissioner of the Revenue for the City of Suffolk

You request my opinion on several questions concerning the authority of the Coun-  
cil of the City of Suffolk to reduce or eliminate the salary supplement historically paid in  
past years to the commissioner of the revenue.

I. Facts

The Council of the City of Suffolk, at its regular meeting of May 21, 1986, ap-  
proved the operating budget for the 1986-1987 fiscal year. A line item in the budget  
provided for a salary of $49,707 for the commissioner of the revenue. On June 18, 1986,  
however, the commissioner was notified by the council, in writing, that his salary had  
been reduced by $1,517, resulting in a salary of $48,190. You claim that this reduction  
decreased, but did not eliminate entirely, the amount of the salary supplement to be paid  
by the city over and above the salary approved by the Compensation Board. The council  
has paid a supplement for the past twelve years to the commissioner, in addition to the  
salary authorized by the Compensation Board.

You ask whether the council has the authority, once it has adopted the budget, to  
reduce the commissioner's salary without cause and without formal action by council in  
public session.
II. Local Governing Body May Reduce Without Cause Salary Supplement Paid to Constitutional Officer

It is the responsibility of the Compensation Board to fix the salaries, expenses and other allowances of constitutional officers, including commissioners of the revenue. See § 14.1-51 et seq. of the Code of Virginia. The sums so fixed comprise the budget for the operations of a constitutional office, funds for which are provided from State and local sources. See § 14.1-64. A local governing body may not appropriate less than the sum fixed by the Compensation Board for the operations of a constitutional office. See Reports of the Attorney General: 1984-1985 at 70(2); 1978-1979 at 56.

Section 14.1-11.4, however, provides:

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.]

See also Item 73(B) of the Appropriations Act, Ch. 643, 1986 Va. Acts 1594, 1629. Prior Opinions of this Office have consistently recognized that the decision whether to supplement the compensation of a constitutional officer or that of his employees with local funds pursuant to § 14.1-11.4 rests in the discretion of the local governing body. See Reports of the Attorney General: 1984-1985 at 71; 1979-1980 at 55; 1978-1979 at 237; 1977-1978 at 76.

Furthermore, it has specifically 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 local 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: 1984-1985, supra; 1982-1983 at 78; 1974-1975 at 340. Thus, in accordance with these prior Opinions, it is my opinion that the council may decide to reduce or eliminate salary supplements paid to the commissioner without cause.

III. Reduction of Salary Supplement Pursuant to Council Policy

You next question the procedures by which the council may reduce or eliminate salary supplements paid to the commissioner.

Section 5.02 of the Charter for the City of Suffolk\(^1\) requires the city manager to submit a proposed budget to the council. Section 5.08 provides for the council's adoption of the budget with such changes as the council may determine. Section 5.06 provides for the city manager to introduce and recommend to the council an appropriations ordinance based on the proposed budget.

Budgets adopted by local governing bodies are for planning and informative purposes only and are statutorily distinguished from appropriations. See §§ 15.1-160, 15.1-162; see generally Reports of the Attorney General: 1986-1987 at 141; 1982-1983 at 16; 1980-1981 at 9. Actual disbursements of money may only be made pursuant to an appropriation for that expenditure by the local governing body. See § 15.1-162. Thus, adoption of a budget which plans for certain expenditures does not automatically result in the expenditure of money for that purpose.

In this instance, the city manager recommended a salary of $49,707 for the commissioner in the proposed budget. See Operating Budget Fiscal Year 1986-87, City of Suffolk, p. 31. I am advised by city officials that this figure was based on the commis-
sioner's salary request to the Compensation Board, plus a local salary supplement. I am advised by the Compensation Board that the commissioner requested a salary of $41,190. The Compensation Board approved funding of $40,188, an amount $1,002 less than that requested.

At its regular May meeting, the council approved the proposed budget's aggregate amount for the entire city, $53,791,346, without approval of individual line items. The council adopted its fiscal year appropriations ordinance for the same aggregate amount without individual line item approvals. See Ordinance No. 45-86, May 21, 1986. The appropriations ordinance directs and authorizes the city manager to do all things necessary to implement the budget.

The commissioner's salary, as it appears in the city's final budget document, is set at $48,322. See Operating Budget, supra. I am advised by city officials that this figure was determined pursuant to a long-standing, but unwritten, policy of the council that the salary supplements of constitutional officers are determined by reference to the final salary figures approved by the Compensation Board. The reduction of the commissioner's salary supplement in this instance, according to city officials, was implemented pursuant to the council's policy and resulted from the Compensation Board's approval of a salary figure less than the commissioner's request.

A written policy guiding the actions of the city manager would be preferable. In the absence of such a written policy delegating to the city manager the ministerial function of making adjustments to the salaries of constitutional officers in the city budget based upon final action by the Compensation Board, the delegation of such a ministerial function should have been adopted by the council in open session and recorded in council's minutes.

The city manager's budget recommendations and the council's appropriations ordinance predated the Compensation Board's action on the commissioner's salary and the preparation of the city's final budget document. The council, of course, is not bound by the individual line item figures in the budget document or by the city manager's actions in setting those figures. It is my opinion, based on the above, that the unwritten policy, pursuant to which the salary supplements of constitutional officers are subject to reduction by the city manager based on the action of the Compensation Board, is not so imprecise as to invalidate the actions of the city manager to implement the budget pursuant to the council's delegation of authority, so long as the minutes of city council reflect the proper delegation of such ministerial authority. This conclusion is premised on the assumption that the council's policy is applied in a fair and uniform manner.

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1The Charter for the City of Suffolk was enacted by Ch. 367, 1973 Va. 516, and has been amended several times since its enactment.
2The figure of $40,188 includes a State supplement authorized by § 14.1-62 and Item 73(A) of the 1986 Appropriations Act.
3Nothing in the information available to this Office explains the difference between this final budget figure of $48,322 and the salary of $48,190 contained in the council's written notification to you dated June 18, 1986.
4The difference between the final budget figure and the original budget figure, $1,385 ($49,707 - $48,322), does not equal the difference of $1,002 between the salary requested of, and the salary approved by, the Compensation Board. I am advised by city officials that local supplements are calculated by a formula which does not result in a dollar-for-dollar reduction based upon Compensation Board action.

COSTS, FEES, SALARIES AND ALLOWANCES - SALARIES AND EXPENSES OF OFFICE - COMPENSATION BOARD GENERALLY. MIDYEAR SALARY ADJUSTMENTS. LOCAL GOVERNING BODY MUST APPROPRIATE AMOUNTS AUTHORIZED BY BOARD AT TIME AUTHORIZED TO BECOME EFFECTIVE.
The Honorable Joseph Rigo
Commissioner of the Revenue for York County

You ask whether a local governing body must appropriate funds to pay midyear salary adjustments made by the Compensation Board (the "Board") for employees of a constitutional officer.

I. Facts

The Board upgraded the salaries of some of your employees as a result of your appeal of your annual budget as set by the Board for the fiscal year commencing July 1, 1986. Such upgrades were made effective by the Board as of January 1, 1987. The local governing body had authorized and paid local supplements to the salaries approved by the Board for your employees during the first half of the fiscal year. It discontinued the supplements for the second half of the fiscal year and has also refused to honor the midyear salary adjustments approved by the Board. The salaries paid to your employees for the second half of the fiscal year, therefore, have been less than the salaries approved by the Board.

II. Applicable Statutes

Title 14.1 of the Code of Virginia provides the manner in which the expenses of a constitutional officer are set. It is the responsibility of the Board to fix the salaries, expenses and other allowances of the constitutional officer. See § 14.1-51. With respect to supplementing salaries approved by the Board, § 14.1-11.4 provides that a local governing body, in its discretion, may grant additional compensation to the employees of constitutional officers wholly at the expense of the local governing body.

III. Local Governing Body May Not Appropriate Amount Less Than That Fixed by Compensation Board

This Office has previously concluded that a local governing body may not approve funds for the operation of a constitutional officer in an amount less than the sum fixed by the Board. See Reports of the Attorney General: 1983-1984 at 72; 1978-1979 at 56. Whenever salaries are fixed as part of the officer's annual budget, therefore, the local governing body must appropriate funds to pay the full salary which the Board has authorized. This requirement remains applicable to any subsequent modifications by the Board to the budget where salaries are adjusted thereafter during the fiscal year.

IV. Salary Supplements Paid to Constitutional Officer May Be Eliminated At Any Time

Section 14.1-11.4 authorizes, but does not require, a locality to supplement salaries of employees of constitutional officers from funds of the locality. See 1982-1983 Report of the Attorney General at 640. This Office has previously concluded that such supplements may be reduced or eliminated at any time by action of the local governing body. See Reports of the Attorney General: 1986-1987 at 85; 1983-1984, supra. It is, therefore, permissible for the local governing body to discontinue for the second half of the fiscal year a salary supplement given to employees of a constitutional officer during the first half of the fiscal year. This action, however, would have no effect upon a decision of the Board increasing the salaries of the employees for the second half of the fiscal year or upon the obligation of the locality to appropriate sufficient funds to pay those salaries.

V. Conclusion: Local Governing Body Bound by Midyear Salary Adjustments Authorized by Compensation Board to Become Effective at Time So Authorized

Based on the above, it is my opinion that a local governing body must appropriate
sufficient funds to pay any salary adjustments authorized by the Board as of the time they are authorized to become effective. The approval or discontinuance of any local supplements does not alter the responsibility on the part of the local governing body to implement such salary adjustments by the Board upon their effective dates as fixed by the Board.

Inasmuch as a governing body must appropriate the amounts set by the Board at the time the Board authorizes them to become effective, it is unnecessary to address your inquiry whether a formula may be devised by the governing body to average salaries over the entire fiscal year.

2This conclusion would similarly apply to merit increases granted by the Board as part of the officer's annual budget and made effective during the fiscal year.

COSTS, FEES, SALARIES AND ALLOWANCES - SALARIES AND EXPENSES OF OFFICE - COMPENSATION BOARD GENERALLY. SALARIES OF CONSTITUTIONAL OFFICERS BASED ON MOST RECENT POPULATION ESTIMATES AVAILABLE AT TIME SALARIES FIXED.

September 26, 1986

Mr. J. T. Shropshire
Chairman, Compensation Board

You ask whether the State Compensation Board (the "Board") may retroactively pay salary increases to constitutional officers on the basis of increased population figures issued after such salaries have been fixed by the Board.

I. Facts

The pertinent facts are as follows: In May 1985, the Board fixed the annual salaries of constitutional officers utilizing the 1984 provisional population estimates published by the Tayloe Murphy Institute of the University of Virginia. The provisional figures are issued pending the Institute's computation of final population figures. In May 1986, the Board received the Tayloe Murphy 1984 final population figures. In several localities, the 1984 final population figures were greater than the 1984 provisional estimates made a year earlier.

II. Salaries of Constitutional Officers Are Fixed by Board, Subject to Title 14.1 and Appropriations Act

The salaries of constitutional officers are fixed by the Board, subject to the parameters set forth in Title 14.1 of the Code of Virginia and the Appropriations Act. See 1983-1984 Report of the Attorney General at 72. Section 14.1-51 requires that the Board fix the budgets of such officers "on or before May 15 of each year." The Appropriations Act provides that the salaries of constitutional officers be prescribed in accordance with the population of the cities or counties served by such officers, and states that "the Compensation Board shall use the most recent population estimate from the United States Bureau of the Census or the Tayloe Murphy Institute of the University of Virginia available when fixing the officer's annual budget." Chapter 613, 1985 Va. Acts 1158, 1491-97 (emphasis added).

III. Statutes Authorizing Salaries of Public Officers Strictly Construed

Unambiguous statutory provisions are to be given their plain language meaning. See 1984-1985 Report of the Attorney General at 293. Moreover, statutes granting compensation to public officers ordinarily are strictly construed. See 1980-1981 Report of the
Attorney General at 73. Additionally, the use of the word "shall" generally indicates mandatory intent. See 1977-1978 Report of the Attorney General at 150. Construing the above provisions of the Code and the 1985 Appropriations Act accordingly, it is my opinion that the Code and Appropriations Act currently require that the Board fix the salaries of constitutional officers based upon the latest population estimates available at the time such salaries are established.

The Board could, of course, request the General Assembly to amend the Appropriations Act to permit the use of later population figures to fix retroactively the salaries of constitutional officers and redetermine their budgets. If the General Assembly were to adopt such an amendment, it is my judgment that such an amendment would be constitutional. At the present time, however, neither the Code nor the Appropriations Act authorizes the Board to fix retroactively the salaries of constitutional officers and redetermine the previously approved budgets based on population figures made available subsequent to the time prescribed for such action.

IV. Conclusion: Code and Appropriations Act Currently Require Salaries of Constitutional Officers to Be Fixed in Accordance with Most Recent Population Estimates Available at Time Fixed

Based on the above, it is my opinion that the Code and the Appropriations Act require that the Board use the most recent population estimates provided by the United States Bureau of the Census or the Tayloe Murphy Institute available at the time the Board fixes the salaries and annual budgets of constitutional officers. Inasmuch as there is no authority for the use of later issued statistics, such salaries and annual budgets may not be retroactively increased unless and until the General Assembly amends current law.

1 The decision whether to use figures produced by the Tayloe Murphy Institute or the U.S. Bureau of the Census is within the discretion of the Board. See 1981-1982 Report of the Attorney General at 81. The Board has used the figures provided by the Tayloe Murphy Institute.

COSTS, FEES, SALARIES AND ALLOWANCES - SALARIES AND EXPENSES OF OFFICE - COMPENSATION BOARD GENERALLY - SHERIFFS AND SERGEANTS. SALARIES OF FULL-TIME DEPUTY SHERIFFS SUBJECT TO APPROVAL OF COMPENSATION BOARD AND MUST BE FIXED CONSISTENT WITH REGULATIONS OF DEPARTMENT OF PERSONNEL AND TRAINING FOR SALARIES OF CORRECTIONAL OFFICERS.

February 28, 1987

The Honorable Marshall E. Honaker
Sheriff for the City of Bristol

You ask (1) whether a sheriff has the discretion to fix the individual annual salaries of his full-time deputy sheriffs within the aggregate allowance set by the Compensation Board or whether the determination of such salaries is limited by §§ 14.1-73.1:1 and 14.1-73.1:2 of the Code of Virginia to the salaries approved by the Compensation Board; and (2) whether a sheriff and his deputies are subject to the regulations of the Department of Personnel and Training, and, if so, in what respect.

I. Applicable Statutes

Section 14.1-73.1:1 provides that the salary of a full-time deputy sheriff is to be determined by the sheriff. The section provides, in part, as follows:

The annual salary of each full-time deputy sheriff . . . shall be reported to the Compensation Board by the sheriff at the time he files his report . . . and at any time thereafter when the sheriff effects a change in the salary or
employs a new such deputy sheriff. Such salaries as determined by the respective sheriff shall conform to the requirements set forth in § 14.1-73.1:2 and shall not in the aggregate exceed the aggregate allowance by the Compensation Board for personal services to the respective sheriffs for such deputy sheriffs. [Emphasis added.]

Section 14.1-51 outlines the duties of the Compensation Board in fixing salaries. In fixing the salaries of full-time deputy sheriffs mentioned in § 14.1-73.1:1, the Board shall act solely with reference to establishing an aggregate allowance for personal services to the respective sheriffs for such deputy sheriffs. The annual salary of each such full-time deputy sheriff shall be fixed and determined as provided by §§ 14.1-73.1:1, 14.1-73.1:2, and 14.1-73.1:3. [Emphasis added.]

Sections 14.1-51 and 14.1-73.1:1 must be read in pari materia with § 14.1-73.1:2, which outlines certain requirements limiting the authority for determining the salaries of full-time deputies and provides, in pertinent part:

The salary range of any full-time deputy sheriff ... shall be no less than that of a correctional officer within the classification and pay system for state employees and shall be administered in accordance with regulations for that system administered by the Department of Personnel and Training. [Emphasis added.]

II. Conclusion: Salaries of Full-Time Deputies Are Subject to Approval of Compensation Board and Must Be Fixed Consistent with Regulations of Department of Personnel and Training for Salaries of Correctional Officers

Based on the above statutes, it is my opinion that the authority of the sheriff to fix the salaries of his full-time deputies is limited in several respects. The Compensation Board is required to set the aggregate personal services salary allowance for a sheriff's full-time deputies. That aggregate salary allowance is the total for all the individual salary determinations for each full-time deputy sheriff at a rate no less than the Department of Personnel and Training scale for correctional officers. The sheriff may request the Compensation Board to determine the salaries of full-time deputy sheriffs only within that aggregate amount and in accordance with § 14.1-73.1:2, which provides that the salary range and pay system must be administered in accordance with the regulations of the Department of Personnel and Training. Changes in the salary grade of full-time deputy sheriffs must be reported to the Compensation Board for its approval and must be consistent with the Department of Personnel and Training Policies & Procedures Manual1 for setting salaries both at grade and step levels.

These procedures must be followed to determine the annual salaries of all full-time deputy sheriffs. The procedures apply to the annual budget submission cycle, any mid-year promotion or advancement of deputies, and the hiring of new deputies whether as replacements for vacancies or for filling newly created positions.

1Pertinent portions are enclosed for your information.

COSTS, FEES, SALARIES AND ALLOWANCES - SALARIES AND EXPENSES OF OFFICE - SHERIFFS AND SERGEANTS. COUNTIES, CITIES AND TOWNS. LOCAL GOVERNING BODY'S AUTHORITY TO PROVIDE MOTOR VEHICLE LIABILITY INSURANCE OR SELF-INSURANCE COVERAGE FOR VEHICLES OWNED BY CITY OR COUNTY BUT OPERATED BY SHERIFF, HIS DEPUTIES, OR HIS EMPLOYEES. REIMBURSEMENT BY COMPENSATION BOARD OF EXPENSES INCIDENT TO USE OF CITY OR COUNTY OWNED VEHICLES.

October 25, 1986
The Honorable W. Alvin Hudson  
Sheriff for the City of Roanoke

You ask whether a local governing body has the authority to extend its liability insurance or its self-insurance program to include motor vehicle liability insurance coverage for vehicles owned by the city or county but operated by the sheriff, his deputies, or his employees.

I. Motor Vehicle Expenses Reimbursed by Compensation Board

As a general practice, vehicles for sheriffs' departments are purchased and owned by the city or county served by each sheriff. The Compensation Board has never approved funding for the purchase of such vehicles. See 1985-1986 Report of the Attorney General at 56. Section 14.1-76 of the Code of Virginia, however, provides for the Compensation Board to reimburse localities for the expenses related to the use of city or county owned vehicles. Section 14.1-76 provides:

Each sheriff shall submit a monthly statement of all traveling expenses incurred by him, and by each of his full-time deputies, to his county or city. The county or city shall pay the expenses to the person or vendor entitled thereto and submit same to the Compensation Board for reimbursement if within the sheriff's annual budget approved by the Board. Payments due counties and cities under this section shall be paid to the county or city within ninety days following the receipt by the Compensation Board of a completed statement of monthly expenses.

The Compensation Board has adopted the mileage reimbursement levels set out in the Appropriations Act for the use of personal vehicles in the discharge of official duties as the level of reimbursement it will pay. See Ch. 643, 1986 Va. 1594, § 4-5.06(f)(2). This level of mileage reimbursement is construed to include all costs incident to the maintenance and operation of personal vehicles. See § 14.1-9. Motor vehicle liability insurance coverage is clearly such a cost incident to the operation of motor vehicles.

II. Cities and Counties Authorized to Provide Motor Vehicle Liability Insurance Coverage

Local governing bodies do not have the general authority to provide liability insurance coverage for constitutional officers and their employees. See 1985-1986 Report of the Attorney General at 73. Section 15.1-19.1, however, provides:

The governing body of every county may provide motor vehicle liability insurance for the purpose of protecting all operators of motor vehicles owned or leased by the county, the county school board, or any sanitary district, authority, or other governmental unit established by the governing body, and may make such appropriations and expenditures from any available funds for the purpose of paying such insurance. All previous expenditures for any such purpose by any county are ratified. [Emphasis added.]

Section 15.1-19.1 expressly authorizes counties to provide motor vehicle liability insurance coverage protecting all operators of county owned vehicles. Furthermore, § 15.1-503.4:3(A) authorizes political subdivisions to combine to form group self-insurance pools to provide, among other types of coverage, motor vehicle liability insurance.

I am unaware, however, of any statute expressly authorizing cities to provide such insurance coverage individually. It is my opinion, nevertheless, that such authority is necessarily implied as an incident of motor vehicle ownership and is contemplated by the reimbursement provisions of § 14.1-76. Accordingly, it is my further opinion that both
cities and counties have the authority to extend their insurance coverage or their self-insurance programs to include motor vehicle liability insurance coverage for vehicles owned or leased by the city or county but operated by the sheriff, his deputies, or his employees.

III. Legal Representation May Be Provided in Accordance with Provisions of Liability Insurance Coverage or Self-Insurance Plan

You also raise the question of whether the city attorney has the authority to represent the operators of city owned automobiles. Section 15.1-66.4 provides for the legal representation of constitutional officers and their employees in civil actions arising out of the performance of their official duties when no legal defense is provided under the office's insurance coverage. It is my opinion, therefore, that the authority to provide motor vehicle liability insurance or self-insurance coverage for vehicles owned by the city and assigned to the sheriff's department necessarily includes the authority to provide whatever legal representation is normally provided for the operators of such vehicles under the terms of the liability insurance coverage or self-insurance program.

1Compare § 15.1-19.2 (representation of officers and employees of a local governing body by county, city or town attorney).

COUNTIES, CITIES AND TOWNS - BOUNDARY CHANGES OF TOWNS AND CITIES - ANNEXATION. COMPENSATION PAID BY CITY FOR SCHOOL FACILITIES IN ANNEXED AREA SHOULD BE CREDITED TO GENERAL REVENUE FUND OF COUNTY AND MADE AVAILABLE FOR APPROPRIATION BY BOARD OF SUPERVISORS.

June 26, 1987

The Honorable Glenn A. Brown
Treasurer of Pittsylvania County

You ask two questions concerning the disposition of certain funds paid to Pittsylvania County (the "county") by the City of Danville ("Danville") as compensation for school facilities in the area of the county annexed by Danville.

I. Facts

Effective December 31, 1986, Danville annexed certain areas formerly within the county. By order dated July 7, 1986, the three-judge annexation court ordered Danville to pay the county specified sums as compensation for school facilities ordered transferred to Danville. These facilities include land, buildings, mobile classroom units, classroom and cafeteria equipment, library books and textbooks, and school buses. See § 4(c) of the order.

II. Annexation Court Authorized to Order City to Pay Compensation for Transferred School Facilities

You first ask whether funds received from Danville as "compensation for public improvements" should be credited to the general revenue fund of the county and made available for appropriation by the board of supervisors for any purpose or whether the funds should be credited to some other fund.

Sections 15.1-1042(c) and 15.1-1043 of the Code of Virginia authorize the annexation court to order Danville to compensate the county for the value of public improvements, including public schools and school equipment, and to determine the value of the transferred public improvements. Both these statutes and the annexation court order direct that payment be made to the county and do not refer to the county school board.
The question presented by your inquiry, therefore, is whether compensation for real and personal property owned by the county school board is subject to appropriation by the board of supervisors.

III. Compensation Paid by Danville Subject to Board of Supervisor's Appropriations Power

A recent Opinion of this Office concluded that an insurance payment to a county school board derived from the school board's real property could not be expended by the board of supervisors unless an appropriation by the board of supervisors authorizing the expenditure had been made. See Opinion to J. G. Overstreet, County Attorney for Bedford County, dated March 10, 1987 (1986-1987 Report of the Attorney General at 192). The conclusion reached in the Overstreet Opinion was based on the statutes setting out school funding procedures (Ch. 8 of Title 22.1, §§ 22.1-88 through 22-124) and local government budget procedures (§ 15.1-162) and is consistent with prior Opinions of this Office which conclude that revenue generated by school operations or accruing to a school board is subject to the appropriations power of the local governing body. See, e.g., Reports of the Attorney General: 1982-1983 at 16 (textbook rental revenue subject to appropriations power and may not be expended absent appropriation by local governing body), and at 407 (cafeteria revenues); 1981-1982 at 328 (funds derived from sale of surplus school property subject to appropriation by local governing body); and 1974-1975 at 371 (proceeds from sale of surplus property subject to appropriations power).

I am unaware of any provision in the annexation, school board funding, or local government budget statutes which would require that compensation for school facilities paid by an annexing city be treated differently from other revenue derived from real or personal property owned by a school board. Accordingly, it is my opinion that funds received from Danville as "compensation for public improvements" should be credited to the general revenue fund of the county and made available for appropriation by the board of supervisors for any purpose.

Your second question is, if the compensation paid by Danville is not to be credited to the general revenue fund of the county, whether the school board may expend the funds from either real or personal property as in their sole discretion they may decide. In light of my conclusion regarding your first question, a response to this second question is unnecessary.

1The conclusion reached in this Opinion has been modified by statute. See § 22.1-89.1.
2Relying on Howard v. School Board, 203 Va. 55, 122 S.E.2d 891 (1961), several earlier Opinions conclude that accrued revenue relating to real property owned by the school board vests in that board, independent of the appropriations authority, to the same extent that the property from which the revenue was derived vests in the school board. See 1961-1962 Report of the Attorney General at 222 (damage award from State Department of Highways), at 223 (proceeds of sale of school property), and at 225 (insurance proceeds after destruction of school building by fire). The Howard Court constitutionally invalidated a statute divesting a school board of the authority to determine whether property held by the board was necessary for school purposes. The Howard decision, however, did not consider the disposition of revenue collected by the school board and is, for that reason, inapposite.

COUNTIES, CITIES AND TOWNS - BUILDINGS, MONUMENTS AND LANDS GENERALLY. LOCAL GOVERNING BODY NOT COMPELLED TO SERVICE AND MAINTAIN FIRE EXTINGUISHING SYSTEM WITHIN CLERK'S OFFICE IF IT DETERMINES RECORD ROOM RESISTANT OR IMPERVIOUS TO FIRE WITHOUT SYSTEM.

March 16, 1987
You ask whether § 15.1-257 of the Code of Virginia requires a local governing body to service and maintain a helon fire extinguishing system within the clerk's office vault so that the system will operate as intended when installed.

I. Facts

Grayson County built a new courthouse that was occupied in 1981. Inside the new courthouse, a fireproof vault was included in the clerk's office. The fireproof vault includes a built-in helon fire extinguishing system. You have advised a member of my staff by telephone that the board of supervisors (the "board") has declined to provide funds for maintenance of the fire extinguishing system in the future. You advise also that the fireproof vault within the courthouse was built to specifications designed for such vaults.

II. Section 15.1-257 Requires Governing Body Provide Fireproof Record Room for Clerk's Office

Section 15.1-257 provides, in part, as follows:

The governing body of every county and city shall provide courthouses with suitable space and facilities to accommodate the various courts and officials thereof serving the county or city, and, within or without such courthouses, a clerk's office the record room of which shall be fireproof . . .

The question, therefore, is whether the board's obligation to provide a fireproof record room extends to maintaining the fire extinguishing system.

III. Board May Not Be Compelled to Maintain Fire Extinguishing System if Record Room Is Impervious or Resistant to Fire Damage Even in Absence of System

In Broaddus v. Supervisors, 99 Va. 370, 38 S.E. 177 (1901), the Supreme Court of Virginia considered whether a county had fulfilled its statutory obligation to erect a fireproof clerk's office. The Court held that the obligation of the county board of supervisors to provide a fireproof clerk's office was mandatory. Id. at 372, 38 S.E. at 177. The Court further held, however, that the board had a range of discretion as to how it complied with the requirement that a clerk's office be adequately fireproofed. The Court, therefore, declined to review the board's decision that the clerk's office had been sufficiently fireproofed to comply with the statutory requirement. Id. at 372-73, 38 S.E. at 177-78.

In the present Grayson County courthouse, the clerk's office includes a fireproof vault constructed according to specifications for such vaults. If, in the exercise of its discretion, the board has determined that the maintenance of the fire extinguishing system is not necessary to comply with § 15.1-257, the board may not be compelled to provide such maintenance merely because of a difference of opinion between the board and the clerk. See Broaddus v. Supervisors. Compare 1984-1985 Report of the Attorney General at 16, 17-18 (disagreement between local governing body and Commonwealth's attorney regarding suitability of office space to be resolved by compromise). It is my opinion, therefore, that the board may not be compelled to service and maintain the helon fire extinguishing system within the clerk's office if it determines that the record room is resistant or impervious to fire without the system.

1Fireproof" is defined as "[i]mpervious or resistant to damage by fire." The American Heritage Dictionary 508 (2d ed. 1982).
COUNTIES, CITIES AND TOWNS - COUNTIES GENERALLY - BOARDS OF SUPERVISORS. ADMINISTRATION OF THE GOVERNMENT GENERALLY - COMPREHENSIVE CONFLICT OF INTERESTS ACT. PROHIBITED CONDUCT REGARDING TRANSACTIONS. NEITHER § 2.1-610(B) NOR § 15.1-540 PROHIBITS AFFIRMATIVE MAJORITY CONSISTING OF SINGLE VOTE TO EXTENT THAT MOTION BEFORE BOARD DOES NOT REQUIRE APPROPRIATION OF MORE THAN $500, IMPOSITION OF TAXES, OR AUTHORIZATION TO BORROW MONEY.

July 10, 1986

The Honorable John Lane Mitchell, Jr.
Commonwealth’s Attorney for King and Queen County

You ask whether a single vote by one member of a board of supervisors is sufficient to decide questions presented to the board pursuant to § 15.1-540 of the Code of Virginia if the remaining members of the board disqualify themselves from voting pursuant to § 2.1-610.

I. Pertinent Provisions

Section 15.1-540 states, in part, 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.) Section 2.1-610(B) states, in part, that "[i]f disqualifications ... leave less than the number required by law to act, the remaining member or members shall have authority to act for the agency by majority vote ...." (Emphasis added.) Finally, Art. VII, § 7 of the Constitution of Virginia (1971) states, in part, that "[n]o ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body." (Emphasis added.)

II. Prior Interpretations of Pertinent Provisions

Several Opinions of this Office have construed § 15.1-540 and its predecessor statutes. See Reports of the Attorney General: 1982-1983 at 45; 1978-1979 at 203; 1950-1951 at 29; 1938-1939 at 23. Prior to 1946, the statutory predecessor of § 15.1-540 (§ 2717 of the 1942 Code (1946 Cum. Supp.)) provided that the vote of a majority of the supervisors present would determine all questions submitted to the board of supervisors. In the 1938-1939 Report of the Attorney General, supra, this Office held that a motion receiving a majority of the votes of supervisors voting passed lawfully, even though it was not supported by a majority of those actually present. This conclusion was based upon the view that the members present who abstained from voting acquiesced to the action of those actually voting.

In Hudgins v. Hall, 183 Va. 577, 32 S.E.2d 715 (1945), the Supreme Court of Virginia held that § 2717 required a majority vote of all the supervisors present rather than merely a majority of the supervisors voting. The Court expressly stated that should a change in the statute be desired, appeal should be made to the General Assembly and not to the courts. See Hudgins, 183 Va. at 587, 32 S.E.2d at 720.

In 1946, the General Assembly amended § 2717 to provide that a majority of the supervisors voting on any question was necessary rather than a majority of the supervisors present. See Ch. 77, 1946 Va. Acts 99. See also 1950-1951 Report of the Attorney General, supra. This legislative action, in my opinion, was in response to the Court's holding in Hudgins the preceding year and was intended to make the voting requirements of § 2717 less restrictive. The voting requirements of § 2717 have been carried over essentially unchanged into § 15.1-540.1

Article VII, § 7 requires, in effect, that any ordinance that will affect the financial condition of a county, city, or town must be passed by a recorded affirmative vote of the
majority of all members elected to the local governing body. See 1977-1978 Report of the Attorney General at 289. The requirements of Art. VII, § 7, derive from § 123 of the Constitution of Virginia (1902). See II A. Howard, Commentaries on the Constitution of Virginia 846 (1974). That provision was enacted to establish a system of procedural safeguards to protect the "financial condition of cities." (Emphasis added.) It required that all local ordinances which affected the financial status of a city had to be enacted in a different manner from other local ordinances. The 1901-1902 Constitutional Convention was of the opinion that a requirement for passage by a majority of all elected members would provide the needed financial safeguard. See II Report of the Proceedings and Debates of the Constitutional Convention 1953, 1955-60, 2032 (1906). In 1971, this requirement was made applicable to all units of local government. See II A. Howard, supra.

The Comprehensive Conflict of Interests Act, §§ 2.1-599 through 2.1-634 (the "Conflicts Act"), was enacted in 1983 with the stated purpose of assuring the citizens of Virginia that "the judgment of public officers and employees will not be compromised or affected by inappropriate conflicts." Section 2.1-599. In accordance with this stated policy, § 2.1-610(B) provides that, in the event members disqualify themselves, a local governing body may still pass motions by an affirmative majority, even if the voting members do not represent a quorum of the body.

III. Conclusion

The Conflicts Act does not specify a minimum number of votes necessary to constitute a majority. Furthermore, neither § 2.1-610(B) nor § 15.1-540 in my opinion prohibits an affirmative majority consisting of a single vote, as long as the motion before the board does not require an appropriation of more than $500, the imposition of taxes, or authorization for the borrowing of money. If the motion before the board does involve such an appropriation, imposition, or authorization, however, then Art. VII, § 7 operates to require an affirmative majority of all elected members for the motion to pass.

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1 See 1983-1984 Report of the Attorney General at 271. With regard to the voting requirements of the Park Authorities Act, this Office opined that the sentence in § 15.1-1231, providing that "[a] majority of the members of the authority shall constitute a quorum and the vote of a majority of members shall be necessary for any action taken by the authority" (emphasis added), meant that a majority vote of all members was required for the park authority to take action on a question before it. In 1984, however, the General Assembly changed the language of the statute to require only a majority vote of a quorum. See Ch. 255, 1984 Va. Acts 464. Similarly, for commissions created under the Public Recreational Facilities Authorities Act, §§ 15.1-1271 through 15.1-1286, § 15.1-1274 provides that "[a] majority of the members of the commission shall constitute a quorum and the vote of a majority of such members shall be necessary for any action taken by the authority." (Emphasis added.) But see § 15.1-1249 (vote of majority of members of water and sewer authority required for authority to act).

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COUNTIES, CITIES AND TOWNS - COUNTIES GENERALLY. PRISONS AND OTHER METHODS OF CORRECTION - LOCAL CORRECTIONAL FACILITIES - REGIONAL JAILS AND JAIL FARMS. LOCAL GOVERNING BODIES MAY SELF-INSURE JAIL BOARD MEMBERS OF REGIONAL DETENTION CENTER OPERATED PURSUANT TO § 55.1-105 ET SEQ.

August 12, 1986

Mr. John H. Foote
County Attorney for Prince William County

You ask whether the local governing bodies of the City of Manassas and the County of Prince William may self-insure, either separately or mutually, the Jail Board of the
Prince William/Manassas Regional Adult Detention Center ("Regional Jail"), a regional jail established under §§ 53.1-105 through 53.1-115.1 of the Code of Virginia. You indicate that the Regional Jail expects in the near future to lose its public officials' liability insurance policy covering the ten members of the Jail Board, the Regional Jail's governing body.

I. Relevant Statutes

Pursuant to the provisions of § 53.1-106(A), eight of the Jail Board members are appointed by the county, and two by the city, for terms of unspecified length. Under § 53.1-106(B), the Jail Board has the power to:

1. Establish rules and regulations governing the operation of the jail or jail farm not inconsistent with standards of the State Board of Corrections;

2. Purchase land for the jail or jail farm for joint ownership by the participating political subdivisions with the approval of the local governing bodies;

3. Provide for all necessary stock, equipment and structures for the jail or jail farm within the budget approved therefor by the participating political subdivisions; and

4. Appoint a superintendent of such jail or jail farm and necessary guards therefor who shall serve at the pleasure of the board.

The political subdivisions establishing a regional jail or jail farm shall pay their pro rata costs for land, stock, equipment and structures. [Emphasis added.]

Section 15.1-506.1 allows localities to provide self-insurance "for certain or all of its officers and employees and volunteers who are not employees of the governing body and members of commissions and boards recognized by the local governing body." (Emphasis added.)

Section 15.1-19.2 provides that a local governing body "may expend public or other funds for insurance or to establish and maintain a self-insurance program to cover ... risks or liability" arising out of any actions taken in furtherance of the duties of "any member of any board or commission appointed by such governing body."

II. Independent Political Subdivisions Exercise Authority Without Approval of Superior Body

The principal question to be addressed is whether the Jail Board is a "commission or board recognized by the local governing bodies" or a separate "political subdivision" for the purposes of § 15.1-506.1. If the Jail Board is a recognized commission or board, the governing bodies may provide self-insurance for the Jail Board's members; if it is a separate political subdivision, then § 15.1-506.1 does not apply, and the Jail Board will be responsible for its own self-insurance. See 1983-1984 Report of the Attorney General at 78.

As stated in a prior Opinion of this Office, the term "political subdivision" is broad and comprehensive, may be used in more than one sense, and may include a governmental body of the State created for a single public purpose and authorized to exercise the sovereign power of the State only to a limited degree. See Reports of the Attorney General: 1983-1984, supra; 1980-1981 at 27; 1973-1974 at 217. A political subdivision is an entity created by law to aid in the administration of government, and, if it is a recipient of sovereignty, it is independent of other governmental bodies and may act within its discretion to exercise its statutory powers without the approval of a superior authority. See 1983-1984 Report of the Attorney General, supra.
III. Local Governing Body's Degree of Control over Jail Board Members Determines Independent Political Subdivision Status

Although the Jail Board has considerable discretion with regard to the rules and regulations governing detention facility operations and in personnel matters, it nevertheless depends upon the approval of the local governing bodies for the purchase of any land, stock, equipment or structure for the facility. Any land used by the jail must be purchased for joint ownership by the participating local governments. See § 53.1-108(B)(2). The Jail Board also must account to the local governing body for its activities and budget.

This Office generally has opined that whether a board or commission is an independent political subdivision depends upon the degree of control that the local governing body exercises over the actions of the board or commission. Particularly relevant to this inquiry, in addition to the factors already discussed, is the local governing body's authority to appoint and remove members of the board. For example, in the 1983-1984 Report of the Attorney General, supra, the Fairfax County Economic Development Authority was held to be an independent political subdivision. Chapter 643, 1964 Va. Acts 975, 976, created the Authority as "a political subdivision of the Commonwealth" (§ 1) whose commissioners were appointed to terms of specific length (§ 4). Similarly, the Fairfax County Park Authority was held to be a "public body politic and corporate" (§ 15.1-1230), whose members were appointed to terms of specific length (§ 15.1-1331). The Fairfax County Library Board also was held to be a political subdivision, whose members exercised authority independent of local government intervention for terms specified by statute (§ 42.1-35).

In each of these fact situations, an essential element associated with the status as an independent political subdivision is the appointment of officials by the governing body of the locality or authority for a specific term. In such case, §§ 24.1-79.6 and 24.1-79.7 provide that appointed officials may be removed from office only upon a showing of cause after notice and an opportunity to be heard. On the other hand, § 24.1-79.2, which provides that an appointed officer may be removed from office only by the appointing person or governing body, has been interpreted by this Office to mean that officers appointed to local boards, commissions, or authorities, without a specific term of appointment, serve at the pleasure of the person or governing body that made the appointment. See 1984-1985 Report of the Attorney General at 10, 278. The ability to remove an appointed officer from his office at will, without a showing of cause, places the appointing governing body in a position superior to the officer. Other factors being equal, it is my opinion that service of the members of a board or commission at the pleasure of a superior governing body denies the board or commission the status of independent sovereignty.

IV. Jail Board Is Not Independent Political Subdivision and May Therefore Be Included in Self-Insurance Program of Localities

The members of the Jail Board of the Regional Jail are not appointed to any specific term. Prior Opinions of this Office have held that a statutory section which provides for the appointment of officers, but does not limit the term of these officers, implicitly grants to the appointing person or body the power to remove the appointed official at will and without cause. See Reports of the Attorney General: 1984-1985 at 10; 1983-1984 at 91, 435. The appointing local governing bodies, therefore, are able to exercise a degree of control over the members of the Jail Board that is distinguishable from those situations in which local governments are without any direct authority over appointees to other types of boards, e.g., park authorities or library boards. See 1983-1984 Report of the Attorney General, supra. Accordingly, it is my opinion that Jail Board members are among those officers who may be included within the self-insurance program of the localities.
See 1979-1980 Report of the Attorney General at 129, which states, in part: "Self-insurance is not insurance in the ordinary sense, particularly because of the absence of an insurance contract. Yellow Cab Co. v. Adinolfi, 204 Va. 815, 818, 134 S.E.2d 308 (1964). At the same time, I find no definition of self-insurance in the Code of Virginia, even though it is basic to a number of statutory provisions besides § 15.1-506.1. See Ch. 8 of Title 65 (Workmen's Compensation-Insurance and Self-Insurance), especially § 65.1-104.2, relating to 'group self-insurance associations;' § 46.1-395 (certain self-insurers exempt from Motor Vehicle Safety Responsibility Act); and most closely in point, § 2.1-425.1 (Self-insurance of State motor vehicles), added by Ch. 231 [1979 Acts of Assembly. From a review of these statutes, it appears the General Assembly uses the term 'self-insurance' to describe arrangements to indemnify an identifiable class of persons independently connected with the self-insurer (for example, its employees) against loss or liability arising out of the independent connection (for example, the course of the employment). The arrangements also usually involve some sort of security, bond, reserve or trust fund (often with periodic supplements like premiums) to secure the payments due to the indemnified class. So viewed, self-insurance has most of the elements of ordinary insurance: a responsibility or undertaking to indemnify an identifiable class with respect to specific risks or contingencies, with a funding of costs by financial transfers, often in a periodic fashion similar to premiums. Lacking is a contract of insurance because of the identity of the party providing, and paying for, the indemnity. In the absence of a contract, the insured class, risks and contingencies are identified or specified by other means..."

Section 15.1-21 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." The Jail Board is subject to the authority of both the City of Manassas and the County of Prince William. Section 15.1-506.1 grants authority to the county and the city to provide self-insurance for the Jail Board's members. Subject to the requirements listed in § 15.1-21, both the county and the city may agree to provide self-insurance for the Jail Board, either mutually or separately.

COUNTRIES, CITIES AND TOWNS - COUNTY, CITY AND TOWN OFFICERS GENERALLY. CONSTITUTION OF VIRGINIA - LOCAL GOVERNMENT - MULTIPLE OFFICES. DEPUTY SHERIFF MAY BE CANDIDATE FOR LOCAL GOVERNING BODY; IF ELECTED, MAY NOT SERVE ON LOCAL GOVERNING BODY AND REMAIN DEPUTY.

January 9, 1987

The Honorable Clay Hester
Sheriff for the City of Newport News

You ask whether a deputy sheriff may be a candidate for city council in the city in which he is a deputy sheriff. You also ask whether the deputy sheriff may remain in that position if elected to city council. You state that deputy sheriffs in your office are not covered by the city's personnel plan.

I. Deputy Sheriff May Be Candidate for City Council

I am unaware of any State statute prohibiting a deputy sheriff or other deputy of a constitutional office from being a candidate for city council. Compare 1982-1983 Report of the Attorney General at 399 (State Police dispatcher need not resign position during candidacy for political office).

The Hatch Political Activity Act, 5 U.S.C. §§ 1501 through 1508 (the "Hatch Act"), provides that, under certain limited conditions, a state or local officer or employee may not be a candidate for elective office. See 5 U.S.C § 1502(a)(0). In general, the Hatch
Act applies to officers or employees of a state or local agency if their principal employ-
ment is in connection with an activity which is financed in whole or in part by loans or
grants made by the United States or a federal agency. See 5 U.S.C § 1501(4). The Hatch
Act, by its own terms, does not apply to an individual who exercises no functions in con-
nection with a federally financed activity. Thus, only if the 'deputy sheriff in question
exercises functions in connection with a federally financed activity would the Hatch

Assuming this connection with federally financed activity is not present, it is my
opinion that a deputy sheriff may be a candidate for city council in the city in which he
is a deputy sheriff.

II. Individual May Not Serve on City Council and Remain a Deputy Sheriff

You next ask whether, if elected, an individual may serve on city council and
remain a deputy sheriff.

Section 15.1-50(A) of the Code of Virginia provides:

No person holding the office of treasurer, sheriff, attorney for the Com-
monwealth, clerk of the court in the office of which deeds are recorded,
commissioner of the revenue, or supervisor or councilman shall hold any
other office mentioned in Article VII of the Constitution at the same
time....

See Art. VII, § 6 of the Constitution of Virginia (1971). The article referenced in this
section provides a parallel constitutional prohibition and mentions both local governing
bodies and sheriffs.

Section 15.1-50, therefore, prohibits an individual from serving both as a member
of city council and as sheriff. Prior Opinions of this Office have consistently concluded
that the prohibition of § 15.1-50(A) extends to the deputies of sheriffs and other consti-
tutional officers. See Reports of the Attorney General: 1984-1985 at 244 (deputy sher-
iff); 1979-1980 at 281 (deputy sheriff), 282 (deputy clerk of circuit court); 1976-1977 at
259 (deputy sheriff); 1974-1975 at 407 (deputy sheriff); 1967-1968 at 213 (deputy clerk of
circuit court). In accord with these prior Opinions, it is my opinion that an individual, if
elected, may not serve on city council and remain a deputy sheriff.1

1See § 15.1-50(C) (qualification in first office serves as bar to right to qualify in sec-
ond office).

COUNTIES, CITIES AND TOWNS - COUNTY, CITY AND TOWN OFFICERS GENER-
ALLY - SHERIFFS AND SERGEANTS. CRIMINAL PROCEDURE - ARREST. MOTOR
VEHICLES. CITY SHERIFFS AND DEPUTIES HAVE AUTHORITY AND DUTY TO
ENFORCE CRIMINAL AND MOTOR VEHICLE LAWS; EXISTENCE OF POLICE DE-
PARTMENT DOES NOT AFFECT SHERIFF'S AUTHORITY BUT DOES AFFECT HIS
DUTY.

July 1, 1986

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

This is in reply to your request for my opinion whether a city sheriff and his deput-
ies, in a city with an existing police department, have the authority and the duty to
enforce the criminal and motor vehicle laws of the city and the State.
I. City Sheriff and Deputies Have Authority and Duty to Enforce Criminal and Motor Vehicle Laws

Article VII, § 4 of the Constitution of Virginia (1971) requires the election of a sheriff in every city and states that the sheriff's duties "shall be prescribed by general law or special act." As to your particular situation, § 6.06 of the Charter for the City of Portsmouth\(^1\) imposes on the sheriff certain duties, not relevant here, "[i]n addition to the duties imposed upon him by State law ...." Included among State statutes which give authority to or impose duties upon sheriffs and which are relevant to your inquiry are §§ 15.1-79, 19.2-76, 19.2-81 and 46.1-6 of the Code of Virginia.

Section 15.1-79 provides that "[e]very officer to whom any order, warrant, or process may be lawfully directed, shall execute the same within his county or corporation ...." Section 19.2-76 states that "[a]n officer may execute within his jurisdiction a warrant or summons issued anywhere in the State. A warrant shall be executed by the arrest of the accused ...."

Section 19.2-81 provides, *inter alia*, as follows:

"The sheriffs of the various counties and cities, and their deputies [and] the members of any duly constituted police force of any city ... provided such officers are in uniform, or displaying a badge of office, may arrest, without a warrant, any person who commits any crime in the presence of such officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence."

Finally, § 46.1-6, a part of the title containing the motor vehicle laws of the State, provides that "[e]very county, city, town or other political subdivision of the State ... shall enforce the provisions of chapters 1 through 4 (§§ 46.1-1 through 46.1-34?) of this title through the agency of any peace or police officer, sheriff or deputy ...."

Reading the above statutes together, it is clear that a city sheriff and his deputies have the authority to enforce the criminal and motor vehicle laws within the city. Compare 1985-1986 Report of the Attorney General at 130. This would include any city ordinance, the violation of which is made a misdemeanor. Compare 1985-1986 Report of the Attorney General at 255(1).

With regard to the duty of a city sheriff and his deputies to enforce the criminal and motor vehicle laws within the city, the Supreme Court of Virginia stated in Commonwealth v. Malbon, 195 Va. 368, 78 S.E.2d 683 (1953), that

"[the sheriff] is ... a conservator of the peace and charged with the enforcement of all criminal laws within his jurisdiction. It is his duty, as well as the duty of the other police officers of the county and city, to investigate all violations of law and to serve criminal warrants."

*Id.* at 371, 78 S.E.2d at 686.

In light of both the above statutes and the Court's opinion in *Malbon*,\(^4\) it is my opinion that the city sheriff and his deputies\(^5\) have both the authority and the duty to enforce the criminal and motor vehicle laws within the city.

II. Existence of Police Department Does Not Affect Sheriff's Authority; Does Affect His Duty

The second part of your inquiry is whether the existence of a city police department has any effect on the authority and duty of the city sheriff and his deputies to enforce the criminal and motor vehicle laws within the city.
Section 15.1-138 provides, in part, as follows:

The officers and privates constituting the police force of counties, cities and towns of the Commonwealth are hereby invested with all the power and authority which formerly belonged to the office of constable at common law in taking cognizance of, and in enforcing the criminal laws of the Commonwealth and the ordinances and regulations of the county, city or town, respectively, for which they are appointed or elected. Each policeman shall endeavor to prevent the commission within the county, city or town of offenses against the law of the Commonwealth and against the ordinances and regulations of the county, city or town; shall observe and enforce all such laws, ordinances and regulations; shall detect and arrest offenders against the same; shall preserve the good order of the county, city or town, and shall secure the inhabitants thereof from violence and the property therein from injury.

See also §§ 15.1-79, 19.2-76, 19.2-81 and 46.1-6, discussed above. These statutes provide that the authority of members of the city police department to enforce the criminal and motor vehicle laws within the city is co-equal with that of the city sheriff and his deputies. Moreover, § 15.1-138 specifically imposes an affirmative duty upon city police officers to exercise that authority.

With regard to the duty of the sheriff and his deputies in a city with an existing police department, I again refer you to Malbon, wherein the Court states that the creation of a separate police department does not relieve the sheriff of his duty to enforce the criminal laws.... However, in the absence of evidence to the contrary, he has a right to assume that the regular police officers of the police departments are performing their duties in enforcing the criminal laws.... On the other hand, if he knows that any such officer is deliberately ignoring or permitting violations of law, it is his duty to take proper steps to prevent and suppress such violations and prosecute the violators.

195 Va. at 372, 78 S.E.2d at 686.

III. Conclusion

In light of the above, it is my opinion that (1) the city sheriff and his deputies have the authority to enforce the criminal and motor vehicle laws within the city, which authority they share co-equally with the members of the city police department; and (2) while the city police have an affirmative duty to exercise that authority, the sheriff and his deputies should exercise that authority in accord with the principles stated by the Supreme Court of Virginia in Malbon, quoted above.

2Section 19.2-71 provides that "[p]rocess for the arrest of a person charged with a criminal offense may be issued by the judge, or clerk of any circuit court, any general district court, any juvenile and domestic relations district court, or any magistrate...."
3See also § 46.1-37, which provides that:
   "(a) The Commissioner [of the Department of Motor Vehicles], his several assistants, and police officers appointed by him are vested with the powers of sheriffs for the purpose of enforcing the laws of this Commonwealth which the Commissioner is required to enforce.
   (b) Nothing in this title shall be construed as relieving any sheriff or sergeant, commissioner of the revenue, police officer or any other official now or hereafter invested
with police powers and duties, state or local, from the duty of aiding and assisting in the enforcement of such laws within the scope of their respective authority and duty."

For a parallel provision relating to the Superintendent of State Police and his assistants, see § 52-8.

4 Although the Malbon case involved the duty of a county sheriff to enforce the law in his county and in a second-class city within his county, that factual distinction does not compel a different conclusion here. Section 15.1-824 provides, inter alia, that city sheriffs shall perform the same duties and exercise the same powers in cities as county sheriffs do in counties.

5 A sheriff's deputies have the same authority and duty as does the sheriff to enforce the criminal and motor vehicle laws. See § 15.1-48.

COUNTIES, CITIES AND TOWNS. CRIMES INVOLVING HEALTH AND SAFETY. NO AUTHORITY TO REQUIRE SELLERS AND PURCHASERS OF HANDGUNS TO ACQUIRE LOCAL PERMIT. REGULATION OF SALE AND PURCHASE OF AMMUNITION PERMITTED.

November 26, 1986

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

You request my opinion concerning the appropriateness of enforcing certain ordinances of the City of Richmond dealing with the sale of handguns and ammunition. Relying on prior Opinions of this Office, you conclude that the handgun ordinances are invalid and unenforceable, but that the ammunition ordinances are valid.

I. Local Ordinances

The City Council for the City of Richmond has enacted several ordinances which:

(1) require a permit to sell handguns and ammunition (see §§ 20-149 and 28-443(a) of the Richmond City Code);

(2) require a permit to purchase a handgun or ammunition (see §§ 20-150 and 28-443(b));

(3) prohibit selling or furnishing handguns to minors (see § 20-156); and

(4) establish certain standards for the issuance of permits by the city's director of public safety to sell or purchase handguns.

The question presented by your inquiry is whether the City of Richmond has the authority under its general police power to regulate the sale or purchase of handguns and ammunition beyond those regulations expressly authorized by statute.

II. Prior Opinions Hold Localities Lack Authority to Regulate Handguns Under General Police Power

A number of prior Opinions of this Office have addressed the scope of a locality's power to regulate the sale, purchase or possession of handguns. See Reports of the Attorney General: 1982-1983 at 755; 1981-1982 at 112; 1988-1989 at 53. Specifically, the Opinion found in the 1982-1983 Report of the Attorney General, supra, held that the City of Virginia Beach lacked the authority to require permits to sell or purchase handguns. The conclusion reached in that Opinion was based on the absence of express statutory authority in the Code of Virginia for the regulation of handguns by localities, a pattern of legislation regulating the sale and use of dangerous weapons, and the history of the General Assembly's consideration of proposed legislation which would have authorized local regulation of the sale and purchase of handguns.
III. State Legislation May Preempt Exercise of Local Police Power

The Supreme Court of Virginia has considered a number of challenges to a locality's exercise of its police power on the grounds that the challenged regulation was inconsistent with State law or that State law had preempted the subject area. See City of Norfolk v. Tiny House, 222 Va. 414, 281 S.E.2d 836 (1981) (zoning regulation of establishments serving alcoholic beverages upheld); Loudoun County v. Pumphrey, 221 Va. 205, 269 S.E.2d 361 (1980) (ordinance requiring deposit on alcoholic beverage containers invalidated); Tabler v. Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980) (ordinance requiring deposit on beverage containers held to be beyond police power of the local governing body); Wayside Restaurant v. Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974) (regulation of topless dancers in bars upheld); Kiley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972), appeal dismissed, 409 U.S. 907 (1972) (regulation of massage parlors upheld); King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1954) (regulation of keeping of vicious dog upheld).

In considering challenges to local ordinances based upon allegations of an ordinance's inconsistency with State law or State preemption of the subject area regulated, the Court has upheld ordinances when the matter regulated is a proper subject of the police power and the provisions of the ordinances may be harmonized with existing State statutes. In reaching this determination, the key factors have included the nature and extent of State legislation in the subject area and the legislative intent which may be inferred from the existing statutes, or the history of proposed legislation in the subject area considered by the General Assembly. See Tabler v. Fairfax County.

IV. State Statutes Regulate Dangerous Weapons

Various statutes concerning the possession, use and local regulation of dangerous weapons are set out in Arts. 4 through 7, Ch. 7 of Title 18.2 of the Code of Virginia. Sections 18.2-287 and 18.2-287.1 authorize counties to regulate the carrying of loaded firearms on public highways and transporting loaded rifles and shotguns in vehicles. Sections 15.1-518, 15.1-518.1 and 15.1-865 authorize counties and certain municipal corporations to regulate the discharge of firearms. Sections 15.1-523 and 15.1-524 authorize counties to impose a license tax and certain reporting requirements on sellers of handguns.

The ugly provision of law which speaks of permits as related to purchases or sales of weapons is § 15.1-525, which continues in effect the provisions of Ch. 297, 1944 Va. Acts 432, requiring permits to sell or purchase handguns in any county having a density of population of more than one thousand per square mile.

Prior Opinions of this Office, issued over a period of many years, hold the effect of this pattern of legislation to be that the State has preempted the field and that localities may not, therefore, enact regulatory measures without specific statutory authority. See Reports of the Attorney General: 1982-1983, supra; 1981-1982, supra.

V. General Assembly Has Consistently Refused to Authorize Local Regulation of Sales and Purchases of Handguns

In recent years, on at least seven occasions the General Assembly has considered bills which would have authorized local regulation of the sale and purchase of handguns. See, e.g., H.B. Nos. 516, 967, and S.B. No. 121, 1984 Session of the General Assembly; H.B. No. 70, 1983 Session of the General Assembly; H.B. No. 350, 1982 Regular Session of the General Assembly; H.B. No. 1764, 1981 Regular Session of the General Assembly; H.B. No. 1870, 1979 Session of the General Assembly. Compare H.B. No. 1771, 1985 Session of the General Assembly; S.J.R. No. 114, 1975 Va. Acts 1531. This history of the General Assembly's consideration of proposed enabling legislation to permit or require local regulation of the sale or purchase of handguns creates a strong inference of legislative intent that localities have only those powers expressly granted by the General
Assembly concerning the sale or purchase of handguns. This Office cannot accomplish by interpretation what the General Assembly has repeatedly declined to do by statute. Accordingly, it is my opinion that the long-standing Opinions of the Attorney General, cited above, must be presumed to be correct. Compare 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). It is further my opinion, therefore, that the ordinances in question are invalid and unenforceable to the extent they require a city permit for the sale or purchase of a handgun.

VI. Regulation of Sale and Purchase of Ammunition
Authorized Under City's General Police Power

Two of the ordinances in question also regulate the sale and purchase of ammunition. The 1981-1982 Opinion, supra, authorized a county to regulate the sale of ammunition pursuant to its general police power under § 15.1-510 in the absence of any State statute on the subject.

Section 2.04 of the Charter for the City of Richmond is a general grant of the police power to the City. See Ch. 112, 1975 Va. Acts 284, 285-87. In accord with the 1981-1982 Opinion, supra, it is my opinion that the City of Richmond has the authority under its general police power to regulate the sale and purchase of ammunition. The ordinances in question, therefore, are valid and enforceable to the extent they require a city permit for the sale or purchase of ammunition.
You request my opinion concerning a county's authority to enter into an agreement for the purchase, improvement and resale of real property to promote the industrial development of the county.

I. Facts

The elements of the proposed agreement are as follows: (1) a private landowner will convey title to a large undeveloped tract to the county for the immediate consideration of $1.00; (2) the county will finance the site's development into an industrial park by providing roads, water and sewer; (3) after the development of the site, the county will sell the subdivided tracts to industrial buyers of its choosing; (4) at the time of sale of each subdivided tract, the county will pay the original landowner a prearranged sum for each tract sold; and (5) the county's obligation under the agreement will be subject to future appropriations by the board of supervisors. Should the board fail to appropriate the funds necessary to comply with its obligation, the agreement would require the county to convey the remaining parcels of land back to the original landowner with no consideration passing from the original landowner to the county, even though improvements to the property may have been made.

The advantages of this type of arrangement for the county include the county's control over the quality of development and the type of industry ultimately using the site. Also, the arrangement makes available the site for development without a large initial outlay by the county to purchase the land. You express your concern that this arrangement places the original landowner in the position of financing the initial sale to the county. In these circumstances, you ask whether the county will incur debt by a method not authorized by statute and in violation of the constitutional restrictions on local debt set out in Art. VII, § 10 of the Constitution of Virginia (1971).

II. Acquisition of Property for Subsequent Resale Authorized

Section 15.1-18 of the Code of Virginia provides, in part, as follows:

The governing body of any town may acquire by gift or purchase, but not by condemnation, land within the town or within three miles thereof for the development thereon of business and industry. No such land shall be so acquired unless and until the council has held a public hearing thereon concerning such proposed acquisition. Any land so acquired may be leased or sold at public or private sale to any person, firm or corporation who will locate thereon any business or manufacturing establishment. This section shall constitute the authority for any town to exercise the powers herein conferred notwithstanding any charter provision to the contrary. [Emphasis added.]

On its face, § 15.1-18 is a power granted only to towns. By virtue of § 15.1-522, however, those powers granted to cities and towns under general law have been vested in counties as well. Prior Opinions of this Office have held specifically that § 15.1-522 operates to extend to counties the power granted to towns by § 15.1-18. See Reports of the Attorney General: 1973-1974 at 31; 1971-1972 at 107; 1968-1969 at 54. Accordingly, it is my opinion that § 15.1-18 authorizes counties to acquire property for subsequent resale to promote industrial and business development subject to the procedural safeguards imposed by § 15.1-18.¹

III. Section 15.1-18 Authorizes County Expenditures for Site Development

You state that as part of this arrangement the county will finance the development of the site into an industrial park by providing roads, water and sewer. This site development, I assume, will facilitate the sale of the subdivided tracts to new industries. A prior Opinion of this Office holds that § 15.1-18 authorizes a county to expend funds for the construction and extension of water and sewer lines to land acquired pursuant to
§ 15.1-18 and proposed for business use. See 1971-1972 Report of the Attorney General, supra. In accord with this prior Opinion, it is my opinion that § 15.1-18 authorizes the county to expend funds for the development of property acquired pursuant to that provision.

I also assume that the expenditure of funds for site development will be for the general purpose of promoting the county's industrial and business development, rather than to benefit any individual property owner or commercial entity. Article X, § 10, the "credit clause," prohibits the State or local governments from granting credit to, or in aid of, private persons or corporations. Expenditures which incidentally benefit private interests do not violate the credit clause, provided the animating purpose of the transaction is to promote the locality's interests, rather than private interests. See generally City of Charlottesville v. DeHaan, 228 Va. 578, 323 S.E.2d 131 (1984); Fairfax County v. County Executive, 210 Va. 253, 189 S.E.2d 556 (1960); Almond v. Day, 197 Va. 782, 91 S.E.2d 668 (1956); Reports of the Attorney General: 1983-1984 at 103; 1977-1978 at 181; 1974-1975 at 91. In a different factual context, the promotion of industrial development as a transaction's animating purpose has been upheld against a credit clause challenge, despite incidental benefits to private interests. See Development Authority v. Coyner, 207 Va. 351, 358, 150 S.E.2d 87, 94 (1966) (statute designed to induce new industries to locate in the Commonwealth "serves primarily a public purpose and thus constitutes a proper function of government"). Similarly, the acquisition, development and subsequent lease to a private operator of port facilities by a political subdivision of the State has been held to be a governmental function exercised for public purposes and, therefore, not in violation of the credit clause. See Harrison v. Day, 202 Va. 967, 121 S.E.2d 615 (1961); Harrison v. Day, 200 Va. 764, 107 S.E.2d 594 (1959).

It is my opinion, therefore, that the expenditure of county funds for site development pursuant to § 15.1-18 would not violate the credit clause, provided that the animating purpose of those expenditures is to promote the county's industrial and business development, rather than to benefit the private interests of a landowner or other entity. The question of whether the benefits of a particular transaction inure primarily to private interests is a factual one and must be determined from the circumstances in each case. See 1983-1984 Report of the Attorney General, supra.

IV. Contract Between Landowner and County Establishes County Debt

The contemplated agreement between the landowner and the county requires that, at the time of the property's resale, the county will pay the original landowner a prearranged sum for each tract sold. In the event the board fails to appropriate the prearranged sum for these deferred payments to the landowner, the county is obligated to convey the remaining parcels back to the landowner for no additional consideration. This reconveyance would necessarily include the improvements made by the county in developing the site. The net effect of this agreement is the obligation of the county to appropriate money to satisfy its contractual obligation or to surrender its property together with valuable improvements financed with public funds.

Article VII, § 10(b) provides, in part, 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.

The contractual obligation of the county under the proposed agreement is similar in some respects to a grantor's obligation under a deed of trust. Prior Opinions of this Office have held that a deed of trust establishes a debt subject to constitutional limitations. See Reports of the Attorney General: 1975-1976 at 76, 1972-1973 at 34. See also Button v. Day, 205 Va. 629, 139 S.E.2d 91 (1964) (postponement of time of payment does not remove contractual obligation to pay from constitutional limitations on local debt).

Section 15.1-262, as amended by Ch. 573, 1986 Va. Acts 1438, provides:

The governing body of the county shall have power to sell, at public or private sale, or exchange, lease, mortgage, pledge, subordinate interest in or otherwise dispose of [its] real property . . . .

The express statutory authority of a county to mortgage or subordinate its interest in its real property, however, does not exclude such transactions from the constitutional limitations on local debt. Article VII, § 10 restricts the power of the General Assembly to delegate to localities the power to incur debts or obligations contrary to the constitutional limitations. See Button, 205 Va. at 641, 139 S.E.2d at 99.

Based on all of the above, it is my opinion that the contemplated agreement would establish a debt of the county subject to the limitations imposed by Art. VII, § 10. The county's authority to burden its property in this type of transaction pursuant to § 15.1-262, therefore, must still satisfy constitutional standards.

V. Conditioning Obligation on Future Appropriations Does Not Remove Obligation from Constitutional Limitations

Certain types of debts incurred by local governments are not subject to the otherwise applicable constitutional limitations if the debt falls within one of the judicially created exceptions to those limitations. See, e.g., Fairfax-Falls Church v. Herren, 230 Va. 390, 337 S.E.2d 741 (1985); Fairfax County v. County Executive, 210 Va. 680, 173 S.E.2d 869 (1970) (contract obligation of county contingent on services being rendered); 1985-1986 Report of the Attorney General at 86, 70 (obligation of county conditioned on annual appropriations by board of supervisors).

The county's obligation under the proposed agreement, however, is distinguishable from those obligations which have been excepted from the debt limitations based on an annual appropriations limitation clause in the agreement. In this instance, the county would be obligated to resolve a potentially difficult dilemma: to appropriate funds to pay the original landowner or to surrender valuable improvements in which the county has made a significant investment. In these circumstances, it is my opinion that conditioning the county's obligation on future appropriations does not remove the obligation from the constitutional limitations because the county's resources, be they public funds or real property with valuable improvements, remain at risk.

VI. "Special Fund Doctrine" Not Applicable

Another commonly resorted-to exception to the constitutional limitations on local debt is the "special fund doctrine" first adopted by the Supreme Court of Virginia in Almond v. Gilmer, 188 Va. 822, 51 S.E.2d 272 (1949), which quoted the principle as follows:

Obligations, issued by a state, [1] if payable only from the revenue to be realized from a particular utility or property, acquired with the proceeds of the obligations, [2] 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 [3] 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.* * *
188 Va. at 842-43, 51 S.E.2d at 280 (emphasis by Court). The Court has considered
the doctrine in subsequent cases involving obligations of governmental units at the State and
Watts, Treas., 215 Va. 836, 214 S.E.2d 165 (1975); Button v. Day, 205 Va. 739, 139 S.E.2d
967, 121 S.E.2d 815 (1961); Farquhar v. Board of Supervisors, 196 Va. 54, 82 S.E.2d 577
(1954).

In Farquhar, the Court specifically adopted the special fund doctrine in the context
of a sanitary district's contractual obligation to pay over user fees to discharge a debt
incurred in constructing a sewage disposal system. The Court distinguished the district's
obligation to pay over such revenue from debts of a county running over a period of years
and payable from general tax funds. See id. at 58, 82 S.E.2d at 581.

In determining whether any given indebtedness is within the special fund doctrine,
the Court has considered the following factors:

(1) whether the creditor may look solely to the special fund for the satisfaction of
the obligation (see Button, 204 Va. at 273, 130 S.E.2d at 461);

(2) whether any general obligation of the State or locality is established (see id.;
Button, 205 Va. at 743, 139 S.E.2d at 840);

(3) the extent to which the general revenues of the locality are insulated from the
obligation (see Herren, 230 Va. at 394, 337 S.E.2d at 743; Farquhar, 196 Va. at 61,
82 S.E.2d at 582); and

(4) whether default of the obligation would result in the depletion of the general
resources of the State or the locality (see id. at 69, 82 S.E.2d at 586; Town of South
Hill v. Allen, 177 Va. 154, 168, 12 S.E.2d 770, 775 (1941)).

Under general authorities, the special fund doctrine applies to liens against prop-
erty acquired as a result of the transaction creating the lien and when the creditor can
look only to the property so acquired for the satisfaction of the locality's obligation. See
15 McQuillin, The Law of Municipal Corporations § 41.34 (3d ed. 1985); 64 C.J.S. Munici-
pal Corporations § 1853(b) (1950); 56 Am. Jur. 2d Municipal Corporations, Etc. §§ 651,
655 (1971). See also State ex rel. Hammermill Paper Co. v. La Plante, 205 N.W.2d 784,
58 Wis.2d 32 (1973); Wiggs v. City of Albuquerque, 242 P.2d 865, 56 N.M. 214 (1953) (fol-
lowing general authorities). Compare McNichols v. City & County of Denver, 230 P.2d
591, 121 Colo. 45 (1950) (constitutional limitations on debt apply to mortgage of munici-
pal property, whether already owned by the locality or acquired as a part of the transac-
tion by which the debt is created).

The county's obligation under the proposed agreement does not, in my opinion, sat-
isfy the requirements of the special fund doctrine. The original landowner, as the obli-
gee, is not limited to the sale proceeds of the developed parcels. Rather, the county has
the continuing obligation to appropriate funds or to surrender its property and the
improvements. In these circumstances, the general revenues of the county are not insu-
lated from the obligation, and, should the board fail to appropriate the agreed-upon sum,
the county's general resources would be depleted by the loss of funds expended in developing the site.

It is my opinion, therefore, that the proposed agreement would establish a debt of the county subject to the limitations of Art. VII, § 10(b).

VII. Summary

To summarize, it is my opinion that: (1) § 15.1-18 authorizes the county to acquire property for subsequent resale to industrial or business purchasers; (2) § 15.1-18 authorizes the county to make expenditures to develop the property to facilitate its resale, provided that such expenditures are motivated by public interest rather than by a desire to further private interests; and (3) neither a clause limiting payments to future appropriations nor the special fund doctrine would operate to remove the resulting obligation under the agreement here proposed from the constitutional restrictions on local debt.

1 cf. 1972-1973 Report of the Attorney General at 117 (§§ 15.1-257 and 15.1-261.1 do not authorize a county to acquire property for resale or lease with restrictions on use to preserve open space areas of the county).

2 The constitutional restrictions on the act of incurring of local debt were imposed to protect localities from extravagant outlays by local governing bodies, thereby safeguarding the credit and fiscal integrity of localities. See Button, 205 Va. at 642, 139 S.E.2d at 109; II A. Howard, Commentaries on the Constitution of Virginia 860-63 (1974).

3 A sanitary district created pursuant to § 21-112.22 et seq. is subject to the same limitations on incurring debt as is a county. See Art. VII, § 10(b).

COUNTIES, CITIES AND TOWNS - GENERAL. CONSTITUTION OF VIRGINIA - TAXATION AND FINANCE. SPECIAL SERVICE DISTRICTS. CITY GOVERNING BODY UNDER §§ 15.1-18.2(b)(5) AND 15.1-18.3 GIVEN AUTHORITY TO LEVY AND COLLECT TAX ON ANY PROPERTY SUBJECT TO LOCAL TAX.

February 28, 1987

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

You ask several questions relating to the establishment of a downtown service district by the City of Alexandria pursuant to § 15.1-18.3 of the Code of Virginia. The city is interested in establishing the downtown service district to provide off-street parking facilities to service parking needs primarily generated by office and retail businesses located within the service district. The specific questions presented are: (1) whether a city is limited only to increases in real property taxes to fund services in a downtown service district established pursuant to § 15.1-18.3 or whether it may fund such services by increasing any other taxes it is authorized to levy under its charter or by general law, including gross receipts business license taxes; (2) regardless of the type of tax adopted, whether the additional tax must apply uniformly to all property or businesses in the district or whether the city may exempt some property or businesses in whole or in part; and (3) whether a § 15.1-18.3 downtown service district may be designated as either primary or secondary, and, if such a designation is required, what the legal significance of those terms is.

I. Applicable Statutes

Section 15.1-18.3 authorizes "[t]he governing body of any city, or any town with a population of more than 30,000 [to] designate primary and secondary downtown service districts" and to exercise the powers set forth in § 15.1-18.2(b) in such a district.

Section 15.1-18.2(b) provides, in pertinent part, that
the city council shall have the following powers and duties with respect to the service districts:

* * *

(5) To levy and collect an annual tax upon any property in such service district subject to local taxation to pay, either in whole or in part, the expenses and charges for providing such additional governmental services in such district . . . . [Emphasis added.]

The purpose for creating a downtown service district is "to provide additional or more complete services of government than are desired in the city as a whole." Section 15.1-18.2(a).

II. City May Impose Additional Real and Tangible Personal Property Taxes and Merchant's Capital Taxes to Fund Services in Downtown Service District

The object of a permissible tax levy for downtown service districts under § 15.1-18.2(b)(5) is any property in the service district subject to local taxation. Section 58.1-3000 details the property subject to local taxation, which includes all taxable real and tangible personal property, including the tangible property of public service corporations, except the rolling stock of corporations operating railroads, and the capital of merchants.

It is my opinion, therefore, that the governing body of a city is limited to the imposition of additional real property taxes, tangible personal property taxes and merchant's capital taxes to fund services in a downtown service district.

Local gross receipts business license taxes authorized under § 58.1-3700 et seq. constitute excise taxes imposed on the privilege of engaging in certain businesses and occupations. See 1974-1975 Report of the Attorney General at 459. They are not local taxes on property. It therefore is my opinion that no levy of an additional gross receipts business license tax is permissible for purposes of funding services in a downtown service district established pursuant to § 15.1-18.3.

III. Express Statutory Authority Required to Exempt Certain Property or Businesses from Special District Taxes

You next ask whether a city imposing an additional ad valorem tax in a downtown service district may exempt, in whole or in part, certain property or businesses from the additional tax. Virginia follows the Dillon Rule of strict construction applicable to powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication. See, e.g., Commonwealth v. Arlington County Bd., 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977); 1984-1985 Report of the Attorney General at 99, 100.

There is no authority in Art. X, § 6 of the Constitution of Virginia (1971) for exempting property on any of the bases you present. Neither § 15.1-18.2 nor § 15.1-18.3 authorizes a city to exempt property from the special district taxes. I am of the opinion, therefore, that a city is without authority to exempt, in whole or in part, certain property or businesses from additional district taxes. Such taxes are subject to the uniformity requirement of Art. X, § 1 and must, therefore, be applied uniformly upon the same class of subjects within the boundaries of the service district.

IV. Section 15.1-18.3 Requires Designation of Downtown Service Districts as "Primary" or "Secondary"

Your third question concerns the designation of downtown service districts as "primary" or "secondary." Downtown service districts are created solely by statute. Section 15.1-18.3 permits cities and towns with a population in excess of 30,000 to "designate
primary and secondary downtown service districts." Following the plain language of § 15.1-18.3, it is my opinion that, in establishing a downtown service district, a city must designate this district as either "primary" or "secondary."

This designation as a primary or secondary downtown service district does not limit the purposes for which these districts may be established, however. Similarly, the powers and duties of the governing body with respect to the districts are not affected by their designation.9

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1Gross receipts business license taxes are authorized by § 58.1-3700 et seq.
2You mention as examples of possible exemptions (1) all residential property in the district, or (2) property in the district belonging to owners or lessees who already provide adequate parking at their own expense.
3Three bills were passed by the 1987 Session of the General Assembly which would delete the words "primary and secondary" from the provisions of § 15.1-18.3. See S.B. Nos. 453, 520; H.B. No. 1231 (1987 Sess.).
4Cf. Reports of the Attorney General: 1975-1976 at 293; 1958-1959 at 243; 1955-1956 at 173, construing § 21-118(4) (now § 21-118(6)), which gives sanitary districts the power to levy and collect annual taxes upon all property in the district subject to local taxation to pay expenses for the purposes listed therein. These Opinions concluded that the additional tax could be levied on real and personal property, merchant's capital and the tangible personal property of public service corporations, but if levied, the statute required that the tax be imposed on all such property (e.g., a tax could not be applied solely to real estate). Section 15.1-18.2(b)(5) permits a tax to be levied on any property in the district subject to local taxation. Thus, additional taxes could be imposed on real estate alone, or any of the other categories of property subject to local taxation alone or any combination thereof, subject to the uniformity requirement of Art. X, § 1 of the Constitution of Virginia (1971).
5See 14 McQuillin, Municipal Corporations § 38.80 (3rd ed. 1970) (in the absence of express authorization, a municipal corporation has no power to exempt lands from special taxation.) Of course, property already exempt from taxation under the Constitution or applicable law would not be subject to such a special district tax. See Art. X, § 6.
6The authority of the General Assembly to authorize property tax exemptions is constrained by the Virginia Constitution. See Art. X, §§ 1, 6. I am aware of no authority for establishing the exemptions for residential real estate or the realty of certain businesses addressed in your letter. Different rates of taxation may be imposed upon separate classes of property. See Art. X, § 1; Washington Bank v. Washington Co., 176 Va. 216, 218, 10 S.E.2d 515, 516 (1940). The General Assembly is authorized to classify taxable subjects. See Art. X, § 1. No different classification has been made, however, with respect to residential and commercial real estate. See § 58.1-3008; § 58.1-3500 et seq.; 1968-1967 Report of the Attorney General at 295.
8As noted above, the authorized purpose is "to provide additional or more complete services of government than are desired in the city as a whole." Section 15.1-18.2(a).
9Section 15.1-18.2(b) contains these powers and duties.

COUNTIES, CITIES AND TOWNS - GENERAL. DOWNTOWN ASSESSMENT DISTRICTS. PROMOTION OF DOWNTOWN AREA AND OTHER GOVERNMENTAL SERVICES MAY BE PROVIDED.

July 31, 1986

The Honorable Clifton A. Woodrum
Member, House of Delegates

You request my opinion regarding the use of tax revenues raised within a downtown service district created pursuant to § 15.1-18.3 of the Code of Virginia.
I. Facts

In the City of Roanoke, a Downtown Management Task Force has been studying the preservation and enhancement of downtown Roanoke. One of the task force's recommendations is the establishment of a downtown service district pursuant to § 15.1-18.3. Within the service district, the city would levy and collect an additional or "piggy-back" real property tax to provide additional governmental services. Among the services proposed to be provided would be the promotion of the downtown area and additional governmental services not offered throughout the city, such as extra security and trash pickup, special parking, beautification and landscaping, and other capital improvements to public areas. Funds used for promotion would be limited to marketing and economic and business development activities, such as the preparation of brochures, and the recruitment of new businesses and development. Promotional funds would not be used to promote individual businesses. You ask whether the proceeds of the "piggy-back" real property tax may lawfully be used for each of the proposed purposes.

II. Applicable Statutes

Section 15.1-18.3 provides as follows:

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.

Section 15.1-18.2(a) authorizes service districts for the purpose of providing "additional or more complete services of government than are desired in the city as a whole."

Section 15.1-18.2(b) prescribes the powers and duties of the city council with respect to a service district. Section 15.1-18.2(b)(1) sets out a nonexclusive list of governmental services which may be provided. Section 15.1-18.2(b)(2) authorizes the city to enter into any necessary contracts to provide additional governmental services. Section 15.1-18.2(b)(3) provides that the city council is empowered to levy and collect an annual tax upon any property in such service district subject to local taxation to pay, either in whole or in part, the expenses and charges for providing such additional governmental services in such district and for constructing, maintaining and operating such facilities and equipment as may be necessary and desirable in connection therewith; provided, however, that such annual tax shall not be levied for or used to pay for schools, police or general government services but only for such additional services of government as are not then being offered throughout the entire city, and provided further that the proceeds from such annual tax shall be so segregated as to enable the same to be expended in the district in which raised.

III. Proposed Uses of Tax Revenue Are "Additional Governmental Services" Within Meaning of § 15.1-18.2

Your inquiry presents the question whether the proposed uses of the service district tax revenue are an "additional governmental services" within the meaning of § 15.1-18.2 and thereby authorized by § 15.1-18.3. In my opinion, the phrase "additional governmental services" includes those services of a type usually provided by local governments on a jurisdiction-wide basis. In the service district context, however, such services are provided on an exclusive or enhanced basis within the service district, rather than on a uniform basis throughout the jurisdiction.

It is further my opinion, therefore, that each of the specific uses of tax revenue
specified in your letter are "additional governmental services," in that they are statutorily authorized services which the city could provide on a city-wide basis.¹

As one of the proposed uses of the service district tax revenue, you also refer to "other capital improvements to public space." A determination whether any given capital improvement is for the purpose of providing a governmental service which the city is authorized to provide must necessarily be made on a case-by-case basis.

¹See § 15.1-10 (localities authorized to make limited expenditures "for the purpose of promoting the resources and advantages" of the locality); 16 E. McQuillin, The Law of Municipal Corporations § 44.40 (3rd ed. 1984) (advertising to further economic development is an appropriate purpose for which the taxing power may be exercised). See also §§ 15.1-18.2(b)(1) (garbage removal expressly listed as governmental service); 15.1-137 (protection of property and the preservation of peace and order); 15.1-14(2) (providing off-street parking); 15.1-15(2) and (3) (maintenance and landscaping of public areas).

COUNTIES, CITIES AND TOWNS - GENERAL - PLANNING, SUBDIVISION OF LAND AND ZONING. TERM "COMMERCIAL," AS USED IN § 15.1-11.1, ENCOMPASSES ONLY THOSE AREAS ZONED FOR BUSINESS OR COMMERCIAL USE WITH REGARD TO LOCALITY'S AUTHORITY TO COMPEL REMOVAL OF INOPERATIVE MOTOR VEHICLES.

March 10, 1987

The Honorable G. Steven Agee
Member, House of Delegates

You ask whether the term "commercial," as used in § 15.1-11.1 of the Code of Virginia, encompasses merely business uses or both business and industrial uses.

I. Facts

The City of Salem has enacted a local ordinance pursuant to § 15.1-11.1 dealing with the keeping of inoperative motor vehicles on any property zoned for residential, commercial or agricultural purposes. Some motor vehicles parked in the city would violate this ordinance, except that the area in which the vehicles are parked is zoned for industrial use. The city wishes to have the vehicles removed, but it cannot enforce its ordinance if the term "commercial" does not extend to properties zoned for industrial use.

II. Applicable Statutes

A. Statutory Provisions

Section 15.1-11.1(a) provides, in part, as follows:

The governing body of any county, city or town may, by ordinance, provide that it shall be unlawful for any person, firm or corporation to keep, except within a fully enclosed building or structure or otherwise shielded or screened from view, on any property zoned for residential or commercial or agricultural purposes any motor vehicle, trailer or semitrailer, as such are defined in § 46.1-1, which is inoperative. [Emphasis added.]

Section 15.1-486, a portion of the zoning enabling statutes, provides, in part, as follows:

The governing body of any county or municipality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into dis-
districts of such number, shape and size as it may deem best suited to carry out
the purposes of this article, and in each district it may regulate, restrict,
permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural,
business, industrial, residential, flood plain and other specific uses . . . .
[Emphasis added.]

B. Legislative History

Section 15.1-11.1, when first enacted, authorized the enactment of local ordinances
prohibiting the keeping of inoperative motor vehicles in residential areas. Chapter 390,
1966 Va. Acts 583. In 1970, § 15.1-11.1 was amended to extend this authority to prop-
erties zoned for "commercial" purposes. Chapter 196, 1970 Va. Acts 254. At the time of
this amendment to § 15.1-11.1, § 15.1-486(a) contained parallel language authorizing
local zoning classifications for "agricultural, commercial, industrial, residential, flood
plain and other specific uses." Ch. 1, 1969 Va. Acts 3 (Ex. Sess.) (emphasis added). In
1975, § 15.1-486(a) was amended to delete the word "commercial" and substitute the

III. Prior Opinions Interpret § 15.1-11.1 as Limiting Authority of Local
Governing Body to Regulate Keeping of Inoperative Motor Vehicles

The authority conferred on local governments by § 15.1-11.1 is "based on aesthetic
considerations and reflects the legislative purpose that each locality shall have the power
to require that unsightly junk vehicles stored on property within its boundaries will be
Opinion of this Office concluded that the specific provisions of § 15.1-11.1 limit the im-
plied general authority under a locality's zoning authority to enact stricter provisions
regulating the keeping of inoperative motor vehicles. See 1984-1985 Report of the
1969-1970 at 206 (local ordinances must not be inconsistent with provisions of
§ 15.1-11.1). Any interpretation of the scope of a locality's authority under § 15.1-11.1
must consider the legislative history of the statute, its purpose, and the limitation it
imposes on a locality's exercise of its zoning authority.

IV. Legislative History Indicates Terms "Commercial" and "Business" Are Synonymous

As discussed above, prior to the 1975 amendment to § 15.1-486(a), both §§ 15.1-11.1
and 15.1-486(a) used the term "commercial" as a reference to an appropriate zoning clas-
sification. Prior to the 1975 amendment, § 15.1-486(a) distinguished between "commer-
cial" and "industrial" zoning classifications. Section 15.1-486(a) currently distinguishes
between "business" and "industrial" classifications. Based on this legislative history, it is
my opinion that, in this context, the General Assembly intended the term "business" in
§ 15.1-486(a) to be synonymous with the term "commercial." This conclusion is supported
by general zoning treatises which use the terms "commercial" and "business" inter-
changeably with reference to certain zoning classifications, while using the term "indus-
trial" to refer to a distinct zoning classification. See R. Anderson, American Law of

Finally, a locality's interest in maintaining the aesthetic appearance of its areas is
less compelling in districts zoned for industrial uses than in districts zoned for less inten-
sive uses. See generally R. Anderson, supra, § 9.44. It is reasonable to conclude, there-
fore, that the General Assembly intended to limit a locality's authority to compel the
removal of inoperative vehicles to those areas set aside for residential, commercial and
agricultural uses.
V. Conclusion

Based on the above, it is my opinion that the term "commercial," as used in § 15.1-11.1, encompasses only those areas zoned for "business" or "commercial" uses. Accordingly, § 15.1-11.1 would not authorize the exercise of the authority to compel the removal of inoperative motor vehicles in areas zoned for "industrial" use.

COUNTIES, CITIES AND TOWNS - GENERAL. SECTION 15.1-16.1, AS AMENDED BY H.B. NO. 1367, DOES NOT AUTHORIZE AFFECTED JURISDICTIONS TO ENACT ORDINANCE REQUIRING ALL OPEN TRUCKS OR LOADS BE COVERED.

February 24, 1987

The Honorable V. Earl Dickinson
Member, House of Delegates

You ask whether H.B. No. 1367, as enacted by the 1987 General Assembly and presented to the Governor, authorizes the affected jurisdictions to enact local ordinances that would require truckers to cover open loads.

I. House Bill No. 1367 Enables Certain Localities
to Regulate Tracking of Mud and Debris

House Bill No. 1367 amends § 15.1-16.1 of the Code of Virginia to permit certain counties to enact an ordinance regulating the tracking of mud and debris on highways within their jurisdictions. This statute was originally enacted in 1966.1

II. Dillon Rule of Strict Construction Controls
Legislative Authority of Local Governments

Virginia follows the Dillon Rule of strict construction concerning the legislative authority of local governing bodies. See, e.g., County Board v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985). "The Dillon Rule provides that local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Tabler v. Fairfax County, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980). House Bill No. 1367 does not expressly authorize the affected jurisdictions to enact ordinances requiring truckers to cover open loads. The question presented by your inquiry, therefore, is whether the power to adopt such ordinances may be necessarily or fairly implied from the express power granted by H.B. No. 1367.

"Questions concerning implied legislative authority of a local governing body are resolved by analyzing the legislative intent of the General Assembly." Tabler, 221 Va. at 202, 269 S.E.2d at 360. See also Commonwealth v. Arlington County Pd., 217 Va. 558, 577, 232 S.E.2d 30, 42 (1977). Among the factors considered by the Supreme Court of Virginia in resolving such questions of legislative intent are (1) the history of legislation dealing with the area of regulation and whether such proposed legislation was adopted or rejected,2 and (2) the purposes and object of the statute in question and whether the power asserted is necessary to accomplish that object.3

A. General Assembly Has Rejected Proposed Legislation
   Imposing Covered Load Requirement on Statewide Basis

In recent years, the General Assembly has considered and consistently rejected legislation imposing covered load requirements on a statewide basis or in more limited circumstances.4
B. Current § 15.1-16.1 Not Basis for Adopting Covered Load Ordinance

Section 15.1-16.1 has been an express grant of authority to Arlington and Henrico Counties since 1966. Henrico County has not adopted a covered load ordinance. Arlington County, on the other hand, has adopted an ordinance which would require covered loads in some instances. See Arlington County, Va. Code § 10-25 (1986). I am advised by the Arlington County Attorney, however, that the county's ordinance was not enacted pursuant to § 15.1-16.1, but rather as an exercise of the general police power of the county. See § 15.1-510.

C. Prior Opinion Supports Theory that County Lacks Authority to Adopt Covered Load Ordinance

A prior Opinion of this Office concludes that Fairfax County lacked the authority to adopt a covered load ordinance. See 1971-1972 Report of the Attorney General at 271. The conclusion reached in that Opinion was based on the specific language of § 15.1-522, limiting the power of counties to adopt ordinances regulating the operation of motor vehicles. Id. at 271-72. While not controlling in this instance because of the provisions of § 15.1-16.1, this prior Opinion is persuasive in establishing the then-existing intent of the General Assembly that counties do not have the authority to adopt ordinances requiring covered loads. Compare 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) (General Assembly presumed to have had knowledge of Attorney General's interpretation of a statute, and its failure to make corrective amendments may be taken as legislative acquiescence to that interpretation). See also 1985-1986 Report of the Attorney General at 21, 22.

III. Conclusion: Authority to Adopt Covered Load Ordinance Cannot Be Necessarily or Fairly Implied from § 15.1-16.1

Section 15.1-16.1, even with the amendments proposed in H.B. No. 1367, would not expressly authorize the adoption of covered load ordinances. Neither of the jurisdictions presently authorized to regulate the tracking of mud and debris has enacted a covered load ordinance pursuant to § 15.1-16.1. The General Assembly has, in recent years, considered and consistently rejected legislation requiring covered loads on a statewide basis. Given this legislative history and the absence of express language concerning the covering of truck loads in H.B. No. 1367, it cannot be necessarily or fairly implied that the General Assembly intends to grant the affected jurisdictions the power to adopt covered load ordinances pursuant to § 15.1-16.1. It is my opinion, therefore, that the authority to regulate the tracking of mud and debris granted by § 15.1-16.1 does not further authorize the enactment of an ordinance requiring that all open trucks or loads in the affected jurisdictions be covered.

1See Ch. 429, 1966 Va. Acts 612. Section 15.1-16.1 now applies only to Arlington and Henrico Counties.
1986-1987 REPORT OF THE ATTORNEY GENERAL

You ask whether § 15.1-37.5 of the Code of Virginia, as amended by the 1986 Regular Session of the General Assembly, limits the authority of a county board of supervisors to create a county-wide election district pursuant to § 15.1-37.4.

I. Facts

King George County has the traditional form of county government provided for under §§ 15.1-37.4 through 15.1-130 and §§ 15.1-527 through 15.1-558. See 1977-1978 Report of the Attorney General at 146(2). The board of supervisors (the "board") is composed of three members with a member being elected from each of the county's three election districts. Each member is required to reside within his election district.

The board is considering amending the county election ordinance to expand the board's membership from three to five. Rather than reapportioning the county into five election districts, the proposed amendment would create a new county-wide election district from which two members would be elected.

II. County-Wide Election District May Be Created

You first ask whether the board may create a county-wide election district from which two new members would be elected.

Section 15.1-37.4 provides, in part, as follows:

The governing body of any county may provide by ordinance for a combination of county-wide and less than county-wide election districts and such combination of election districts shall not be a change in the form of county government. Nothing in this section shall preclude the county-wide election of the governing body, combined with a geographical residence requirement that members of the governing body be residents of designated magisterial or election districts in accordance with the provisions of § 15.1-527.2. The local electoral board and the State Board of Elections shall be notified of changes by the mailing of certified copies of the ordinance. [Emphasis added.]

The emphasized language quoted above was enacted by Ch. 297, 1982 Va. Acts 495, 496, and can reasonably be characterized as a legislative response to a prior Opinion of this Office holding that § 15.1-37.4 did not "authorize a 'traditional form' county to organize its board of supervisors into a combination of county-wide and local election districts, without a change in form of government." 1981-1982 Report of the Attorney General at 102, 104.

Giving the current language of § 15.1-37.4 its plain and ordinary meaning, it is my opinion that a county may provide for a combination of county-wide and local election districts. Accordingly, it is also my opinion that § 15.1-37.4 authorizes the creation of a county-wide election district in the circumstances you present.

III. Section 15.1-37.5 Does Not Limit Board's Authority to Create County-Wide District Under § 15.1-37.4

You next ask whether § 15.1-37.5 limits the board's authority to create a county-wide district under § 15.1-37.4.

Section 15.1-37.5 requires local governing bodies to reapportion decennially the representation in the governing body, by redistricting or by creating or eliminating districts to give, as nearly as is practicable, equal representation on the basis of population. Section 15.1-37.5 further provides as follows:

Notwithstanding any other provision of general law or special act, the governing body of such county, city, or town shall not reapportion the represen-
ation in the governing body at any time other than that required following the decennial census, except as provided by law upon a change in the boundaries of the county, city, or town which results in an increase or decrease in the population of the county, city, or town of more than one percent, as the result of a court order, as the result of a change in the form of government, or as the result of an increase or decrease in the number of districts or wards other than at-large districts or wards. [Emphasis added.]

The quoted language was enacted by Ch. 71, 1986 Va. Acts 93. The 1986 amendment was recommended to the General Assembly by the joint subcommittee studying certain revisions in election laws. The subcommittee expressly stated as the basis for its recommendation its intent to limit the authority of local governing bodies to redistrict at less than ten-year intervals. See Report of the Joint Subcommittee Studying Certain Revisions in Election Laws, S. Doc. No. 19 (1988), at 8.

The effect of the 1986 amendment to § 15.1-37.5 is to limit a local governing body's authority to reapportion, except in the specified circumstances. Among those events which authorize local reapportionment is "an increase or decrease in the number of districts or wards other than at-large districts or wards." Section 15.1-37.5. As amended, therefore, § 15.1-37.5 authorizes reapportionment when the number of districts or wards is increased or decreased, but not when the increase or decrease results from the creation or elimination of an at-large district. The basis for this exception is that the creation or elimination of an at-large district does not manifestly alter the representation based upon population and, therefore, require the redrawing of existing district lines. Cf. 1975-1976 Report of the Attorney General at 23 (enlargement of local government by establishing multimember districts; no change in existing districts required).

IV. Conclusion

It is my opinion, therefore, that § 15.1-37.4 authorizes the board to create a county-wide election district and that § 15.1-37.5 does not limit that authority. I note, however, that the implementation of the proposed changes is subject to the preclearance requirement of § 5 of the federal Voting Rights Act of 1965, as amended. See Reports of the Attorney General: 1982-1983 at 220; 1972-1973 at 169.

1 The "traditional" form of county government is utilized by 87 of Virginia's 95 counties. It is also known as the "constitutional" form of county government. It is distinguished principally from optional forms of county government by decentralized government and a greater role in the administration of government by the board of supervisors than by a chief administrative officer.

COUNTIES, CITIES AND TOWNS - GOVERNMENT OF CITIES AND TOWNS. INCREASE IN INCUMBENT MAYOR'S SALARY EFFECTIVE AT BEGINNING OF MAYOR'S NEW TERM AS AUTHORIZED BY § 15.1-827.

July 8, 1986

The Honorable Clifford F. Hapgood
Commonwealth's Attorney for Franklin County

You ask whether an increase in the salary of the Mayor of the Town of Rocky Mount, adopted by the town council to commence July 1, 1986, violates State law or would constitute a misappropriation of public funds.

I. Facts

The Town of Rocky Mount is a chartered municipal corporation having a town council of six members and a mayor. The town does not employ a town manager. At the reg-
ular municipal election, the incumbent mayor won reelection for a four-year term to commence July 1, 1986.

At a regular monthly meeting which took place after the municipal election, the town council voted to raise the mayor's salary. The raise was adopted prior to July 1 as part of the town budget for the next year to become effective July 1. A question has been raised as to the legality of increasing the mayor's salary in these circumstances.

II. Applicable Statute

Section 2 of the Charter for the Town of Rocky Mount provides that "[t]he mayor may receive a salary for his services, the amount to be fixed by the council, as provided for in § 15.1-827 of the Code of Virginia." See Ch. 23, 1978 Va. Acts 38, 39. Section 15.1-827 of the Code of Virginia provides as follows:

The mayor shall preside over the council; and the council may direct the payment to the mayor of a salary in an amount established by council, payable as the council may direct; notwithstanding any provision of a town charter or any other law setting forth the salary of mayor. No increase in salary of a mayor shall take effect during the incumbent mayor's term in office. In the event of the absence of the mayor, the council may appoint a president pro tempore. [Emphasis added.]

The current four-year term of the incumbent mayor ends on June 30. The mayor's new term commences July 1. A prior Opinion of this Office held that the salary of an incumbent mayor could be increased pursuant to § 15.1-827 to become effective on the commencement of the mayor's new term. See 1977-1978 Report of the Attorney General at 348. See also 1982-1983 Report of the Attorney General at 36, 39, 41 (increases in salary for members of county boards of supervisors).

III. Conclusion

Based on the above, it is my opinion that the increase in the mayor's salary, adopted prior to the beginning of the mayor's new term and to commence at the beginning of the new term, is authorized by § 15.1-827. Accordingly, an increase in the mayor's salary properly adopted pursuant to statutory authority would not be a misappropriation of public funds.

1Compare § 14.1-46.01 (similar restrictions applicable to members of county boards of supervisors); § 15.1-827.1 (restrictions applicable to town council members other than the mayor); §§ 15.1-939 through 15.1-945 (restrictions applicable to mayors and councilmen under certain modified forms of municipal government).

COUNTIES, CITIES AND TOWNS - PLANNING, SUBDIVISION OF LAND AND ZONING. FAMILY DIVISIONS EXCEPTION LIMITED TO PURPOSES CONSISTENT WITH OBJECTIVE OF ENHANCING VALUES SOCIETY PLACES UPON INTER VIVOS DISPOSITION OF FAMILY ESTATES FREE OF GOVERNMENT REGULATION.

October 15, 1986

Mr. George R. St. John
County Attorney for Albemarle County

You ask whether certain intrafamily real property transactions may be deemed to be "for the purpose of circumventing" § 15.1-466(A)(k) of the Code of Virginia. This section provides that under certain circumstances, family members may subdivide a parcel of land without complying with the county's subdivision ordinance.
I. Facts

As an illustration, you present the following factual situation: A man and wife reside in another state and have no intention of moving to Virginia. Through a realtor, they learn of a prime parcel of raw land in an expensive residential area. The parcel is large enough for two estate-style homes if it can be divided. Full compliance with the subdivision ordinance, however, is economically impracticable because of topographical factors. The parcel's value would double if it could be divided without compliance. The realtor informs the man of the "family division" law. The man then purchases the parcel, has a plat drawn dividing the parcel and a deed drawn conveying half of the divided parcel to his wife, and then applies for approval of this family division as exempt from the subdivision regulations.

The applicant admits that neither he nor his wife intend ever to occupy the property, and, when the division is approved, each spouse will market their half of the original parcel. The couple's attorney claims that this is a legitimate family purpose, enhancing the family's finances, and that because the statute is silent as to any requirement that the family members intend to occupy or use the property, or that they be residents of the county or the State, their purpose and intentions are irrelevant.

You ask whether, under the circumstances, a purchase of land for the avowed purpose of (a) subsequently dividing it under the family division provision of § 15.1-466(A)(k), and (b) reselling it at a profit above that which could be realized if subdivision regulations applied, constitutes "circumvention" of the subsection.

II. Applicable Statute

Section 15.1-466 provides:

A. A subdivision ordinance shall include reasonable regulations and provisions that apply to or provide:

* * *

(k) For reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner, subject only to any express requirement contained in the Code of Virginia and to any requirement imposed by the local governing body that all lots of less than five acres have reasonable right-of-way of not less than ten feet or more than twenty feet providing ingress and egress to a dedicated recorded public street or thoroughfare. Only one such division shall be allowed per family member, and shall not be for the purpose of circumventing this subsection. For the purpose of this subsection, a member of the immediate family is defined as any person who is a natural or legally defined offspring, spouse, or parent of the owner. The provisions of the subsection shall apply only to subdivision ordinances adopted by counties and the City of Suffolk.... [Emphasis added.]

The provisions of subsection 15.1-466(A) are mandatory and exclusive in that local subdivision ordinances must contain the specified provisions and may not include provisions and regulations other than those specified. See Hylton v. Prince William Co., 220 Va. 435, 258 S.E.2d 577 (1979). See also Reports of the Attorney General: 1979-1980 at 328; 1978-1979 at 257; 1977-1978 at 302; 1976-1977 at 199, 336. Subsection 15.1-466(A)(k), therefore, requires counties and the City of Suffolk to include a "family division" provision in the local subdivision ordinance. The "family division" provision of subsection 15.1-466(A)(k) is expressly limited in that such a division shall not be for the purpose of circumventing that subsection.
The question presented, therefore, is whether this express limitation restricts the "purposes" for which a family division may be made.

III. "Family Division" Exception to Subdivision Ordinance
   Intended to Avoid Otherwise Applicable Formalities and Expenses

Subdivision ordinances are enacted as a delegation of the police power of the State to the locality. See Nat. Realty Corp. v. Virginia Beach, 209 Va. 172, 163 S.E.2d 154 (1968); 1984-1985 Report of the Attorney General at 296. The combined purposes of zoning and subdivision powers are set out in § 15.1-427.

Section 15.1-465, applicable specifically to a locality's subdivision power, provides, in part, that "[t]he governing body of any county or municipality shall adopt an ordinance to assure the orderly subdivision of land and its development." Among the concerns addressed by subdivision ordinances are the coordination of existing and planned streets, the provision of drainage and sewerage systems, and the preservation of the stability of critical slopes. See § 15.1-466. See also Supervisors v. Ecology One, 219 Va. 29, 245 S.E.2d 425 (1978); Reports of the Attorney General: 1981-1982 at 316; 1976-1977 at 199.

The manifest intent of the General Assembly in enacting subsection 15.1-466(A)(k) was to permit property owners in counties and the City of Suffolk to divide existing parcels by a single transfer per family member to another family member without being subject to the formalities and expenses attendant to compliance with otherwise applicable provisions of a subdivision ordinance. See 1985-1986 Report of the Attorney General at 83; 1982-1983 Report of the Attorney General at 374, 375 n.3.

IV. Rules of Statutory Construction Limit
   Scope of "Family Division" Exception

The intended scope of the "circumvention" limitation of subsection 15.1-466(A)(k) is not clear from the face of the provision, and application of the rules of statutory construction is therefore required to resolve the question presented. "[T]he primary object of statutory construction is to ascertain and give effect to legislative intent." Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). Concurrently, "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." Id.

I note that the "immediate family" among which subsection 15.1-466(A)(k) permits a division includes an "offspring, spouse, or parent." Thus, the principal focus is upon intergenerational transfers. In my opinion, the provisions of subsection 15.1-466(A)(k) are intended to promote the values society places upon the inter vivos disposition of family estates with a minimum of government regulation. By permitting family divisions without compliance with otherwise applicable requirements, such divisions promote the cohesiveness of the family. The exercise of a delegated police power to promote similar family values has been upheld by the Supreme Courts of both the United States and Virginia. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); City of Manassas v. Rosson, 224 Va. 12, 294 S.E.2d 799 (1982), appeal dismissed, 459 U.S. 1166 (1983).

It is my opinion, therefore, that the General Assembly intended to restrict the application of subsection 15.1-466(A)(k) to family divisions for purposes consistent with the objective of enhancing such family values, including keeping the family estate within the immediate family, and passing real property interests from one family generation to another. Conversely, I do not believe the family division exception from subdivision ordinance requirements was intended to apply to profit-motivated divisions for short-term investment purposes.
The above conclusion is consistent with two relevant rules of statutory construction. First, exceptions to otherwise applicable statutes are to be narrowly construed. See Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982). Second, the words of a statute are presumed to be of some effect and are not to be treated as meaningless. See Anderson v. Commonwealth, 190 Va. 665, 297 S.E.2d 72 (1950); Raven Coal Corp. v. Absher, 153 Va. 332, 149 S.E. 541 (1929). To conclude that subsection 15.1-466(A)(k) excepts intrafamily division for any purpose from the requirements of a subdivision ordinance would be to render the statute's "circumvention" clause meaningless and would give the exception unnecessary scope not justified by the exception's intent and contrary to the general welfare of the community.

V. Conclusion

Based on the above, it is my opinion that subsection 15.1-466(A)(k) requires that a family division of a parcel be for purposes consistent with the objective of enhancing the values society places upon the inter vivos disposition of family estates free of government regulation, such as keeping the family estate within the immediate family, and passing real property interests from one generation to another, rather than for the purpose of short-term investment. It is further my opinion that the local governing body has the power to enact reasonable provisions within a subdivision ordinance to protect against the abuse of subsection 15.1-466(A)(k), thereby serving the general welfare of the community.

1 Subsection 15.1-466(A)(k) was enacted by Ch. 188, 1979 Va. Acts 246, 247-48, and was originally designated as subsection 15.1-466(k). The present division of subsection 15.1-466 results from 1983 amendments which designated the then-existing provisions as subsection (A) and added a new subsection (B). See Ch. 167, 1983 Va. Acts 184, 186. The language of subsection 15.1-466(A)(k) was not amended to reflect this change in structure. The existing language of "circumventing this subsection" reflects the language of the original subsection 15.1-466(k), now designated as subsection 15.1-466(A)(k). Because both subsections 15.1-466(k) and 15.1-466(A)(k) are properly denominated "subsections," I do not attach any significance to the failure of the 1983 amendments to clarify the reference to "subsection."
II. Denial of Rezoning Petition on Basis of Adverse Impact of Proposed Use on Existing Retail Businesses Would Be Unreasonable Exercise of Zoning Power Under Current Zoning Enabling Legislation

You first ask whether a local governing body may lawfully deny a petition for rezoning for a proposed new retail shopping center on the grounds that construction of such a shopping center might adversely affect the business of existing retail establishments in the locality. Under Virginia law, the standards governing the validity of zoning ordinances are well established. In adopting a zoning ordinance, the action of a local governing body is presumed valid as long as it is not unreasonable or arbitrary. The burden is on the party challenging the ordinance to show that it bears no reasonable or substantial relation to the public health, safety, morals or general welfare. On the other hand, a local governing body may not restrict the use of property under the guise of the police power when the basis for the restriction is unrelated to the police power interests of the locality. See Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959); 1983-1984 Report of the Attorney General at 475.

The purposes of a zoning ordinance and the factors to be considered in the drafting of such ordinances are set out in §§ 15.1-427, 15.1-489 and 15.1-490 of the Code of Virginia. No provision in these statutes expressly authorizes the governing body to base its decision on the impact of the proposed land use on existing businesses which compete with the proposed use.

In Board of Supervisors v. Davis, 200 Va. 316, 106 S.E.2d 152 (1958), the Supreme Court of Virginia held that the decision of a board of supervisors to deny a rezoning petition to permit the construction of a regional shopping center was arbitrary, unreasonable and invalid, because the denial bore no substantial relation to the community's police power interests. The Court upheld the trial court's determination that the basis of the board's denial was the adverse economic effect the proposed shopping center might have had on a previously approved, but not yet constructed, competing shopping center. See id., 200 Va. at 321, 106 S.E.2d at 157. Other justifications offered by the board were rejected as incidental to the board's decision. In reaching its decision, the Court stated:

It is not a proper function of a zoning ordinance to restrict competition or to protect an enterprise which may have been encouraged by a prior zoning classification. [Citations omitted.]

200 Va. at 322, 106 S.E.2d at 157. See also Nat. Linen Service v. Norfolk, 196 Va. 277, 83 S.E.2d 401 (1954) (ordinances adopted pursuant to a locality's police power which in their operation necessarily restrain competition are in general condemned).

The Court's decision in Davis is consistent with decisions of other state courts holding that an exercise of the zoning power, the primary purpose of which is to restrict competition, is unauthorized and constitutes an unreasonable exercise of the zoning power. See 1 R. Anderson, American Law of Zoning 3d § 7.28 (1986); 101A C.J.S. Zoning and Land Planning § 38 (1979); 82 Am. Jur. 2d Zoning and Planning § 46 (1978).

In the factual situation you present, the denial of the pending application for rezoning to permit the construction of a shopping center would be based primarily on a desire to insulate existing retail businesses against new competition, rather than the factors set out in the zoning enabling legislation. You suggest no other justification for the denial of petition. In accord with Davis, it is therefore my opinion that the denial of the rezoning
petition on that basis would be arbitrary, unreasonable and invalid under the current zoning enabling legislation because of a lack of any substantial relation to the locality's police power.

III. Denial of Rezoning Petition on Basis of Adverse Impact of Proposed Use on Competitors Raises Legitimate Antitrust Concerns

You next ask whether there are legitimate federal and State antitrust concerns for a local governing body or its members when the governing body denies a petition for rezoning for a new shopping center on the basis that the proposed use would damage existing retail businesses. The denial of such a petition would necessarily restrict competition in the area's retail industry. You state that existing retail merchants are opposed to further retail development of the area.


Local governments enjoy a limited immunity from antitrust liability under the "state action" doctrine established by the Supreme Court of the United States in Parker v. Brown, 317 U.S. 341 (1943). Municipal immunity from antitrust liability is available when the municipality acts pursuant to a clearly articulated and affirmatively expressed state policy. The Court has held that a municipality's actions taken pursuant to enabling legislation which necessarily contemplates anticompetitive conduct is entitled to state action immunity. See Hallie v. Eau Claire, 471 U.S. 34 (1985); Reasor v. City of Norfolk, Va.

As noted above, Virginia's zoning enabling statutes do not authorize a locality to exercise its zoning power in a manner primarily intended to restrict competition or on the basis that existing businesses may be adversely affected should a petition for rezoning be granted. In the absence of appropriate enabling legislation, a court will not find a locality entitled to state action immunity from antitrust liability should an unlawful conspiracy or contract be found. Accordingly, it is my opinion that, in the circumstances you present, there are legitimate federal and State antitrust concerns if the pending rezoning petition is denied and there is a basis for inferring a conspiracy or contract between local officials and existing retail merchants. It should be noted that damages no longer may be assessed against local governments or persons under the direction of local governments for violations of federal antitrust statutes. See 15 U.S.C. §§ 35, 36. Local governments remain potentially liable for damages, however, under §59.1-9.12 for violations of the Virginia Antitrust Act.

IV. Zoning Enabling Statutes Do Not Authorize Imposition of Moratorium on Rezoning Petitions for Particular Type of Land Use

Your third question is whether the local governing body may enact a moratorium on rezonings for new shopping centers for two to three years in order to assess the viability
of existing businesses in the locality. The effect of such a moratorium would be to deny all property owners the right to petition the governing body for a change in zoning classification, regardless of the circumstances giving rise to the petition.

In Bd. of Supervisors v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975), the Court held that the zoning enabling legislation did not authorize a county to impose a moratorium on the filing of site plans. The Court's decision was based, in part, on the provisions of § 15.1-491 and the absence of any authority in that statute for suspending the right of a property owner to file site plans.

Section 15.1-491(g) authorizes the amendment of existing zoning regulations whenever required by "public necessity, convenience, general welfare, or good zoning practice." Such amendments may be initiated by petition of the property owner. Section 15.1-491(g) further provides that "the [zoning] ordinance may provide for the consideration of proposed amendments only at specified intervals of time." It is my opinion that § 15.1-491(g) does not authorize a local governing body to impose a moratorium on rezonings for a particular purpose. I note also that the proposed moratorium would constitute an exercise of the locality's police power based upon an unauthorized factor, i.e., the insulation of existing retail businesses from new competition.

V. Enabling Legislation Would Not Be Unconstitutional Per Se

Your final question anticipates the conclusions I have reached above. You ask whether the General Assembly could, consistent with the Constitutions of the United States and Virginia and federal and State antitrust laws, bestow on Virginia localities the authority either to deny a rezoning based upon its adverse impact on existing businesses or to declare a moratorium on shopping center rezonings.

A. Enabling Legislation Would Establish Immunity from Antitrust Liability

As noted above, the state action doctrine immunizes localities from federal antitrust liability when the locality acts pursuant to enabling legislation which necessarily contemplates anticompetitive conduct. The state action doctrine does not require that a statute compel the anticompetitive conduct or that the state actively supervise the anticompetitive conduct. See Hallie, 471 U.S. at 46. Similarly, the Virginia Antitrust Act does not make unlawful any activity which is authorized by a Virginia statute. See § 59.1-9.4(b)(1). See also Reasor, 606 F. Supp. at 796. Accordingly, the General Assembly could enact enabling legislation authorizing localities to deny a rezoning petition based upon the adverse impact of the rezoning on existing businesses or to declare a moratorium on shopping center rezonings. The enabling legislation would immunize localities acting pursuant to the statutes from both federal and State antitrust liability.

B. Enabling Legislation Would Not Be Unconstitutional Per Se

The zoning power is a legislative power vested in the Commonwealth and delegated, in turn, to local governments authorizing the enactment of zoning ordinances. See Byrum v. Orange County, 217 Va. 37, 225 S.E.2d 369 (1976). In the zoning enabling legislation, the General Assembly has undertaken to achieve "a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights." Horne, 216 Va. at 120, 215 S.E.2d at 458. Conflicts between constitutionally protected property rights and the exercise of the police power arise constantly and are inevitable. See West Brothers Brick Co. v. Alexandria, 169 Va. 271, 192 S.E. 881 (1937), appeal denied, 302 U.S. 658 (1937).

In order to satisfy constitutional requirements, a zoning regulation must bear a rational relationship to a permissible state objective as expressed in the enabling legislation and may not in its terms arbitrarily discriminate. See City of Manassas v. Rosson, 224 Va. 12, 224 S.E.2d 799 (1982), appeal dismissed, 459 U.S. 1166 (1983). In Bd. Sup. James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975), the Court held that cer-
tain subclassifications of permitted uses in a commercial zone were unreasonable because of a lack of any substantial nexus between the restrictions imposed and the public welfare. See id., 216 Va. at 144, 216 S.E.2d at 212. In order to satisfy constitutional requirements in the factual situation you present, therefore, there must be a substantial relationship between the general welfare of the community and the exercise of the zoning power. Be it by the denial of a rezoning petition based upon the adverse impact of the rezoning on existing businesses or the imposition of a moratorium on rezonings for a specific type of land use.

In at least two instances, state courts have upheld exercises of the zoning power designed, in part, to insulate existing businesses from competition. See Carty v. City of Ojai, 143 Cal. Rptr. 506, 77 Cal.App.3d 329 (1978); Forte v. Borough of Tenafly, 255 A.2d 804, 106 N.J. Super. 346 (1969). In both Carty and Forte, however, the exercise of the zoning power was pursuant to planning and development studies undertaken in an effort to preserve deteriorating central business districts by limiting suburban retail development. In both cases, the decisions emphasize that the public interest was served by maintaining a central business district, that the exclusion of competition was incidental to the exercise of the police power to preserve the central business district, and that the localities were acting pursuant to carefully drawn plans.

Considering all of the above, it is my opinion that enabling legislation authorizing the denial of rezoning petitions on the basis of the adverse impact of the rezoning on existing businesses and the imposition of moratoriums on rezonings for a specific type of land use would not be unconstitutional per se. The exercise of such authority by a locality would, of course, be subject to challenge as to its reasonableness. A legislative expression of the police power interest to be served by the exercise of the zoning power in this manner would be advisable to support arguments in favor of the constitutionality of the action.

1On the other hand, exercises of the zoning power which have an incidental effect on competition will be upheld if properly based on a legitimate police power interest of the community. See, e.g., Loudoun Co. v. Lerner, 221 Va. 31, 267 S.E.2d 100 (1980) (denial of rezoning petition based on applicant's failure to satisfy "minimum population to support" criterion for a regional shopping center held to be reasonable basis for local governing body's action when such criterion was specified in county's comprehensive plan).

COUNTIES, CITIES AND TOWNS - PLANNING, SUBDIVISION OF LAND AND ZONING. VACATION OF BOUNDARY LINES. PROPOSED INSTRUMENT OF VACATION SHOWING ONLY TWO ADJOINING LOTS HELD UNDER COMMON OWNERSHIP AND SIGNED ONLY BY OWNER DOES NOT SATISFY MANDATORY PROVISIONS OF § 15.1-482(a).

November 21, 1986

The Honorable Frank J. Gallo
Commonwealth's Attorney for Fluvanna County

You request my opinion concerning the proper procedure a lot owner must follow to vacate an existing lot boundary line shown on a recorded subdivision plat.

I. Facts

The subdivision in question consists of 4,500 residential lots which were created and platted in twelve separate phases over a period of approximately ten years. The subdivision is an integrated whole with access to all lots limited to private roads owned by a property owners' association. Plats creating the subdivision were recorded showing all lots and roads in each phase. All plats creating the subdivision, as well as restrictive covenants covering each phase, reserve a ten-foot utility easement along the sidelines of each lot. The subdivision is served by a central water and sewer system, the trunk lines
of which generally lie within the road right-of-way. At times, however, the ten-foot utility easements are used to connect individual residences to the system. Also, the right to establish and maintain bridle and hiking trails is reserved across the rear of each subdivision. Ownership fees are based on lot ownership with fees assessed for each lot owned. The subdivision is sparsely developed, with residences on only 400 out of 4,500 lots. The property owners' association is the owner of the adjoining roadways and easements.

An owner of two adjoining lots in a phase of 350 lots has presented to the board of supervisors a plat prepared at his direction showing only his adjoining lots. The lot owner requests that the two lots be joined to enable the construction of a dwelling across the existing lot lines. The petitioning lot owner is the only signatory of the instrument presented to the board. You ask whether the proposed instrument of vacation showing only two adjoining lots under common ownership constitutes an appropriate instrument of vacation under § 15.1-482 of the Code of Virginia.

II. Applicable Statutes

Section 15.1-482 provides, in part, that where any lot is sold, the plat or part thereof may be vacated as follows:

(a) By instrument in writing agreeing to said vacation signed by all the owners of lots shown on said plat and also signed on behalf of the governing body of the county or municipality in which the land shown on the plat or part thereof to be vacated lies for the purpose of showing the approval of such vacation by the governing body. The word 'owners' shall not include lien creditors except those whose debts are secured by a recorded deed of trust or mortgage and shall not include any consort of an owner. The instrument of vacation shall be acknowledged in the manner of a deed and filed for record in the clerk's office of any court in which said plat is recorded.

Section 15.1-483 provides, in part, as follows:

The recordation of the instrument as provided under paragraph (a) of § 15.1-482 or of the ordinance as provided under paragraph (b) of § 15.1-482 shall operate to destroy the force and effect of the recording of the plat or part thereof so vacated, and to vest fee simple title to the centerline of any streets, alleys or easements for public passage so vacated in the owners of abutting lots free and clear of any rights of the public or other owners of lots shown on the plat, but subject to the rights of the owners of any public utility installations which have been previously erected therein.

Section 15.1-483.1 provides:

The governing body of any county, city or town may provide, as a part of its subdivision ordinance, that the boundary lines of any lot or parcel of land may be relocated or otherwise altered as a part of an otherwise valid and properly recorded plat of subdivision or resubdivision approved as provided in such subdivision ordinance and executed by the owner or owners of such land as provided in § 15.1-477, provided such action does not involve the relocation or alteration of streets, alleys, easements for public passage, or other public areas; and provided further, that no easements or utility rights-of-way shall be relocated or altered without the express consent of all persons holding any interest therein.

III. Statutory Procedures for Vacating Subdivision Lot Lines Are Mandatory

Prior Opinions of this Office have consistently held that the statutory procedures for vacating or altering subdivision lot lines on a recorded plat are mandatory for any such vacation or alteration to be effective. See 1984-1985 Report of the Attorney Gen-
eral, supra note 1. The manifest purpose of the statutory procedures is to prevent diminution of public uses and conveniences guaranteed in the original plan of subdivision. See 1980-1981 Report of the Attorney General at 335. In this instance, the recorded plat of subdivision expressly creates utility and other easements which are vested in the property owners' association. The proposed vacation of the existing subdivision lot lines will necessarily extinguish the existing utility easement. You do not state whether the proposed vacation will affect the reservation of rights across the rear of the lots.

IV. Conclusion

In the factual situation you present, the lot owner seeks to vacate the existing lot lines shown on the plat after the sale of lots shown thereon. The proposed instrument of vacation would have the effect of extinguishing the utility easement granted to the property owners' association. See § 15.1-483. The proposed instrument signed only by the petitioning lot owner does not, in my opinion, satisfy the requirements of § 15.1-482(a). An effective instrument of vacation under § 15.1-482(a), in these circumstances, must be signed by all the lot owners shown on the plat of which the lots affected are a part and by a duly authorized representative of the property owners' association. See 1975-1976 Report of the Attorney General at 279. It is further my opinion that the proposed instrument of vacation does not satisfy the requirements of § 15.1-483.1 because the instrument would have the effect of extinguishing a utility right-of-way without the express consent of all persons holding any interest in the right-of-way.

1 Section 15.1-482(b) provides for vacation of plats or parts thereof by ordinance of the local governing body subject to certain procedural safeguards. See generally 1984-1985 Report of the Attorney General at 297.

2 You do not indicate whether the county's zoning ordinance contains a provision for the alteration or relocation of boundary lines as authorized by § 15.1-483.1.

3 I express no opinion as to the effect the proposed vacation would have on rights reserved by restrictive covenants. See generally Reports of the Attorney General: 1984-1985, supra note 1; 1980-1981, supra; 1979-1980 at 327.

COUNTIES, CITIES AND TOWNS - POLICE AND PUBLIC ORDER. CONSOLIDATION OF COUNTY SHERIFF'S DEPARTMENT AND TOWN POLICE DEPARTMENT BY CONTRACT NOT AUTHORIZED BY § 15.1-131.3.

December 16, 1986

Mr. Paul X Bolt
County Attorney for Grayson County

You ask whether § 15.1-131.3 of the Code of Virginia permits the Sheriff of Grayson County, the Board of Supervisors of Grayson County, the Town of Independence, and the Town of Fries to enter into a contractual agreement whereby the sheriff will become the chief of police of both towns and provide law enforcement services through his department in those towns. You also ask whether the board of supervisors can contractually bind the sheriff in an agreement with the town councils.

I. Facts

The Town of Independence and the Town of Fries, both located within Grayson County, have contacted the Board of Supervisors of Grayson County and the Sheriff of Grayson County with a request that both towns, the county and the sheriff enter into a contract which would consolidate the towns' police forces with the sheriff's department. Under the proposed contract, the sheriff would become the chief of police for both towns and would provide law enforcement services for both towns and the county, including the enforcement of town ordinances within the towns. The county would furnish the additional officers required.
The county would also furnish all other equipment, materials, supplies, communication and dispatch services required, including police vehicles and uniforms. The towns would reimburse the county for additional expenses on a per capita basis as set out in the contract.

II. Section 15.1-131.3 Does Not Authorize Consolidation of Town Police Forces with a County Sheriff's Department

Your inquiry focuses on whether §15.1-131.3 permits the consolidation of a county sheriff's department with town police departments. Section 15.1-131.3 provides, in pertinent part, as follows:

The governing body of any county, city or town may, in its discretion, enter into a reciprocal agreement with any other county, city, town, any agency of the federal government exercising police powers, or with any combination of the foregoing, for such periods and under such conditions as the contracting parties deem advisable, for cooperation in the furnishing of police services. Such governing bodies also may enter into an agreement for the cooperation in the furnishing of police services with the Department of State Police.

Section 15.1-131.3 specifically enumerates those agencies and governmental entities empowered to contract for the provision of police services. Since a sheriff's department is not among those enumerated in this statute, there is no authority under §15.1-131.3 for the proposed arrangement. A statute which limits the manner in which something may be done or the entity which may do it also evinces the intent that it shall not be done otherwise. "Expressio unius est exclusio alterius." Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) quoting Christiansburg v. Montgomery County, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976). Further construction of the language of the statute is not necessary because it is clear and unambiguous. Therefore, the plain meaning must be accepted. See Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982).

In 1970, my predecessor rendered an Opinion interpreting §15.1-131.3 as authorizing an agreement which would consolidate the police department of a town within a county with the sheriff's department of that county. See 1970-1971 Report of the Attorney General at 92. Based on what I consider to be well-recognized rules of statutory construction and the clear language of this statute, as outlined above, I must respectfully disagree with the prior Opinion, and I hereby overrule it.

III. The Board of Supervisors May Not Bind Sheriff in Contract with Town Councils

Your second question is whether the board of supervisors has the authority to bind the sheriff in a contract with the town councils.

Prior Opinions of this Office have consistently held 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 equipment therein and selection and supervision of personnel in the positions assigned to the sheriff. See Reports of the Attorney General: 1984-1985 at 285; 1978-1979 at 237; 1975-1976 at 62; 1973-1974 at 322; 1971-1972 at 367. Similarly, in the absence of a statute, a local governing body may not assign additional duties to a sheriff without his consent. See 1978-1979 Report of the Attorney General, supra. The sheriff's service is independent of municipal or county government and independent of the State government. The county is not responsible for the actions of the sheriff's department, nor does the county have any control over the actions of the sheriff. See Sherman v. City of Richmond, 543 F. Supp. 447 (E.D. Va. 1982).

The principle of a constitutional officer's independence from control by a local governing body is based upon the office's constitutional status and the officer's popular election. See 1975-1976 Report of the Attorney General, supra. Section 15.1-131.3 does not
abrogate a sheriff's independence, and I am unaware of any other provision of law which
does so in this circumstance.

IV. Conclusion

Accordingly, it is my opinion that § 15.1-131.3 does not authorize the consolidation
by contract of the town police forces of Independence and Fries with the Sheriff's
Department of Grayson County. Likewise, the county board of supervisors may not bind
the sheriff in such a contract.

1Section 15.1-131.3 also provides that a governing body of any county, city and town
may enter into a reciprocal agreement with another county, city or town, or combination
thereof, for the consolidation of police departments or divisions of departments thereof.
Clearly, this section of the statute does not authorize the arrangement requested be-
because Grayson County has no police department, and this portion of the statute is
uniquely applicable to the consolidation of police departments.

COUNTIES, CITIES AND TOWNS - POLICE AND PUBLIC ORDER - EMPLOYMENT OF
OFF-DUTY OFFICERS. BOARD OF SUPERVISORS NOT LIABLE BY REASON OF
ENACTING ORDINANCE UNDER § 15.1-133.1 AUTHORIZING DEPUTY SHERIFFS TO
ENGAGE IN OFF-DUTY EMPLOYMENT WHERE THEY MAY HAVE OCCASION TO
EXERCISE POLICE POWERS.

November 21, 1986

The Honorable Harry O. Tinsley
Sheriff for Madison County

This is in response to your inquiry as to whether the board of supervisors of a
county could incur civil liability as a result of adopting an ordinance pursuant to
§ 15.1-133.1 of the Code of Virginia.

I. Background

Under the provisions of the Law Enforcement Liability Self-Insurance Plan as
administered by the Division of Risk Management of the Department of General Ser-
vice, off-duty, "part-time" employment by deputy sheriffs is excluded from coverage
unless (1) the locality has enacted an ordinance pursuant to § 15.1-133.1 permitting this
off-duty employment, and (2) the employing entity is an organization meeting the defini-
tion contained in § 18.2-340.1(1).

II. Board of Supervisors Does Not Risk Liability

The enactment of an ordinance is a purely governmental function involving the
exercise of discretion. Accordingly, a county board of supervisors enjoys sovereign
immunity from suits instituted against it arising from the enactment of an ordinance. See
generally 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). Consequently, a board of supervisors incurs no
risk of liability from adoption of an ordinance pursuant to § 15.1-133.1.

COUNTIES, CITIES AND TOWNS - POWERS OF CITIES AND TOWNS. MOTOR VEHI-
CLES - REGULATION OF TRAFFIC - POWERS OF LOCAL AUTHORITIES IN GENERAL
- MAXIMUM SIZE AND WEIGHT; COMBINATION OF VEHICLES. LOCAL PENALTY ON
OVERWEIGHT VEHICLE IMPERMISSIBLY INCONSISTENT WITH § 46.1-342(a).

November 26, 1986
The Honorable Harry J. Parrish  
Member, House of Delegates

You ask whether, under current Virginia statutory and case law, the City Council of the City of Manassas may establish by ordinance maximum gross weight limitations for roads within its jurisdiction and also provide for liquidated damages for violations of such weight limits to be paid to the city, or whether a statutory change is necessary.

I. Municipal Corporation Granted Certain Powers to Regulate Streets and Motor Vehicles

Pursuant to § 15.1-839 of the Code of Virginia, the City of Manassas, as a municipal corporation, has been granted those general powers that are necessary or desirable to promote the general welfare of its inhabitants. The Manassas City charter also confers powers to the city, generally, to regulate streets and motor vehicles and to impose assessments for local improvements. In addition to these general powers, § 46.1-180 grants powers to local authorities, including cities, to adopt ordinances regulating the operation of vehicles within their jurisdiction, so long as the ordinances are not in conflict with other provisions of Title 46.1.

Under Art. 11, Ch. 4 of Title 46.1, the General Assembly has provided a mechanism to regulate maximum vehicle weights on State highways. Section 46.1-342(a) provides that upon conviction of a violation of weight limits set either by statute or permit, the court shall assess liquidated damages in specified amounts and the sums collected shall be paid over to the State Treasurer for allocation to the fund appropriated for the construction and maintenance of State highways.

The issue posed by your question is whether a local ordinance to collect and retain vehicle overweight penalties is consistent with State law.

II. Local Ordinance Must Be Consistent with State Law

You did not propose specific ordinance language in your question. For purposes of analysis, however, it appears that a municipality has two options in structuring an ordinance regulating truck weight, if an ordinance were permissible at all. First, the ordinance could impose a fine or penalty in addition to the liquidated damages prescribed by State statute. Second, the local ordinance could provide that the monies collected be the same amount as in the State statute, but be paid to the locality rather than to the State Treasurer. As indicated below, it is my opinion that either method would be impermissibly inconsistent with existing State law.

The test for the requisite consistency between a local ordinance and State law is addressed in the case of Wayside Restaurant v. Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974), which involved a local ordinance prohibiting obscene performances in a more restrictive and detailed manner than comparable State statutes. The Supreme Court of Virginia upheld the local ordinance as a valid exercise of the city's police power. The Court relied upon its former ruling in King v. Arlington County, 195 Va. 1084, 1090, 81 S.E.2d 477, 591 (1954) that:

'[W]here both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail . . . .'}
The consistency required between § 46.1-180 and local ordinances has been examined in prior Opinions of this Office. In one Opinion, an ordinance was being considered by the City of Salem limiting the right to open a vehicle door in the path of an approaching vehicle. See 1978-1979 Report of the Attorney General at 185. The Opinion first noted that the Dillon Rule limits the powers of localities to those expressly conferred or powers held by necessary implication. Section 1-13.17 was referenced for the proposition that local ordinances must not be inconsistent with the laws of the State. The Opinion then held that where there is adequate enabling legislation and no conflict with State law, an ordinance is not precluded by the absence of comparable State Code provisions.

In another Opinion, a proposed Fairfax County ordinance creating a motor vehicle offense of failure to pay full attention to driving was found inconsistent with State law. See 1978-1979 Report of the Attorney General at 74. In that situation, the locality had the general power to regulate vehicle operation under § 46.1-180. State law, however, already provided for the offense of reckless driving, with discretion granted to the court alone to reduce the charge to improper driving upon a showing of slight culpability. The Opinion held that failure to pay full attention to driving was comparable to improper driving; thus, for the locality to adopt an ordinance allowing a police officer to charge the lesser offense of failure to pay full attention to driving would invade the statutory prerogative of the court.

III. Locality May Not Add Surcharge to State Overweight Penalties and May Not Provide that Overweight Penalties or Liquidated Damages Be Paid to Locality Rather than to State Treasurer

Localities are empowered to regulate traffic pursuant to § 46.1-180(a). Such regulation must not, however, be inconsistent with Title 46.1. A locality may not add a surcharge penalty to the penalty existing under current State law because § 46.1-180(c) expressly prohibits a locality from imposing penalties greater than those provided under Title 46.1 for similar offenses. Likewise, a local ordinance that provided for penalties or liquidated damages to be paid to the locality would be in direct conflict with the provisions of § 46.1-342(a), which states in mandatory language that "[s]uch sums shall be paid into court or collected by the attorney for the Commonwealth and forwarded to the State Treasurer and allocated to the fund appropriated for the construction and maintenance of State highways." A local ordinance which required that these funds be paid to the locality in lieu of payment to the State Treasurer would, in the language of Wayside Restaurant, prohibit what the legislature has expressly required. Such action clearly would be contradictory to the express State statutory scheme for the payment of vehicle overweight liquidated damages.

Additional support for this conclusion is found in § 46.1-342.1. That section specifically provides that counties which have opted out of the State system of secondary roads in accordance with Ch. 415, 1932 Va. Acts 872, may adopt ordinances to collect for local use the liquidated damages normally forwarded to the State pursuant to § 46.1-342. By specifically authorizing those counties outside of the State secondary road system to collect and retain vehicle overweight liquidated damages, the legislature has clearly indicated that other localities are without this power. See Reports of the Attorney General: 1983-1984 at 218; 1982-1983 at 657.

IV. Conclusion

Based on the above, it is my opinion that additional legislation would be necessary to permit the City of Manassas to adopt an ordinance to provide for the retention of liquidated damages for overweight vehicles.

1§ 15.1-839. General grant of power; enumeration of powers not exclusive; limitations on exercise of power.—A municipal corporation shall have and may exercise all
powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be in addition to any general grant of power. The exercise of the powers conferred under this section is specifically limited to the area within the corporate limits of the municipality, unless otherwise conferred in the applicable sections of the Constitution and general laws, as amended, of the Commonwealth."

Chapter 721, 1976 Va. Acts 1120, §§ 1, 18(E) and (S), 21, 29, 35, and 37. None of these powers specifies vehicle weight regulation; all must be consistent with the Constitution and Code of Virginia.

Section 46.1-180(a) states, in part, as follows: "In counties, cities and towns the governing body may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities and towns not in conflict with the provisions of this title and may repeal, amend or modify such ordinances and may erect appropriate signs or markers on the highway showing the general regulations applicable to the operation of vehicles on such highways."

See § 33.1-224 et seq.

COUNTIES, CITIES AND TOWNS - PUBLIC UTILITIES; FRANCHISES; ETC. FEDERAL CABLE COMMUNICATIONS POLICY ACT OF 1984 PREEMPTS INCONSISTENT PROVISIONS OF STATE LAW AND EXISTING FRANCHISE AGREEMENTS REGARDING RENEWAL OF FRANCHISES AND ACQUISITION OF CABLE TELEVISION SYSTEMS BY FRANCHISING LOCALITY.

July 31, 1986

The Honorable Paul C. Cline
Member, House of Delegates

You ask several questions concerning the renewal of a cable television franchise by the City of Harrisonburg. More specifically, you ask to what extent the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 through 559 (the "Act"), preempts various provisions of the Code of Virginia applicable to the award of cable television franchises by cities and towns.

I. Facts

The city presently has a franchise agreement with Warner Amex Cable Communications, Inc. ("Warner Amex") for the operation of a cable television system. The existing franchise agreement expires April 1, 1988. Pursuant to 47 U.S.C. § 546, Warner Amex has invoked the Act's procedure governing the renewal of existing cable franchises. In accordance with that procedure, public hearings were conducted to obtain public comment on Warner Amex's past performance and to ascertain the city's future cable-related needs. On March 19, 1986, the city forwarded a request for a proposal for renewal to Warner Amex. On May 20, 1986, Warner Amex filed the requested proposal with the city requesting a 15-year franchise for the operation of a cable television system within the city. The city thereafter gave the public notice required by 47 U.S.C. § 546(c)(1) of receipt of the proposal for renewal.

The existing franchise agreement provides that upon the expiration of the franchise term, the city may purchase the system for its original cost less accumulated depreciation.
II. Applicable Provisions of the Act

1. The purposes of the Act,\(^1\) as set out in 47 U.S.C. § 521, are to

   (1) establish a national policy concerning cable communications;

   * * *

   (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

   * * *

   (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title . . . .

2. Section 541 authorizes a locality to award one or more franchises within its jurisdiction.\(^2\)

3. Section 546 sets out the renewal procedure which may be invoked by a locality or a cable operator. Major elements of the procedure include the following:

   (a) A public hearing must be held to identify the community's future cable-related needs and to review the operator's past performance.

   (b) Upon receipt of a proposal for renewal, the locality must give public notice of the receipt of the proposal.

   (c) Within four months of the receipt of the proposal for renewal, the locality must renew the franchise or issue a preliminary decision that the franchise is not to be renewed.

   (d) Upon a preliminary decision not to renew, the locality or the operator may initiate an administrative proceeding to consider whether (i) the operator has complied with the existing franchise terms; (ii) the operator's service has been of sufficient quality; (iii) the operator has the financial, legal and technical ability to provide the services set out in the proposal; and (iv) the proposal reasonably meets the future cable-related needs of the community.

   (e) Upon the completion of the administrative proceeding, the locality must issue a written decision granting or denying renewal. Any denial of renewal must be based on an adverse finding with respect to at least one of the four criteria listed above.

   (f) A locality's decision to deny renewal is subject to appeal to federal district court and the court is authorized to grant appropriate relief if it finds the denial was not properly based on the listed criteria.

4. Section 547 provides that if a renewal of a franchise is denied and the locality acquires ownership, the price of the acquisition may be determined according to the provisions of an existing franchise agreement.

5. Section 556(c) provides that "[e]xcept as provided in . . . § 557 . . . any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."

6. Section 557(a) provides that any franchise in effect on the effective date of Title 47 "shall remain in effect, subject to the express provisions of this title."
III. Applicable Provisions of Code of Virginia

1. Section 15.1-307 of the Code of Virginia requires that cities and towns, prior to granting a franchise or lease to use public property in a manner not permitted to the general public for a term of more than five years, advertise for and publicly receive bids. A grant of franchise may provide that upon termination of the grant, the plant may be transferred to the city or town. A plant so acquired may be sold or leased or, if authorized by law, operated by the city or town.

2. Section 15.1-308 requires the advertisement of any proposed ordinance granting a franchise.

3. Section 15.1-309 requires that such advertisements invite bids for the proposed franchise.

4. Section 15.1-310 requires the city or town, should it decide to grant the franchise, to accept the highest and best bid. A lower bid may be accepted in certain circumstances.

5. Section 15.1-23.1 authorizes counties, cities and towns to grant franchises for cable television systems and to impose a fee on such franchises.

IV. Federal Law Preempts Conflicting Provisions of State Law

The U.S. Const. Art. VI, cl. 2 (the "supremacy clause") 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; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The supremacy clause gives Congress the power to preempt State law. One variety of preemption "occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Louisiana Public Service Com. v. FCC, 476 U.S. ___, 106 S. Ct. ___, 90 L. Ed. 2d 369, 381-82 (1986) (citations omitted). Section 556 expressly preempts State law inconsistent with the Act. Whether the advertisement and bidding requirements of §§ 15.1-307 through 15.1-310 are preempted turns, therefore, on whether they are inconsistent with the Act.

As noted above, § 556 of the Act provides for the coordination of federal, state and local regulation of cable television and expressly preempts inconsistent state laws. Section 557 provides for the continuation of the provisions of existing franchise agreements subject to the express provisions of the Act. Accordingly, state laws and the provisions of existing franchise agreements which conflict with the express provisions of the Act are preempted.

V. Advertisement and Competitive Bidding Requirements of §§ 15.1-307 through 15.1-310 Preempted by Act's Renewal of Franchise Procedure

You ask whether, if Warner Amex meets the criteria for renewal set out in § 546(c)(1) of the Act, the city is required to comply with the advertisement and competitive bidding provisions of §§ 15.1-307 through 15.1-310 of the Code. In other words, you ask whether the Act's renewal of franchise procedure set out in § 546 preempts the requirements of §§ 15.1-307 through 15.1-310.

Section 526 sets out the Act's purposes of a uniform national policy regulating cable television and the establishment of an orderly process for franchise renewal which protects the operator from unfair denial of renewal when the operator meets the Act's stan-
The Act contains no provision with regard to competitive bidding under state law as a part of the renewal procedure under § 546. In my opinion, the "highest and best bid" requirement of § 15.1-310 conflicts with the presumption in favor of renewal established by § 546. In other words, the Act's structured renewal procedure which protects the incumbent franchisee and the advertisement and competitive bidding requirements of §§ 15.1-307 through 15.1-310, which eliminate any protection of the incumbent from competition, are inherently inconsistent. Also, simultaneous proceedings under § 546 and §§ 15.1-307 through 15.1-310 would result in a confused and uncertain process inconsistent with the Act's purpose of uniformity and orderly renewal. Accordingly, it is my opinion that the advertisement and competitive bidding requirements of §§ 15.1-307 through 15.1-310 are preempted by the procedural and substantive provisions of § 546 when § 546 is invoked by either the locality or the operator. The city, therefore, is prohibited from entertaining competing bids or denying renewal on a basis other than that permitted by § 546 when the Act's renewal procedure is invoked.

VI. City May Acquire Cable Television System if Renewal of Franchise Is Denied

You next ask whether the city has the authority to acquire the cable television system pursuant to a provision of the existing franchise agreement.

As noted above, the existing franchise agreement provides that upon the expiration of the agreement's term, the city may purchase the system for an agreed price. Section 557, however, continues the provisions of existing agreements subject to the Act's express provisions. Section 547 provides that if renewal of an operator's franchise is denied, the locality may acquire ownership of a system at a price which may be determined in accordance with an existing franchise. In these circumstances, if renewal of Warner Amex's franchise is properly denied, therefore, the Act permits the city's acquisition of the system pursuant to the provisions of the existing franchise agreement.

VII. City May Operate Cable Television System Pursuant to Charter Provision

Your final question is whether the city may operate the cable television system should the system be acquired.

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. See Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977); 1984-1985 Report of the Attorney General at 99. I am unaware of any provision of general law which authorizes localities to operate cable television systems. Section 15 of the Charter for the City of Harrisonburg provides as follows:

The [city] council is empowered to establish, enlarge, maintain and operate, within or without the corporate limits of the city, suitable systems of . . . such other local public services and utilities as may in its judgment be in the public interest . . . .[17] [Emphasis added.]

The question presented, therefore, is whether a cable television system is a local public service within the meaning of § 15 of the city's charter. That term "public service" has been interpreted to include services related to the convenience, comfort and entertainment of municipal residents. See 1 E. McQuillin, The Law of Municipal Corporations, § 1.64 (3d ed. 1971). I note also the language of the final paragraph of § 15.1-23.1, which describes cable television systems in terms analogous to more traditional public services. It is my opinion, therefore, that § 15 of the city's charter authorizes the city to operate a cable television system should it acquire such a system. Com-
pare City of Issaquah v. Teleprompter Corp., 611 P.2d 741 (Wash. 1980) (city authorized to operate cable television system under Washington law). 8

VIII. Conclusion

To summarize, it is my opinion that (1) the Act's renewal provisions, once invoked, preempt the advertisement and competitive bidding requirements of §§ 15.1-307 through 15.1-310 of the Code, which would otherwise apply; (2) the city may acquire the cable television system pursuant to the provisions of the existing franchise agreement upon the proper denial of Warner Amex's request for renewal; and (3) § 15 of the city's charter authorizes the city to operate a cable television system.


2 I note the holding of the Supreme Court of the United States in Los Angeles v. Preferred Communications, 476 U.S. __, 90 L. Ed. 2d 486, 106 S. Ct. 2034 (1986), that the first amendment may, in certain circumstances, restrict a locality's authority to limit the franchising of cable television systems.

3 Section 15.1-307 is based on the parallel constitutional provision found in Art. VII, § 9 of the Constitution of Virginia (1971). The purposes of the constitutional restrictions on a municipality's ability to grant franchises are to allow the periodic review of the use of public property and to prevent public property from being permanently secured by franchise. See II A. Howard, Commentaries on the Constitution of Virginia 852 (1974). See also Town of Victoria v. Ice, Etc., Co., 134 Va. 124, 114 S.E. 89 (1922).


6 A "renewal" of a franchise upon the termination of an existing franchise under different contractual terms is generally considered to be an award of a new franchise and subject to the requirements of §§ 15.1-307 through 15.1-310. See 1982-1983 Report of the Attorney General at 115.

7 The Charter for the City of Harrisonburg was enacted by Ch. 712, 1952 Va. Acts 1174, and has been amended several times since its enactment.

8 Sections 533(e)(1) and 547 of the Act clearly indicate that municipal ownership of cable television systems is permissible.

COUNTIES, CITIES AND TOWNS - TRANSPORTATION DISTRICT ACT OF 1964.
AMENDMENT TO § 15.1-1364 PROPOSED BY H.B. NO. 1533 NECESSARY TO CLARIFY PARTICIPATION BY JURISDICTIONS IN SELF-INSURANCE PLAN SET UP BY TRANSPORTATION DISTRICT.

February 28, 1987

The Honorable David G. Brickley
Member, House of Delegates

You ask whether a proposed amendment 1 to § 15.1-1364 of the Code of Virginia to define "liability policy" to include a self-insurance plan is necessary, considering certain facts detailed in your inquiry. The Northern Virginia Transportation District ("district")
plans to provide a commuter rail project for the Northern Virginia area. In so doing, the Northern Virginia Transportation Commission wishes to set up a self-insurance plan instead of purchasing liability insurance and questions whether, without amending § 15.1-1364 as described above, constituent jurisdictions may agree to pay for the self-insurance plan.

I. Liability Prior to 1986 Amendment to § 15.1-1364
Limited by Proprietary-Governmental Function Theories

Prior to July 1, 1986, a transportation district providing passenger rail services was liable only for its negligent acts or omissions, and those of its employees, committed in the conduct of any "proprietary" function. As to those negligent acts or omissions occurring in the performance of a governmental function, only the employees or agents of such districts could be held liable, and only for negligence committed in the performance of ministerial, rather than discretionary, acts. 

II. 1986 Amendment Removes Liability Limitation for District, Not Employees

After July 1, 1986, a transportation district providing passenger rail service could be held liable for any acts or omissions of its employees without regard to the proprietary-governmental distinction, subject to a limitation on recovery of $25,000.00, or the maximum amount of any liability policy maintained, per claimant. See § 8.01-195.3. The liability of the employee or agent for negligence remains unchanged. See 1986-1987 Report of the Attorney General at 141, 146 n.6.

III. Authority to Provide Self-Insurance Plan for Employee or Agent Negligence Exists

Section 15.1-1358, which was not affected by the 1986 amendments to the Transportation District Act of 1964, permits a district to purchase liability insurance for itself and its employees and agents and to provide liability protection for agents such as railroads and their employees as part of a contract for services. Instead of purchasing insurance, it is my understanding that the district proposes to set up a self-insurance plan pursuant to § 2.1-526.8:1. This statute authorizes a transportation district to join in the establishment of such a plan, subject to the concurrence of the Department of General Services, through its Division of Risk Management, and with the approval of the Governor, to cover its employees. Such a plan may also provide coverage for the district itself, but need not do so.

IV. Self-Insurance Plan Is Not "Liability Policy"

Given the precise language of § 8.01-195.3, if such a self-insurance plan called for the district to be liable for more than $25,000.00, it would be of no effect, since the language of the statute limits the amount recoverable by any claimant to $25,000.00 or the maximum limits of any liability policy maintained to insure against negligence or other torts. Clear legislative intent must be found before sovereign immunity is waived. 

V. Conclusion: Amendment to § 15.1-1364 Proposed by H.B. No. 1533
Necessary to Clarify Participation by Jurisdictions in Plan

Although the district has the authority to purchase a liability policy to protect its employees within any policy limit, and an "insurance plan" is being substituted for such a
policy, the proposed amendment clarifies the authority of the district to pay claims in excess of $25,000.00 per claimant pursuant to the "insurance plan." Based on the above, the proposed legislation forecloses any question concerning the authority of either the district or its constituent jurisdictions to participate in the self-insurance plan envisioned and the extent of their tort liability.

1 See H.B. No. 1533 (1987 Sess.).
3 The term "employee" included agents such as Amtrak and other railroads.
4 See § 2.1-526.8:1, which envisions the plan being composed of purchased insurance, self-insurance or a combination thereof.
5 Arguably, the legislation is not necessary because employee liability, as noted in Part II, supra, is not affected by § 15.1-1364 or the Virginia Tort Claims Act.

COUNTIES, CITIES AND TOWNS – TRANSPORTATION DISTRICT ACT OF 1964. CIVIL REMEDIES AND PROCEDURE – ACTIONS. CONSTITUTION OF VIRGINIA – LOCAL GOVERNMENT – DEBT. SECTIONS 15.1-1359 AND 15.1-1364 AUTHORIZE LOCALITIES TO CONTRACT WITH TRANSPORTATION DISTRICT SUBJECT TO TORT CLAIMS ACT TO PAY PROPORTIONATE SHARES OF TORT CLAIMS AGAINST DISTRICT.

July 14, 1986

Mr. John H. Foote
County Attorney for Prince William County

You ask four questions regarding liability and funding with respect to the operation of a commuter rail demonstration project under the auspices of the Northern Virginia Transportation Commission ("NVTC"). You explain that, initially, the Northern Virginia counties and cities involved in the project plan to support the operation of a single train, Amtrak's Virginian, between Fredericksburg and Washington, D.C., over tracks owned by the Richmond, Fredericksburg and Potomac Railroad Company ("RF&P"). Thereafter, the intention is to conduct a two-year, eight-train pilot program on two lines: the Fredericksburg line and a line from Manassas to Washington, D.C. You explain further that the inability of the localities to obtain insurance satisfactory to Amtrak and RF&P has impeded the initiation of this effort.

I. Contract Wherein NVTC Indemnifies Amtrak and RF&P for Tort Claims Arising out of Operation of Commuter Rail Project Permissible Under Certain Conditions

You ask first whether NVTC may enter a contract with Amtrak and RF&P agreeing to indemnify the latter two entities for tort claims arising out of their operation of commuter rail service on behalf of NVTC.

A. NVTC Has Authority to Enter into Certain Indemnification Agreements

Section 15.1-1358(d) of the Transportation District Act of 1964, as amended, Ch. 32 of Title 15.1, § 15.1-1342 et seq. of the Code of Virginia, provides that transportation district commissions may enter into all contracts or agreements necessary or incidental to the performance of their duties and to the execution of the powers granted under the Transportation District Act. See also § 15.1-1358(l), which provides that a commission may perform any acts authorized by Ch. 32 through its own officers, agents and employees, or by contracts with any persons.

The foregoing provisions must be read in conjunction with § 15.1-1372, which mandates that Ch. 32 be liberally construed to effect its ends. Reading these provisions as a
whole, I conclude that NVTC has the authority to enter the type of indemnification agreement at issue, absent limiting factors discussed below.

B. Governmental Entity's Entry into Indemnification Agreements Is Limited

1. Indemnification Agreements May Constitute Impermissible Waiver of Sovereign Immunity

This Office has consistently opined that indemnification agreements constitute an impermissible waiver of sovereign immunity absent specific statutory authority for such action. See Reports of the Attorney General: 1979-1980 at 11, 1976-1977 at 51; 1957-1958 at 49. I am aware of no reason why these Opinions would not apply to transportation district commissions, including NVTC. Accordingly, it is my opinion that NVTC cannot agree to indemnify Amtrak and RF&P if such an agreement would constitute a waiver of sovereign immunity, unless specific statutory authority exists for that waiver.

The question presented is, therefore, to what extent does NVTC possess sovereign immunity from tort liability. My analysis of this issue assumes that the indemnification agreement has not been entered into prior to the effective date of the amendments to the Virginia Tort Claims Act and the Transportation District Act, Ch. 584, 1986 Va. Acts 1452 (the "1986 Amendments").

2. NVTC's Sovereign Immunity Partially Abrogated by 1986 Amendments

In Fairfax County v. County Executive, 210 Va. 253, 169 S.E.2d 556 (1969), the Supreme Court of Virginia found that the Washington Metropolitan Area Transit Authority's power to plan, develop and finance improved transit facilities was a governmental function for public purposes. In so holding, the Court cited cases in other jurisdictions recognizing that authorities created to establish and maintain subway or street railway projects in large metropolitan areas exercise a governmental function.²

Applying the Fairfax County decision to the case at hand, I find that NVTC's operation of a commuter rail system constitutes a governmental function. Accordingly, common law principles of sovereign immunity apply to NVTC for its exercise of governmental functions unless that immunity is waived by the General Assembly.³

The determination of the extent of NVTC's sovereign immunity from tort liability within Virginia also requires an analysis of the Tort Claims Act and § 15.1-1371 of the Transportation District Act. Section 15.1-1371, as amended by the 1986 Amendments, provides:

Every district shall be liable for its torts and those of its officers, employees and agents committed in the conduct of any proprietary function but shall not be liable for any torts occurring in the performance of a governmental function. However, the provisions of this section shall not apply to a transportation district subject to the provisions of the Virginia Tort Claims Act [citation omitted].

The Tort Claims Act, as amended by the 1986 Amendments, provides, in pertinent part, that a transportation district which has entered into an agreement with any firm or corporation as an agent to provide passenger rail services within such district, and to which NVTC is a party, shall be liable, to the extent of $25,000, or the maximum limits of a liability insurance policy, for claims accruing on losses caused by the tortious conduct of its employees.⁴ See § 8.01-195.3.

Under the facts presented, it appears NVTC will enter a contract with Amtrak and RF&P for the provision of passenger rail service. Accordingly, I find that NVTC is a transportation district covered by the 1986 Amendments to the Tort Claims Act and,
thereby, falls within the exception under § 15.1-1371 and is not controlled by the liability provisions of that section. Consequently, NVTC would be immune from tort liability arising out of its operation of a commuter rail system except to the limited $25,000 amount per claim, per occurrence provided for in the Tort Claims Act in the absence of a liability insurance policy providing greater coverage. It is my opinion, therefore, that NVTC may, to the extent of the 1986 legislative abrogation of its immunity from tort liability, enter an agreement indemnifying Amtrak and RF&P for tortious acts of their employees occurring within Virginia with respect to the governmental function of operating the commuter rail project.

3. Sovereign Immunity May Not Bar Indemnification in D.C.

You state that you believe that there would be no sovereign immunity to waive in the District of Columbia on the basis of Biscoe v. Arlington County, 738 F.2d 1352 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 909 (1985). You suggest, therefore, that NVTC could provide for open-ended indemnification of Amtrak and RF&P within the District of Columbia.

Assuming, without deciding, that no sovereign immunity would apply to NVTC's operation of a commuter rail system in the District of Columbia, the principle that indemnification agreements constitute an impermissible waiver of sovereign immunity would not limit NVTC's authority to so indemnify Amtrak and RF&P within that jurisdiction. Nevertheless, this Office has previously opined that open-ended indemnification agreements are disfavored. See 1979-1980 Report of the Attorney General, supra. I am in accord with this prior Opinion. Thus, I suggest that any indemnification of these entities by NVTC within the District of Columbia should be limited to a stated amount.

II. Participating Localities May Assume Contractual Liability for Tort Claims Against NVTC

You next ask whether the participating jurisdictions may enter into an agreement with NVTC to pay it a proportionate share of any losses which may be incurred under a commuter rail master agreement. The effect of the contemplated agreement would be to obligate the localities to appropriate money to a fund from which tort claims against NVTC would be paid. As noted above, a locality has no authority to assume the tort liability of another entity by contract, or to otherwise waive its sovereign immunity in the absence of a statute authorizing such a waiver. See Reports of the Attorney General: 1984-1985 at 108; 1979-1980 at 11; 1975-1976 at 318; 1971-1972 at 102; 1969-1970 at 70; compare 1976-1977 Report of the Attorney General at 51 (Identical rule for the State and its agencies).

There are two statutes in the Act which address the authority of local governments to assume the obligations of transportation districts. The first, § 15.1-1359, authorizes counties and cities to contract with transportation districts to assume the transportation district's expenses and obligations. Any such contract, however, must specify the annual maximum obligation of the contracting locality or provide a formula by which the locality's obligation is determined. Section 15.1-1359 further requires that the contracting locality be authorized to do everything necessary or proper to carry out and perform its obligation under the contract. It is my opinion that § 15.1-1359, standing alone, does not authorize the localities to assume a portion of NVTC's tort liability.

The second statute, § 15.1-1364(a), as amended in 1986, provides as follows:

Except for claims cognizable under the Virginia Tort Claims Act, Article 18.1 (§ 8.01-195.1 et seq.) of Chapter 3 of Title 8.01, no pecuniary liability of any kind shall be imposed on the Commonwealth or upon any county or city constituting any part of any transportation district because of any act, agreement, contract, tort, malfeasance, misfeasance, or nonfeasance, by or on the part of the commission of such transportation district, or any member of such commission, or its agents, servants and employees, except as other-
wise provided in this chapter with reference to contracts and agreements between the commission or interstate agency and any county or city.

As noted above, the 1986 amendments to the Virginia Tort Claims Act provided for a limited waiver of the immunity of transportation districts from tort claims. See §§ 8.01-195.2, 8.01-195.3. There being no other statute of which I am aware which concerns the waiver of immunity from tort claims for transportation districts or their component jurisdictions, the question presented is whether §§ 15.1-1359 and 15.1-1364 together authorize the localities to assume by contract a portion of NVTC's potential tort liability.

The primary object of interpretation of any statute is to give effect to the legislative intent behind the statute's enactment. See Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1976); 1984-1985 Report of the Attorney General at 13, 228. Considering all the statutory changes made by Ch. 584, 1986 Va. Acts 1452, to §§ 8.01-195.2, 8.01-195.3, 15.1-1364 and 15.1-1371, it is my opinion that the 1986 amendments were intended to authorize the participating localities to contract pursuant to § 15.1-1359 with the commission to assume liability for tort claims against NVTC to the extent such claims are cognizable under the Virginia Tort Claims Act. The participating localities, therefore, may contract with NVTC pursuant to § 15.1-1359 to assume proportionate shares of any losses from tort claims which may be incurred under a commuter rail master agreement subject to the limitations of the Tort Claims Act. As noted earlier, § 15.1-1359 also requires that the annual maximum obligation of the contracting localities be specified or that the contract provide a formula to determine the contracting localities' obligation under the contract.

III. Participating Jurisdictions May Budget and Appropriate Funds as Needed to Satisfy Contractual Obligation

You next ask whether the participating localities must budget and appropriate their entire annual shares of potential liability up to the contractual limits or whether the necessary amounts could be budgeted and appropriated as needed. This inquiry arises from the nature of the contractual obligation undertaken by the localities; that is, the maximum potential liability of each locality will be set by contract, but the actual costs of fulfilling their obligations each year are subject to claims being liquidated against NVTC.

Statutory and charter provisions require that localities keep detailed accounts for each item of appropriation showing the appropriation made, the amount drawn on the appropriation, the unpaid obligations charged against the appropriation and the unencumbered balance in the appropriation account. See §§ 15.1-605 (county executive form of government, Prince William County); 15.1-640 (county manager form, Arlington County); 15.1-766 (urban county executive form, Fairfax County). See also Ch. 536, 1950 Va. Acts 1038, as amended by Ch. 512, 1981 Va. Acts 782 (charter for the City of Alexandria); Ch. 481, 1942 Va. Acts 933 (charter for the City of Fredericksburg). Statutory and charter provisions require that localities keep detailed accounts for each item of appropriation showing the appropriation made, the amount drawn on the appropriation, the unpaid obligations charged against the appropriation and the unencumbered balance in the appropriation account. See §§ 15.1-605 (county executive form of government, Prince William County); 15.1-640 (county manager form, Arlington County); 15.1-766 (urban county executive form, Fairfax County). See also Ch. 536, 1950 Va. Acts 1038, as amended by Ch. 512, 1981 Va. Acts 782 (charter for the City of Alexandria); Ch. 481, 1942 Va. Acts 933 (charter for the City of Fredericksburg).

Counties, cities and towns are required to prepare and approve an annual budget for informative and fiscal planning purposes under § 15.1-160. In no event, however, is the approval of such a budget deemed to be an appropriation. See § 15.1-162. Section 15.1-162 further provides that no money shall be paid out unless an annual or periodic appropriation has been made. See also § 15.1-549. Section 15.1-162.1 sets out a procedure by which budget items specified pursuant to § 15.1-161 may be amended to increase the aggregate amount to be appropriated during the current fiscal year. Actual disbursements of money must be made pursuant to an appropriation for that expenditure by the local governing body. See § 15.1-162. See generally Reports of the Attorney General: 1982-1983 at 16; 1980-1981 at 9. The question, therefore, is whether these statutorily mandated budgeting and accounting procedures require the participating localities to budget and appropriate funds for a contractual obligation, the exact amount of which is subject to claims being liquidated against NVTC.
You suggest that because of the contractual nature of the obligation, the maximum obligation of each locality must be budgeted and appropriated annually. You advise that the localities contemplate annual appropriations and payments to NVTC of a fixed sum to constitute a self-insurance reserve. The remaining portion of the localities' obligation would be budgeted and appropriated but not paid over to NVTC unless and until needed.

In my opinion, the statutory budgetary and accounting procedures reviewed above do not require the annual budgeting and appropriation of sufficient funds to satisfy the maximum contractual obligation. Sections 15.1-160 through 15.1-162 require only that the budget reflect contemplated expenditures related to any given budget item. If the actual costs of satisfying the contractual obligation exceed the amount budgeted and appropriated, the local governing body may amend its budget and make additional appropriations to satisfy the obligation. It is my opinion, therefore, that the participating localities may budget and appropriate the funds necessary to satisfy the contractual obligation as they are needed. In the alternative, the localities may budget and appropriate the funds to satisfy their maximum contractual obligation at one time and thereafter make disbursements from the appropriations account as needed. I suggest, however, that the contract provide that the failure of a locality to budget and appropriate its maximum obligation under the contract does not operate to terminate the contract for nonappropriation.

iv. Contractual Obligation Would Not Establish Constitutionally Restricted Debt if Conditioned on Annual Appropriations

Your final question is whether the agreement between the participating localities and NVTC would obligate the localities to pay sums in future fiscal years and thus violate the constitutional restrictions on local debt set forth in Art. VII, § 10 of the Constitution of Virginia (1971). You suggest that no "debt" in the constitutional sense would be created if the contract contained a provision permitting its termination at the end of each fiscal year should a locality determine not to appropriate funds to satisfy the contractual obligation.

Contractual provisions which purport to bind a locality to a fixed obligation to make payments in future years are generally considered to be debts subject to the constitutional restrictions of Art. VII, § 10. See Reports of the Attorney General: 1984-1985 at 96, 86; 1982-1983 at 149; 1981-1982 at 48. The contractual obligation in this instance, however, will be conditioned upon annual appropriations by the local governing body. Prior Opinions of this Office have consistently held that contracts entered into in one fiscal year and requiring payments in future years do not establish a constitutionally restricted debt if conditioned on annual appropriations because no revenues beyond the current fiscal year are obligated. See Reports of the Attorney General: 1985-1986 at 86, 70; 1982-1983, supra. 1

The contractual provision permitting termination for nonappropriation permits the exercise of the local governing body's discretion each fiscal year. In that way, future governing bodies are not bound by the contractual agreements of their predecessors. Accordingly, it is my opinion that the contemplated agreement between the participating localities and NVTC would not be subject to the constitutional restrictions on debt provided the agreement is conditioned on annual appropriations by the local governing bodies.

1 There is an apparent misunderstanding as to the scope of the indemnification to be provided, however. You state that the indemnification would cover only the actual operation of the commuter rail because the Virginia Department of Highways and Transportation ("VDH&T") has agreed to insure parking lots and train platforms. On the other hand, officials of VDH&T have informed me that the agency has agreed to insure parking lots connected with the commuter rail service but not the train platforms.

2 See also Tunnel District v. Beecher, 202 Va. 452, 117 S.E.2d 685 (1961), wherein the Supreme Court of Virginia ruled that the operation of a shuttle bus system by the tunnel
district constituted a governmental function. But cf. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S.Ct. 1005 (1985), rejecting the "traditional governmental versus proprietary test" for determination of state immunity from federal regulation under the Fair Labor Standards Act. In Garcia, the Court did not decide whether the transit authority's functions constituted a traditional governmental function. Rather, the Court noted in Garcia, 105 S.Ct. at 1007 n.1, that the lower court concluded municipal ownership and operation of a mass transit system is a traditional governmental function and then cited the following authority to the contrary: Kramer v. New Castle Area Transit Authority, 87 F.2d 308 (3rd Cir. 1982), cert. denied, 489 U.S. 1146 (1983); Alewine v. City Council of Augusta, Ga., 699 F.2d 1060 (11th Cir. 1983) cert. denied, 105 S.Ct. 1391 (1985); Dove v. Chattanooga Area Reg. Transp. Auth. (CARTA), 701 F.2d 50 (6th Cir. 1983); Francis v. City of Tallahassee, 424 So.2d 61 (Fla. App. 1982).

Transportation districts are statutorily designated as bodies "corporate and politic." Section 15.1-1346. Such terminology normally refers to a political subdivision. See 1979-1980 Report of the Attorney General at 5. The Supreme Court of Virginia has found that the doctrine of sovereign immunity extends to political subdivisions in their exercise of governmental, rather than proprietary, functions. See Freeman v. City of Norfolk, 21 Va. 57, 266 S.E.2d 885 (1980); Tunnel District v. Beecher, 202 Va. 452, 117 S.E.2d 685 (1961).

Section 8.01-195.2 defines "employee" to include "any officer, employee or agent of any ... transportation district...." (Emphasis added.)

I find that the language of the 1986 Amendments clearly extends the Tort Claims Act to certain transportation districts as defined therein without regard to the geographical boundaries of such districts. See § 8.01-195.2 defining "transportation district." Because of the clarity of the language applicable to transportation districts regardless of the geographic boundaries wherein the passenger rail service is provided, I do not discuss further the differing views on this matter set forth in your request.

In your request, you assert the view that the Tort Claims Act would apply not only to NVTC but also to Amtrak, RF&P, and their employees. It is my opinion that an examination of the language of the Tort Claims Act does not support this view.

Section 8.01-195.2 defines transportation districts covered by the Act to include those districts which have entered an agreement with a firm as an agent to provide passenger rail service within such districts, provided NVTC is a party to the agreement. Section 8.01-195.3 creates liability for such districts up to the limits stated therein for loss caused by the negligence of any employee. The applicable language provides that "any transportation district shall be liable for claims for money only accruing on or after July 1, 1986, on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment... ." Section 8.01-195.3 (emphasis added). The liability addressed is only that of the transportation district, although its liability is based on the act of an employee, which term includes employees or agents of a transportation district. See § 8.01-195.2. See also attached orders of circuit courts in the Commonwealth and 1985-1986 Report of the Attorney General at 180, concluding that the Tort Claims Act does not abolish the common law principles of sovereign immunity for employees of the Commonwealth.

Based on the foregoing, I conclude that while the Tort Claims Act abolishes some sovereign immunity protections for transportation districts providing commuter rail service, it does not affect the tort liability of RF&P, Amtrak, or their employees. The liability of these entities and their employees entails a consideration of whether, and to what extent, the sovereign immunity of a governmental body flows to its agents and the agents' employees. Because these considerations are outside the scope of your indemnification inquiry, they are not addressed.

Although NVTC may enter such an indemnification agreement, § 56-119 would prohibit Amtrak or RF&P from entering such an agreement if it purports to limit the companies' liability as a common carrier. Section 56-119 invalidates any contract provision which attempts to exempt a transportation company from liability when acting as a common carrier. On the other hand, case law has established that such provisions, including indemnification clauses, are not prohibited where a transportation company occupies a private status role. See Southern States v. N. & W. Railway, 219 Va. 191,
247 S.E.2d 461 (1978) (railroad acted as a common carrier [shipper-carrier] at the time of injury to an employee of Southern States who attempted to open the door of a boxcar he had been assigned to unload and, therefore, the prohibitions of § 56-119 applied); C. and O. Ry. Co. v. Telephone Co., 216 Va. 858, 224 S.E.2d 317 (1976) (railroad was deemed to occupy a private status not governed by § 56-119 prohibitions in granting the telephone company right-of-way to locate its cables on railroad property). Under § 56-316, a transportation company may be removed from the prohibitions of § 56-119 insofar as limitations of liability are included in a published tariff accepted by the State Corporation Commission. See Peninsula Transit Corp. v. Jacoby, 181 Va. 697, 26 S.E.2d 97 (1943). I am not aware of any limitations applicable to RF&P or Amtrak pursuant to § 56-316. From the facts presented, it appears that the prohibitions of § 56-119 would not apply to RF&P because it merely permits use by NVTC of its railway tracks; no contract is made for the carriage of passengers or property. Amtrak, however, appears to come within the prohibitions of § 56-119 because its contract involves the provision and operation of a rail passenger car, a common carrier, rather than private activity. Because the effect of § 56-119 is tangential to your indemnification question, I have not considered the impact, if any, that federal regulation of railroad tariffs may have on § 56-119. See, e.g., policy of the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

In Biscoe, the court held that the District of Columbia was not required to honor a claim of sovereign immunity by a Virginia county in an action against that county based on a negligent high-speed police chase into the District of Columbia.

It certainly is plausible that under a different set of facts and in light of the Virginia legislature's specific and limited abrogation of such districts' immunity from tort liability in the Tort Claims Act, the rule as to the application of sovereign immunity in the District of Columbia for a Virginia transportation district would vary from the holding in Biscoe.

A prior Opinion of this Office held that a waiver of sovereign immunity to suit in tort actions cannot be implied from general statutory language or implied from merely procedural provisions. See 1980-1981 Report of the Attorney General at 317. I find the amended language of § 15.1-1364 to be sufficiently definite so as to permit a partial waiver of sovereign immunity of the participating localities pursuant to contract. As noted earlier, it is assumed that claims arising from the operation of the commuter rail service within the District of Columbia do not involve the waiver of sovereign immunity.

The charters for both Alexandria and Fredericksburg have been amended many times since their original enactment. Chapter 6 of the Alexandria charter sets out certain requirements regarding annual budgets and appropriations. Section 24(b) of the Fredericksburg charter sets out the same type of requirements, though in less detail.


COUNTIES, CITIES AND TOWNS - VIRGINIA WATER AND SEWER AUTHORITIES ACT. HIGHWAYS, BRIDGES AND FERRIES - COMMONWEALTH TRANSPORTATION BOARD, ETC. - EMINENT DOMAIN AND DAMAGES. AUTHORITY TO USE "QUICK TAKE" METHOD OF CONDEMNATION.

February 9, 1987

Mr. Joseph L. Howard, Jr.
County Attorney for Washington County

You ask whether the grant of the power of eminent domain to water and sewer authorities in § 15.1-1250(f) of the Code of Virginia includes the authority to take possession of and title to property before or during condemnation, file payments into court or certificates in lieu of payments, and proceed in accordance with the provisions of § 33.1-119 et seq.
I. Applicable Statutes

Section 15.1-1250(f), a portion of the Virginia Water and Sewer Authorities Act, §§ 15.1-1239 through 15.1-1270, provides that an authority is authorized to acquire, purchase, lease as lessee, construct, reconstruct, improve, extend, operate and maintain any water system, or sewer system, or sewage disposal system, or a garbage and refuse collection and disposal system or any combination of such systems within, without, or partly within and partly without one or more of the political subdivision or subdivisions by action of whose governing body or governing bodies the authority was created, or who may after February 27, 1962, join such authority; and to acquire by gift, purchase or the exercise of the right of eminent domain lands or rights in land or water rights in connection therewith, within, without, or partly within and partly without one or more of the political subdivision or subdivisions by action of whose governing body or governing bodies the authority was created, or who may after February 27, 1962, join such authority; and to sell, lease as lessor, transfer or dispose of all or any part of any property, real, personal or mixed, or interest therein at any time acquired by it; provided, that in the exercise of the right of eminent domain the provisions of § 25-233 shall apply. In addition, the authority in any county or city to which §§ 15.1-335 and 15.1-340 are applicable shall have the same power of eminent domain and shall follow the same procedure therefore as provided in §§ 15.1-335 and 15.1-340 ... and provided, further, that no property or any interest or estate therein owned by any county, city, town or other political subdivision of the Commonwealth shall be acquired by the exercise of the power of eminent domain without the consent of the governing body of such county, city, town or political subdivision; and except as otherwise herein provided, each authority is hereby vested with the same authority to exercise the power of eminent domain as is vested in the State Highway and Transportation Commissioner of Virginia .... [Emphasis added.]

The condemnation procedure to which § 15.1-1250(f) refers is found in § 33.1-119 et seq. and is commonly known as the "quick take" or "right of entry" method of condemnation. See Reports of the Attorney General: 1984-1985 at 376; 1974-1975 at 172.

II. General Principles Governing Interpretation of Condemnation Statutes

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, 776-77, 76 S.E. 921, 925 (1913). Statutes authorizing condemnation are to be strictly construed and the power exercised in the manner provided by law. See Dillon v. Davis, 201 Va. 514, 519, 112 S.E.2d 137, 141 (1960); see also Reports of the Attorney General: 1984-1985 at 129, 131; 1972-1973 at 186, 187. Where the legislature has plainly delegated the power of eminent domain to a subordinate agency, however, the legitimate scope of that power cannot be curtailed by construction. See N. & W. R. Co. v. Lynch. C. Mills, 106 Va. 376, 378, 56 S.E. 146 (1907); see also 1982-1983 Report of the Attorney General at 35, 61.

III. Section 15.1-1250(f) Confers upon Water and Sewer Authorities the Authority to Use "Quick Take" Method of Condemnation

It is a fundamental rule of statutory construction that words in a statute should be given their usual, commonly understood meaning. See 1984-1985 Report of the Attorney General at 14, 15, and 449, 450. Section 15.1-1250(f) plainly confers "the same authority to exercise the power of eminent domain as is vested in the State Highway and Transportation Commissioner of Virginia." Section 33.1-119 et seq. authorizes the Commissioner to use the "quick take" method of condemnation. Accordingly, it is my opinion that § 15.1-1250(f) confers the authority to use the "quick take" method of condemnation provided in § 33.1-119 et seq. upon water and sewer authorities.
The emphasized portion of § 15.1-1250(f) was first enacted by Ch. 554, 1954 Va. Acts 643, 644. Similar grants of the power of eminent domain as are vested in the State Highway and Transportation Commissioner appear in other statutes. See, e.g., § 15.1-238(e) (grant of power to counties for certain purposes); § 15.1-898 (grant of power to those municipal corporations which have been granted the powers set out in Ch. 18 of Title 15.1, §§ 15.1-837 through 15.1-907, for certain purposes); § 15.1-1628 (grant of power under the Electric Authorities Act, §§ 15.1-1603 through 15.1-1634).

Notably, §§ 15.1-238(e) and 15.1-898 authorize counties and some cities and towns to use the "quick take" method of condemnation in relation to the installation and construction of sewerage disposal systems and water distribution systems. See 1968-1969 Report of the Attorney General at 94.

COURTS NOT OF RECORD - CIVIL PROCEDURE, VENUE, AND JURISDICTION. CIVIL REMEDIES AND PROCEDURE - LIMITATIONS OF ACTIONS - EVIDENCE - COMPELLING ATTENDANCE OF WITNESSES, ETC. GENERAL DISTRICT COURT NOT AUTHORIZED TO COMPEL ATTENDANCE OF OUT-OF-STATE INMATE FOR CIVIL PROCEEDING; STATUTE OF LIMITATIONS NOT TOLLED BY INCARCERATION.

April 15, 1987

The Honorable Fred E. Martin, Jr.
Judge, Norfolk General District Court

You ask whether a general district court judge has the authority to order the transportation of a North Carolina inmate to Virginia to prosecute the inmate's civil claim in the general district court in Virginia. You also ask whether the statute of limitations for a civil action is tolled by incarceration of the plaintiff.

I. Facts

An inmate incarcerated by the North Carolina Department of Corrections has filed a warrant in debt in the General District Court of the City of Norfolk, claiming that he is entitled to damages for personal injuries suffered on the defendant's premises. In a letter accompanying his warrant in debt, the inmate has requested the court to order that he be transported to Virginia to litigate his claim.

II. General District Court Has No Authority to Compel Attendance of Out-of-State Inmate for Civil Proceeding

Section 16.1-77 of the Code of Virginia limits the jurisdiction of a general district court to the territory it serves. The judge of a general district court may exercise only the jurisdiction expressly conferred upon him. See Fuller v. Edwards, 180 Va. 191, 195, 22 S.E.2d 26, 28 (1942). Unless specific statutory authority exists for a general district court judge to exercise civil jurisdiction over an individual incarcerated in a foreign state for the purpose of returning him to Virginia, therefore, the court may not do so.

Section 8.01-410 authorizes a circuit court to obtain the attendance of inmates incarcerated in Virginia at a civil trial convened in Virginia. The application of this statute is, however, limited both to a circuit court and to an inmate confined in a Virginia correctional or penal institution. Section 19.2-269.1 is the parallel provision applying to inmate witnesses in criminal trials, and it is similarly limited in its application. The Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings, Art. 2, Ch. 16 of Title 19.2 (§ 19.2-272 et seq.), and §§ 53.1-206 and 53.1-208, providing for the surrender of individuals incarcerated in Virginia to foreign jurisdictions, either for prosecution or as witnesses, are also applicable only to criminal proceedings and require authorization by a circuit court.

I find no Virginia statute which permits the transportation of an out-of-State inmate for civil matters in a general district court. It is my opinion, therefore, that a gen-
eral district court judge does not have the authority to order that an out-of-State inmate be brought to Virginia to prosecute the inmate's civil claim.

III. Statute of Limitations Not Tolled by Plaintiff's Incarceration

Section 8.01-229 lists the conditions under which the statute of limitations in civil matters is tolled in Virginia. This statute provides that the only circumstance where an applicable statute of limitations does not run against a convict is when he becomes entitled to bring an action against his committee. Clearly this exemption is inapplicable to your inquiry. Additionally, it has been held that the statute of limitations is not tolled by a plaintiff's incarceration. Almond v. Kent, 459 F.2d 200, 202-03 (4th Cir. 1972).

IV. Conclusion

Based on the above, it is my opinion that a general district court judge may not order a civil plaintiff who is incarcerated in a foreign jurisdiction transported from that jurisdiction to Virginia to litigate the inmate's civil claim. I am further of the opinion that Virginia's statute of limitations is not tolled by the inmate-plaintiff's incarceration.

COURTS NOT OF RECORD - DISTRICT COURTS. MODIFIED FORMS SHOULD NOT BE USED AS SUBSTITUTE FOR FORMS APPROVED BY COMMITTEE.

November 21, 1986

The Honorable Andrew J. Winston
Sheriff for the City of Richmond

You ask whether the Committee on District Courts (the "Committee") has the authority to prescribe the forms which must be used for the commitment or release of an accused from local jails. In particular, you wish to know whether an arrest warrant and the form setting conditions of release, recognizance, and bond, both of which have been modified to include additional information required on the Committee forms, are acceptable substitutes for two Committee-approved forms to be used in cases where an accused is to be committed to or released from jail. The Committee forms are the "Commitment to Jail" Form DC-352-3/80, and the "Release" Form DC-353 3/80.

I. Applicable Statute

Section 16.1-69.51 of the Code of Virginia provides, in pertinent part, as follows:

Notwithstanding any other provision of law, the Committee . . . after consultation with the Executive Secretary of the Supreme Court, may determine the form and character of the records of the district courts and magistrates.

[Emphasis added.]

II. Magistrates Must Use Committee-Approved Forms for Committing or Releasing an Accused from Jail

Section 16.1-69.51 authorizes the Committee to determine both the form and character of records used by district courts and magistrates. This statute is clear, unambiguous in its terms, and without exception. The Committee has exercised the authority given it under § 16.1-69.51 by the preparation and distribution of the "Commitment to Jail" Form DC-352-3/80 and the "Release" Form DC-353 3/80.

This Office has, in an Opinion to you dated July 31, 1986, found in this Report at 158, concluded that in the absence of a form containing the information required to be provided on forms approved by the Committee, magistrates must use forms approved by the Committee. This conclusion was based upon an earlier Opinion which held that a local practice of modifying a copy of a judgment to serve as a writ of fieri facias was
legally insufficient where the modified judgment does not contain all the information required on the Committee's form approved for use as a writ of fieri facias. An earlier Opinion was cited as authority for the proposition that the use of an approved form was not mandatory if a substituted form contained all the "necessary information." See 1981-1982 Report of the Attorney General at 63. That earlier Opinion approved the use of a modified civil warrant in debt as an abstract of judgment. The focus of these earlier Opinions was on the content of the form and not upon the form itself. For that reason, I do not construe these Opinions as controlling your present inquiry. To the extent that these prior Opinions may be construed to permit the use of forms other than those approved by the Committee, however, they are hereby overruled.

Although the modified forms forwarded with your letter require the same information required by the forms approved by the Committee, a comparison of the forms approved by the Committee with the modified forms reveals them to be substantially different in format. This alone frustrates the uniformity that § 16.1-69.51 was designed to attain.

III. Conclusion

Because of the plain wording of § 16.1-69.51, I am of the opinion that the modified forms should not be used as a substitute for the forms approved by the Committee.

COURTS NOT OF RECORD – DISTRICT COURTS. USE BY MAGISTRATES OF JAIL COMMITMENT CARD APPROVED BY COMMITTEE ON DISTRICT COURTS.

July 31, 1986

The Honorable Andrew J. Winston
Sheriff, Richmond City Jail

This is in reply to your request for my opinion as to whether an arrest warrant on which a magistrate has noted and initialed the amount of bond is a sufficient document to commit and hold a person in jail or whether the magistrate must instead issue a jail commitment card and retain possession of the warrant.

I. Applicable Statute

Section 16.1-69.51 of the Code of Virginia provides, in pertinent part, as follows:

Notwithstanding any other provision of law, the Committee on District Courts, after consultation with the Executive Secretary of the Supreme Court, may determine the form and character of the records of the district courts and magistrates. [Emphasis added.]

II. Magistrates Committing Accused to Jail Must Use Jail Commitment Card in Absence of Another Form Requiring Same Information

Section 16.1-69.51 clearly authorizes the Committee on District Courts (the "Committee") to determine both the form and character of records of magistrates. Documents which do not conform to the form approved by the Committee are not valid unless they contain all the elements of information required by the prescribed form. See 1983-1984 Report of the Attorney General at 120.

The Committee has, in fact, approved a form to be used by magistrates when committing an accused to jail. The commitment card approved by the Committee requires that a magistrate fill in detailed information respecting the accused. This information would not normally be noted by a magistrate on the arrest warrant and, therefore, the warrant would not generally serve as an adequate substitute for the commitment card.
III. Conclusion

Based on the above, I am of the opinion that, in the absence of another form containing the information required by the commitment card, magistrates must use the jail commitment card approved by the Committee.

COURTS NOT OF RECORD - JUVENILE AND DOMESTIC RELATIONS COURTS - ADJUDICATION - TIME LIMITATION. APPLICATION TO PROCEEDINGS IN JUVENILE COURT ONLY.

March 30, 1987

The Honorable James W. Flippin
Chief Judge, Twenty-Third Judicial District

You ask whether the time limitations in § 16.1-277.1 of the Code of Virginia are applicable to circuit court proceedings. You also ask how § 16.1-277.1 would affect the customary "de novo" hearing before a circuit court if the statute is applicable to circuit court proceedings.

I. Applicable Statute

Section 16.1-277.1 provides:

A. When a child is held continuously in secure detention, he shall be released from confinement if there is no adjudicatory or transfer hearing conducted by the court for the matters upon which he was detained within twenty days from the date he was first detained.

B. If a child is not held in secure detention or is released from same after having been confined, an adjudicatory or transfer hearing on the matters charged in the petition or petitions issued against him shall be conducted within 120 days from the date the petition or petitions are filed.

C. When a child is held in secure detention after the completion of his adjudicatory hearing or is detained when the juvenile court has retained jurisdiction as a result of a transfer hearing, he shall be released from such detention if the disposition hearing is not completed within thirty days from the date of the adjudicatory or transfer hearing.

D. The time limitations provided for in this section may be extended by the court for a reasonable period of time based upon good cause shown, provided that the basis for such extension is recorded in writing and filed among the papers of the proceedings.

II. Section 16.1-277.1 Permits Detention of Juveniles in Certain Circumstances

Section 16.1-241(A)(1) provides, in part, that a juvenile and domestic relations district court shall have exclusive original jurisdiction over all cases involving control or disposition of a child who is alleged to be abused, neglected, in need of services or delinquent. A child may be placed in secure detention upon the circumstances and conditions detailed in Art. 4, Ch. 11 of Title 16.1. A circuit court does not obtain jurisdiction over these cases unless the case is transferred to the circuit court pursuant to Art. 7, or an appeal is taken from a final judgment of the juvenile and domestic relations district court pursuant to Art. 11.

Section 16.1-277.1(A) requires that a child continuously held in secure detention be released from confinement if no adjudicatory or transfer hearing is conducted by "the
court" within twenty days from the date the child was first detained. "The court" is defined in § 16.1-228 as "the juvenile and domestic relations district court."

In § 16.1-277.1(B) no reference is made to a court. This section merely requires that, if a child is not held in secure detention or is released, "an adjudicatory or transfer hearing . . . shall be conducted within 120 days from the date the petition or petitions are filed." (Emphasis added.)

Section 16.1-277.1(C) governs situations when a child is held in secure detention after completion of his adjudicatory or transfer hearing (when the juvenile court has retained jurisdiction) and requires release from detention "if the disposition hearing is not completed within thirty days from the date of the adjudicatory or transfer hearing."

III. Statute Not Construed in Parts, but as Whole

It is a fundamental rule of statutory construction that a statute is passed as a whole and not in parts and is animated by one general purpose and intent. Each part or section, therefore, should be construed in connection with every other part to produce a harmonious whole. Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984); Rockingham Bureau v. Harrisonburg, 171 Va. 339, 344, 198 S.E.908, 910 (1938).

IV. Conclusion: Time Limitations Applicable Only to Juvenile Courts

Section 16.1-277.1(A) is, by definition, applicable only to juvenile and domestic relations district courts. The entire section deals with a common subject, and there is no language in § 16.1-277.1(B) or (C) which extends its application to proceedings in a circuit court. I am of the opinion, therefore, that the time limitations contained in § 16.1-277.1 are applicable only to proceedings in a juvenile and domestic relations district court.

Since I have reached this conclusion regarding your first question, a response to your second question is unnecessary.

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COURTS NOT OF RECORD - JUVENILE AND DOMESTIC RELATIONS COURTS - APPOINTMENT OF COUNSEL. GUARDIAN AD LITEM WHO REPRESENTS CHILD IN CONTESTED CUSTODY CASE ENTITLED TO RECEIVE REASONABLE COMPENSATION AND ACTUAL EXPENSES; IF ESTATE OF CHILD INADEQUATE TO PAY SUCH COMPENSATION, COMPENSATION MAY BE TAXED AS COSTS IN PROCEEDINGS.

October 27, 1986

The Honorable R. P. Zehler, Jr.
Judge, Sixteenth Judicial District

You ask what limitations, if any, there are upon the amount of the fee to be ordered by the court to be paid by parties to a contested custody case to compensate a guardian ad litem appointed to represent the child who is the subject of the proceeding.

I. Applicable Statute

In cases involving the contested custody of a child between parents, the appointment of a guardian ad litem to represent the child is governed by § 16.1-268(D) of the Code of Virginia, which provides:

In all other cases which in the discretion of the court require counsel or a guardian ad litem to represent the interests of the child or children or the parent or guardian, a discreet and competent attorney-at-law may be appointed by the court. However, in cases where the custody of a child or
children is the subject of controversy or requires determination and each of
the parents or other persons claiming a right to custody is represented by
counsel, the court shall not appoint counsel or a guardian ad litem to repre-
sent the interests of the child or children unless the court finds, at any stage
in the proceedings in a specific case, that the interests of the child or chil-
dren are not otherwise adequately represented.

II. Prior Opinion

An earlier Opinion of this Office holds that the fee of a guardian ad litem appointed
to represent a minor child pursuant to § 16.1-266(D) is to be determined in accordance
with § 8.01-9.1 See 1980-1981 Report of the Attorney General at 177. That Opinion fur-
ther holds that § 16.1-267, which establishes the maximum fee which may be assessed as
costs against a parent for legal services rendered to a minor by a court-appointed coun-
sel, was limited to an attorney acting in an attorney-client capacity and did not apply to
a guardian ad litem.2 The Opinion concluded that the fee of a guardian ad litem must be
determined by the court and should be reasonable and include actual expenses, in accord-
dance with the provisions of § 8.01-9. I concur in the earlier Opinion that the fee of a
guardian ad litem is not subject to the limitations contained in § 16.1-267 on fees for
court-appointed counsel.

III. Conclusion

I am, therefore, of the opinion that a guardian ad litem appointed to represent a
child who is the subject of a contested custody case should be provided reasonable com-
ensation and actual expenses, and if the estate of the minor child is inadequate for the
purposes of paying such compensation expenses, such compensation may be taxed as costs
in the proceeding.

1Section 8.01-9(A) states, in part, that "[w]hen, in any case, the court is satisfied that
the guardian ad litem has rendered substantial service in representing the interest of the
person under a disability, it may allow such guardian reasonable compensation therefor,
and his actual expenses, if any, to be paid out of the estate of such person provided, if
such estate is inadequate for the purpose of paying such compensation and expenses, all,
or any part thereof, may be taxed as costs in the proceeding."

2Section 16.1-267 was amended by Ch. 213, 1981 Va. Acts 242. The amendment, how-
ever, continued to refer only to the appointment of counsel and not to the appointment
of a guardian ad litem.

The Honorable Berton V. Kramer
Chief Judge, Seventeenth Judicial District

You ask several questions concerning the authority of a juvenile intake officer
under § 16.1-260(B) of the Code of Virginia. Specifically, you ask the following questions
related to civil custody actions in the juvenile and domestic relations district court:

1. Does § 16.1-260(B) create a mandatory duty on the part of the intake staff to
accept and file all civil custody requests as formal petitions to the court?
2. May the juvenile intake staff make a finding that the court lacks jurisdiction to hear a civil custody matter and thereby refuse an individual's request to file a petition for custody?

3. Since the issue of jurisdiction requires findings of fact and conclusions of law, must all petitions be presented for judicial action and determination?

I. Applicable Statute

Section 16.1-260(B) provides, in part:

When the court service unit of any court receives a complaint or a warrant pursuant to subdivision 3 of § 16.1-256 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. The intake officer shall accept and file a petition in which it is alleged that (i) the custody, visitation or support of a child is the subject of controversy or requires determination, (ii) a person has deserted, abandoned or failed to provide support for any person in violation of law, or (iii) a child or such child's parent, guardian, legal custodian or other person standing in loco parentis is entitled to treatment, rehabilitation or other services which are required by law.

II. Section 16.1-260(B) Requires Intake Officers to Accept and File Petition in Custody Cases Which Are Sufficient to Invoke Jurisdiction of Court

Section 16.1-260(B) refers to a court service unit receiving a complaint "alleging facts which may be sufficient to invoke the jurisdiction of the court pursuant to § 16.1-241." (Emphasis added.) Such section further provides that in cases alleging that the custody, visitation or support of a child is the subject of controversy or requires determination, the court intake officer shall accept and file a petition.

The use of the word "shall," when used in this context, should generally be given mandatory effect. See Schmidt v. City of Richmond, 206 Va. 211, 142 S.E.2d 573 (1965). See also 1977-1978 Report of the Attorney General at 106. It is also a basic tenet of statutory construction that all parts of a statute dealing with a subject must be read as a whole. See Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953).

III. Conclusion: Duty Is Mandatory

Accordingly, I am of the opinion that § 16.1-260(B) imposes a mandatory duty on an intake officer to accept and file a petition for all civil custody requests in which sufficient facts are alleged to invoke the jurisdiction of the juvenile court pursuant to § 16.1-241. I am further of the opinion that an intake officer is without authority to make findings on the jurisdiction of the court in such cases. Questions of jurisdiction must be resolved by the juvenile court.

1 There is nothing in § 16.1-260(B), however, which would prohibit an intake officer from questioning the complainant in detail to ascertain that the alleged facts are complete, or to consult with the court as to whether sufficient facts have been alleged to invoke the jurisdiction of the court prior to filing the petition.

COURTS NOT OF RECORD - JUVENILE AND DOMESTIC RELATIONS COURTS. JURISDICTION NOT APPLICABLE TO ADULT OVER AGE OF TWENTY-ONE, NOTWITHSTANDING AGE AT TIME OFFENSE COMMITTED.
The Honorable Lawrence R. Ambrogi
Commonwealth's Attorney for Frederick County

You request my opinion on the jurisdiction of the juvenile and domestic relations
district court when a person reaches the age of majority after the commission of a crime
but before he is apprehended and brought before the court to defend a charge that the
crime was committed.

I. Facts

Prior to his eighteenth birthday, a person committed acts which, if committed by
an adult, would constitute felonies. Evidence establishing probable cause to believe this
person committed the offenses was not discovered until after he reached the age of
eighteen years, but before he reached the age of twenty-one years. You ask whether
jurisdiction of the juvenile and domestic relations district court (the "juvenile court") is
determined by the offender's age at the time of commission of the offenses, or at the
time criminal proceedings are commenced.

II. Applicable Statutes

The following sections of the Code of Virginia provide, in pertinent part, as follows:

§ 16.1-228. ... When used in this chapter, unless the context otherwise requires:

***

'Delinquent act' means an act designated a crime under the law of this Com-
monwealth, or an ordinance of any city, county, town or service district, or
under federal law, or a violation of a court order as provided for in
§ 16.1-292, except an act, which is otherwise lawful, but is designated a
crime only if committed by a child.

'Delinquent child' means a child who has committed a delinquent act or an
adult who has committed a delinquent act prior to his or her eighteenth
birthday. [Emphasis added.]

§ 16.1-241. ... [E]ach juvenile ... court shall have ... exclusive original
jurisdiction ... over all cases, matters and proceedings involving:

A. The custody, visitation, support, control or disposition of a child:

1. Who is alleged to be ... delinquent;

***

The ages specified in this law refer to the age of the child at the time of the
acts complained of in the petition. [Emphasis added.]

§ 16.1-242. ... When jurisdiction has been obtained by the court in the case
of any child, such jurisdiction may be retained by the court until such person
becomes twenty-one years of age, except when the person is in the custody
of the Department [of Corrections] or when jurisdiction is divested under the
provisions of § 16.1-244.

§ 16.1-245. ... If during the pendency of a criminal or quasi-criminal pro-
ceeding against any person in any other court it shall be ascertained for the
first time that the person was under the age of eighteen years at the time of
committing the alleged offense and jurisdiction over such person and offense lies within the juvenile court, such court shall forthwith transfer the case...to the juvenile court....

§ 16.1-285. ...[N]o child committed hereunder shall be held or detained after such child has attained the age of twenty-one years....

III. Jurisdiction of Juvenile Court in Criminal Matters Involving Delinquent Children Is Determined by Age of Child at Time of Commission of Offense

It was the intent of the General Assembly, in enacting the juvenile code, to distinguish the delinquent acts of children from the criminal acts of adults, and to confer on adults who committed offenses prior to reaching the age of eighteen years the benefits provided by the juvenile system. The law includes in its definition of "delinquent child" an adult who has committed a delinquent act prior to his or her eighteenth birthday, and gives the juvenile court exclusive original jurisdiction over all cases involving a "delinquent child." It further provides that the ages specified refer to the age of the child at the time the acts were committed. Moreover, other courts are required to transfer a criminal or quasi-criminal proceeding to the juvenile court if the offender was under the age of eighteen at the time the offense was committed and the juvenile court otherwise has jurisdiction.

In the factual situation you posit, the offender is an adult who has attained the age of eighteen years, but not the age of twenty-one years, and is charged with offenses committed prior to his eighteenth birthday. In view of the foregoing, I am of the opinion that the juvenile court has exclusive jurisdiction to proceed against him unless such jurisdiction is transferred to the circuit court pursuant to § 16.1-269.

IV. Juvenile Court Divested of Jurisdiction when Delinquent Child Attains Age of Twenty-One Years

Although the Code does not specifically limit the age of an adult who can be treated as a "delinquent child," it is clear that the juvenile court's exercise of jurisdiction over a child terminates upon his becoming twenty-one years of age. This is true not only for the juvenile court, which may retain jurisdiction over an offender only until he reaches the age of twenty-one, but also to the detention of juveniles committed to the Department of Corrections, which is prohibited from detaining a child after he reaches the age of twenty-one years. See §§ 16.1-242, 16.1-285.

In a prior Opinion, unrelated to the issues presented herein, I cited, by way of analogy, the cases of Pruitt v. Guerry, 210 Va. 268, 170 S.E.2d 1 (1969) and Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966), for the principle that jurisdiction is determined by circumstances existing at the time of commencement of an action, and not at the time of commission of the offense. I stated therein the general rule that "a juvenile and domestic relations district court has no jurisdiction over a defendant charged when he was an adult with a crime committed when he was a juvenile." See 1985-1986 Report of the Attorney General at 117.

The exercise of jurisdiction by the juvenile court over an adult between the ages of eighteen and twenty-one who committed an offense when under the age of eighteen years constitutes a statutory exception to this rule. Due to termination of the jurisdiction of the juvenile court over an adult once he reaches the age of twenty-one, however, the general rule remains applicable to an adult over the age of twenty-one, notwithstanding his age at the time the offense was committed.
COUNSEL FOR BIOLOGICAL PARENT(S) IN PREADOPTION DIRECT PLACEMENT PROCEDURE PURSUANT TO § 63.1-204(C)(2); HOME STUDY OF PROSPECTIVE ADOPTIVE PARENT(S) NOT REQUIRED.

May 30, 1987

The Honorable William J. Cox
Judge, Fifteenth District Juvenile and Domestic Relations Court

You ask whether, in a preadoption direct placement procedure pursuant to § 63.1-204(C)(2) of the Code of Virginia, (1) the court must appoint a guardian ad litem for the infant in accordance with § 16.1-266(A); (2) it is necessary to apply the provisions of § 16.1-266(C) concerning the biological parent's or parents' right to counsel; and (3) a home study of the proposed adoptive parents must be performed in advance of their appointment as guardians.

I. Applicable Statutes

Section 63.1-204(C)(2) provides:

The natural parent or legal guardian of a child may place the child for adoption directly with the adoptive parents of his or her choice only after executing a valid consent to the proposed adoption before a juvenile and domestic relations district court of competent jurisdiction. Prior to the court's acceptance of the required consent of the natural parent, the court shall ascertain whether the placement is a direct placement as defined in §§ 63.1-195 and 63.1-220 and whether the natural mother, or, if reasonably available, both natural parents, have had an opportunity for counseling concerning the disposition of the child. If the court determines that the placement is a direct placement and the opportunity for counseling has been provided, the court may accept the consent and shall appoint the proposed adoptive parents to be the child's guardians, who shall be responsible for the care of the child until such time as the court order is modified. The juvenile court shall review such orders of appointment at least annually until such time as a final order of adoption is entered in the circuit court. If the court does not accept the consent, the court shall refer the natural parent or legal guardian to the local board of public welfare or social services.

Section 16.1-266 states the conditions under which counsel is appointed or permitted as a matter of right in court hearings of specified cases involving a child. Section 16.1-266 provides, in pertinent part, as follows:

A. Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition terminating residual parental rights or is otherwise before the court pursuant to subsection A 4 of § 16.1-241, the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child.

* * *

C. Prior to the hearing by the court of any case involving a parent, guardian or other adult charged with abuse or neglect of a child or a parent or guardian who could be subjected to the loss of residual parental rights and responsibilities, such parent, guardian or other adult shall be informed by a judge, clerk or probation officer of his right to counsel and be given an opportunity to:

1. Obtain and employ counsel of the parent's, guardian's or other adult's own choice; or
2. If the court determines that the parent, guardian or other adult is indigent within the contemplation of the law pursuant to the guidelines set forth in § 19.2-159, a statement substantially in the form provided by § 19.2-159 and a financial statement shall be executed by such parent, guardian or other adult and the court shall appoint an attorney-at-law to represent him; or

3. Waive the right to representation by an attorney in accordance with the provisions of § 19.2-160. [Emphasis added.]

Section 16.1-241(A)(4), which is referenced in § 16.1-266(A), grants a juvenile and domestic relations district court jurisdiction over proceedings involving the custody or disposition of a child "whose parent or parents for good cause desire to be relieved of his care and custody."

II. Section 16.1-266(A) Requires Appointment of Guardian Ad Litem in Preadoption Direct Placement Procedure Pursuant to § 63.1-204(C)(2)

A juvenile and domestic relations district court must hold a hearing pursuant to § 63.1-204(C)(2) both to approve the execution and validity of a consent by the biological parent(s) to a direct placement adoption and to determine whether the placement is, in fact, a direct placement as defined in §§ 63.1-195 and 63.1-220. If the court's jurisdiction for such determination is founded upon § 16.1-241(A)(4), it is my opinion that appointment of a guardian ad litem is required by § 16.1-266(A), since the proceeding involves custody of a child whose parent or parents, for good cause, desire to be relieved of the care and custody of the child.

III. Section 16.1-266(C) Requires Court, Clerk or Probation Officer to Inform Natural Parent(s) of Right to Counsel

Since a hearing pursuant to § 63.1-204(C)(2) is a hearing which may lead to the release or termination of the rights of the natural parent(s), it is my opinion that the parental right to counsel is mandated by § 16.1-266(C), whether by the natural parents' own choice or by court appointment, unless the parent or parents elect to execute a waiver of their right to counsel pursuant to § 19.2-160.

IV. Home Study of Proposed Adoptive Parents Not Required in Advance of Hearing

Section 63.1-204(C)(2) does not expressly require a study of the domestic situation of the proposed adoptive parents. Several provisions of § 63.1-204(C)(2), however, permit the court to require such a study. For example, the court must assure that an opportunity is provided for counseling of the natural parent or parents concerning the disposition of the child. The court also must verify that the placement is a direct placement. Finally, the court has the discretion not to accept the natural parent's consent if a home study appears appropriate.

COURTS OF RECORD - CLERKS, CLERKS' OFFICES AND RECORDS. PROPERTY AND CONVEYANCES - RECORDATION OF DOCUMENTS. DUTY TO RECORD AUTHORIZED WRITINGS PROPERLY SIGNED AND ACKNOWLEDGED; FACSIMILE SIGNATURE ACCEPTABLE FOR RECORDATION.

May 30, 1987

The Honorable Margaret W. White
Clerk, Circuit Court of the City of Staunton

You ask whether it is proper to record certificates of satisfaction presented in the following situations: (1) an evidence of debt has been assigned, as indicated on the note, but the signature on the certificate of satisfaction does not indicate that the present noteholder is the assignee; (2) the bank executing a certificate of satisfaction is a suc-
cessor, by change of name, merger, or some other means, to the original noteholder, but this succession is not indicated on the certificate of satisfaction; and (3) a facsimile signature is used to mark the underlying note or bond paid.

I. Duty of Clerk to Record Authorized Writings Properly Signed and Acknowledged

Section 17-59 of the Code of Virginia requires a clerk to record "every writing authorized by law to be recorded." Section 55-106 further requires a clerk to record any such signed writing which is properly acknowledged or proved as provided by law. A prior Opinion of this Office has concluded that a clerk must record a document which meets these basic statutory requirements without inquiry as to the legal sufficiency of the writing. See, e.g., 1984-1985 Report of the Attorney General at 380, 381. Further, the clerk has no authority to add requirements for the recording of documents beyond those already required by statute. See 1979-1980 Report of the Attorney General at 79, 80. It is my opinion, therefore, that the documents described in your first two questions should be recorded.

II. Facsimile Signature Acceptable for Recordation

A prior Opinion of this Office has also dealt with the question of facsimile signatures and concluded that a power of attorney may be signed, acknowledged, and sealed by facsimiles. See 1961-1962 Report of the Attorney General at 213. That Opinion specifically states that "to sign' means to attach a name by any known method of 'impressing the name on paper with the intention of signing it.'" Id. at 214. It is my opinion, therefore, that a facsimile signature placed on a certificate of satisfaction with the intent to release an evidence of indebtedness is sufficient to cancel the debt, and that the certificate of satisfaction should be recorded.

CRIMES AGAINST PEACE AND ORDER - UNLAWFUL USE OF TELEPHONES. VIOLATION OF § 18.2-425.1 NOT AVOIDED BY PORTION OF RECORDED SOLICITATION CALL WHICH GIVES LISTENER OPTION TO ENGAGE OR DISSOCATE REMAINING PORTION OF RECORDED MESSAGE.

August 30, 1986

The Honorable Richard H. Barrick
Commonwealth's Attorney for the City of Charlottesville

You ask whether either of two factual situations would constitute a violation of § 18.2-425.1 of the Code of Virginia, which prohibits certain telephone solicitation activities.

I. Facts

In both situations, a business would contact prospective clients by telephone with a recorded message which begins by giving the listener an opportunity not to hear the remaining portion of the recorded message. In the first situation, the recorded message asks the listener to press the "0" key on the telephone if the listener wishes to hear the rest of the message. If the listener does not press the "0" key then the message disconnects. In the second situation, the recorded message asks the listener to hang up the tel-
ephone if the listener does not wish to hear the rest of the message. Although you do not describe the text of the remaining portion of the recorded message, I assume that the entire recorded message in each situation constitutes a solicitation call for an initial sales contact.

II. Relevant Statute

Section 18.2-425.1(A) provides as follows: "Any person who uses recorded solicitation calls for initial sales contacts shall be guilty of a Class 4 misdemeanor." (Emphasis added.) The prohibition of this part of the statute extends to all recorded solicitation calls for initial sales contacts. There is no exception for a recorded message which gives the listener the option to engage, or to disengage, the remaining portion of the message.1

III. Conclusion: Initial Sales Contacts by Recorded Telephone Solicitation Calls Are Prohibited

I am, therefore, of the opinion that both of the fact situations which you describe would constitute a violation of § 18.2-425.1(A).

1Section 18.2-425.1(B) imposes a greater penalty, a Class 3 misdemeanor, if, in addition to using recorded telephone solicitation calls for initial sales contacts, the caller's message cannot be terminated or disengaged by normal telephone operating procedures for cancelling a call.

CRIMES AGAINST PROPERTY – BURGLARY AND RELATED OFFENSES. PERSON CONVICTED UNDER § 18.2-91 NOT PROHIBITED FROM POSSESSING FIREARM.

October 27, 1986

The Honorable James T. Ward
Commonwealth's Attorney for Carroll County

You request my opinion on whether a person convicted of breaking and entering with the intent to commit larceny, pursuant to § 18.2-91 of the Code of Virginia, is prohibited from possessing a firearm under the provisions of § 18.2-308.2.

I. Applicable Statutes

Section 18.2-308.2(A) provides, in pertinent part:

It shall be unlawful for any person who has been convicted of a Class 1, 2 or 3 felony, rape, robbery, or a felony involving the use of a firearm under the laws of this Commonwealth ... to knowingly and intentionally possess or transport any firearm ....

Section 18.2-91 provides as follows:

If any person do any of the acts mentioned in § 18.2-90[1] with intent to commit larceny, or any felony other than murder, rape or robbery, he shall be deemed guilty of statutory burglary; which offense shall be a felony punishable by confinement in a penitentiary for not less than one or more than twenty years, or in the discretion of the jury, or judge sitting without a jury, be confined in jail for a period not exceeding twelve months or fined not more than $1,000, either or both; provided, however, that if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Section 18.2-10 provides, in part, that
The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, or imprisonment for life.

(b) For Class 2 felonies, imprisonment for life or for any term not less than twenty years.

(c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years.

II. Section 18.2-91 Not Designated as Particular Class Felony

Unless Defendant Armed with Deadly Weapon (Class 2 Felony)

The General Assembly has determined that persons convicted of certain serious felonies shall be prohibited from possessing firearms. Originally, § 18.2-308.1 prohibited possession of firearms by persons convicted of felonies involving the use of a firearm. See Ch. 474, 1979 Va. Acts 712. Subsequently, the legislature broadened the class of felonies in § 18.2-308.2(A) for which the prohibition would apply, to include Class 1, 2 or 3 felonies (Ch. 515, 1982 Va. Acts 851), and the offenses of rape and robbery (Ch. 233, 1983 Va. Acts 264).

Chapter 5, Art. 2 of Title 18.2 defines the offenses of burglary and statutory burglary. A conviction for burglary, pursuant to § 18.2-89, or statutory burglary, under § 18.2-90, is punishable as a Class 3 felony. Your inquiry, however, refers to statutory burglary as defined in § 18.2-91, which is not designated as a particular class of felony, but is punishable as set out in that statute. For all of these burglary offenses, if the defendant was armed with a deadly weapon at the time of entry, the offense is a Class 2 felony.

Although the maximum punishment for a Class 3 felony, twenty years imprisonment, is the same as the maximum penalty for a conviction of statutory burglary under § 18.2-91, the range of punishment for a conviction under § 18.2-91 is different from that provided in § 18.2-10 for Class 1, 2 or 3 felonies. Statutory burglary under § 18.2-91 is an unclassified felony. See § 18.2-14.

III. Conclusion

A violation of § 18.2-308.2(A) prohibiting certain persons from possessing or transporting firearms is punishable as a Class 6 felony. It is, therefore, a penal statute, and must be strictly construed against the Commonwealth and limited in application to cases falling clearly within the language of the statute. See Turner v. Commonwealth, 226 Va. 456, 309 S.E.2d 337 (1983). A conviction of statutory burglary under § 18.2-91, when a person was not armed with a deadly weapon, is not a conviction of a Class 1, 2 or 3 felony, and is not one of the specified offenses in § 18.2-308.2(A). I am of the opinion, therefore, that a person who is convicted of statutory burglary under § 18.2-91, but who was not armed with a deadly weapon at the time of entry, is not prohibited by § 18.2-308.2(A) from possessing a firearm. In the event, however, that a defendant is convicted of being armed with a deadly weapon at the time of entry, he would be guilty of a Class 2 felony and, therefore, be subject to the provisions of § 18.2-308.2(A).

1 Section 18.2-90 provides, in part: "If any person in the nighttime enters without breaking or in the daytime breaks and enters . . . a dwelling house . . . with intent to commit murder, rape, or robbery, he shall be deemed guilty of statutory burglary, which offense shall be a Class 3 felony. However, if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony."
CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED. IN PER SE PROSECUTION EVIDENCE OF ALCOHOL CONSUMPTION THAT MIGHT AFFECT CHEMICAL TEST RESULT ADMISSIBLE.

December 16, 1986

The Honorable William T. King
Commonwealth's Attorney for Richmond County

You ask for my opinion on the following question:

In the trial of a case prosecuted under § 18.2-266 of the Code of Virginia, when the Commonwealth has entered into evidence the result of a chemical test administered in accord with § 18.2-268 showing the blood alcohol concentration of the defendant as 0.10 percent or more, is it proper to admit refuting evidence indicating that the blood alcohol content at the time of the operation of the motor vehicle was less than 0.10 percent?

Specifically, may the defendant submit evidence that either just before or just after the operation of the vehicle an alcoholic beverage was consumed?

I. Applicable Statutes

Section 18.2-266 is the so-called per se provision of the Virginia drunk driving statute. Section 18.2-266 provides, in part:

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 0.10 percent or more by weight as indicated by a chemical test administered in accordance with the provisions of § 18.2-268 . . . .

II. Applicable Case Law

No Virginia case has specifically addressed the issue you raise. Other jurisdictions with per se statutes similar to Virginia's, however, have dealt, either directly or indirectly, with the question you pose. Unfortunately, the cases in those jurisdictions have not been entirely consistent in their results.

At one extreme, the Supreme Court of Vermont has held, in State v. Dacey, 138 Vt. 491, 495, 418 A.2d 856, 859 (1980), that evidence relating the defendant's blood alcohol content ("BAC") at the time of the test back to the BAC at the time of vehicle operation is not only admissible in the trial of a per se violation, but that the prosecution is required to present expert testimony relating the test result back to the time of vehicle operation. At the other extreme, in State v. Rucker, 297 A.2d 400 (Del. Super. Ct. 1972), the court held that the prosecution need only show that the test was taken within the statutory time limit and that it indicated a BAC of 0.10 percent or more. The Rucker case held that "the legislation is so worded as to preclude these factors [including the possible variances in readings between tests taken while the accused was driving and those taken afterwards] from being considered as issues of fact." Id. at 403.

It appears that no other jurisdictions have adopted the extreme positions of either the Vermont or Delaware courts. There are several cases from other jurisdictions, however, which fit somewhere on the continuum between either requiring expert testimony or refusing to admit any evidence at all relating the result of a chemical test to the BAC of the defendant at the time he was operating the vehicle. See, e.g., State v. Knoll, 110 Idaho 678, 718 P.2d 589 (Idaho App. 1986); State v. Ulrich, 17 Ohio App. 3d 182, 478 N.E.2d 812 (1984); State v. Malone, 65 N.C. App. 782, 310 S.E.2d 385 (1984);
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III. Chemical Test is Element of Proof in *Per Se* Violation; Rebutting Evidence Admissible

Your question can best be answered by analyzing the nature of the *per se* offense. If the result of a chemical test (administered in accordance with § 18.2-268 and showing a BAC of 0.10 percent or greater) constitutes an element of the offense described by § 18.2-266(i), then evidence as to when the defendant consumed alcohol would be irrelevant in a prosecution under that section. Conversely, if the result of the chemical test constitutes only an element of proof, and not an element of the offense, then evidence of alcohol consumption by the defendant at a time when such consumption could affect the test result arguably would be relevant and admissible.

No cases could be found which specifically hold that the result of a chemical test constitutes an element of the offense in a *per se* prosecution. A concurring opinion in Erickson, 662 P.2d at 968-70, takes the position that it is an element of the offense (citing as authority State v. Rucker), but the majority opinion holds otherwise. Moreover, even the concurring opinion in Erickson expresses the view that there may be a third element of the offense: that the individual has consumed no alcohol between the time of the alleged offense and the time of the test. See Erickson, 622 P.2d at 970.

Every other case dealing with this issue holds, explicitly or implicitly, that the test result is an element of proof, not an element of the offense. See, e.g., Ulrich, 17 Ohio App.3d at 199, 470 N.E.2d at 821; State v. Rollins, 141 Vt. 105, 109, 444 A.2d 884, 886 (1982); and State v. Clark, 286 Or. 33, 44, 593 P.2d 123, 129 (1979). Under those decisions, the element of the offense is having a BAC above the prescribed limit at the time of vehicle operation. The result of a test performed in accordance with statutory requirements is a necessary part of the proof of that element, but such proof, like any other proof, is subject to attack by the defendant through the introduction of other relevant evidence.

In my view, in the absence of a statute such as the one in Minnesota, cited in footnote 3 above, those cases which hold that the chemical test result constitutes an element of proof, rather than an element of the offense, in a *per se* prosecution are persuasive. I therefore am of the opinion that, in a prosecution under § 18.2-266(i), it is proper to admit competent evidence which might tend to negate, or affirm, the accuracy of a chemical test result to reflect the BAC of the defendant at the time of the alleged offense.

IV. Prosecution Not Required to Introduce Expert Testimony

Having concluded that the result of the chemical test constitutes merely an element of proof rather than an element of the offense in a *per se* prosecution, I feel compelled to state further that I disagree with the holding of the Vermont Supreme Court that the prosecution must introduce expert testimony to relate the test result back to the time of the alleged offense. In my opinion, that holding is inconsistent with the obvious intent of the legislature in enacting a *per se* statute. Adoption of the *per se* law was intended to simplify the proof required in a drunk driving prosecution, not to make such proof more complex. See Erickson, 622 P.2d at 965 n. 1.

V. Results of BAC Chemical Test

Presumptively Relate Back to Time of Alleged Offense

It appears that in every jurisdiction other than Vermont, the BAC reading obtained as a result of a blood or breath test administered in accordance with statutory requirements is considered to relate back automatically to the time of the alleged offense. In some states this automatic relation back is statutory. In most jurisdictions, however,
the courts have read such interpretation into statutes very similar to § 18.2-266(i). For example, in Erickson, 662 P.2d at 965, the Alaska Court of Appeals held:

We are satisfied that the assembly, by utilizing the language 'as determined by a chemical test within four hours of his arrest . . .,' intended to establish two presumptions . . . (1) that a 'chemical test' . . . accurately reflects a subject's blood-alcohol level at the time it is administered and (2) that an examination . . . conducted [in accordance with statutory requirements] will result in a reading equal to or less than the actual blood-alcohol rate at the time of driving. [Citation omitted.]

Such an interpretation is consistent with the holding of the Supreme Court of Virginia in Jackson v. City of Roanoke. As noted earlier, the Jackson case dealt with the presumptions (provided in § 18.2-269) for a prosecution for driving under the influence, not with the per se law. Nevertheless, it interprets those presumptions as relating back to the time of the offense, and other jurisdictions have relied on similar holdings (interpreting the presumptions in their own laws) to justify a relation-back interpretation of their per se laws. See Knoll, 718 P.2d at 593.

Moreover, as the Idaho Appeals Court stated in Knoll, 718 P.2d at 594:

It must be remembered that in order to apply the 'per se' provision . . . the judge or jury need not determine a defendant's blood-alcohol content with precision. Rather, the trier of fact need only determine whether the state has proven, beyond a reasonable doubt, that the blood-alcohol content was at least .10%.

Accordingly, it is my opinion that pursuant to § 18.2-266(i), the result of a BAC chemical test that is administered in accordance with § 18.2-268 and that shows a BAC of 0.10 percent or greater presumptively relates back to the time of the alleged offense. If the prosecution has introduced the result of a chemical test and that test result shows a BAC of 0.10 percent or more, such evidence alone is sufficient to convict. The defendant may introduce evidence to attempt to show that the BAC at the time of the alleged offense was lower than at the time of the test (and, conversely, the prosecution may introduce evidence to support the presumption that it was elevated at the time of the alleged offense), but there is no requirement that expert testimony be introduced to establish with precision the exact BAC at the time of the alleged offense.

VI. Conclusion

For the reasons stated herein, it is my opinion that, in a prosecution under § 18.2-266(i), evidence relating the result of a chemical test to the defendant's BAC at the time of the alleged offense is admissible on behalf of the defense or prosecution, but such evidence is not required in order to sustain a conviction. It is my further opinion that the prosecution need not introduce expert testimony to relate the test result back to the time of the offense because: (1) the prosecution need not prove the precise BAC of the defendant at the time of the offense; (2) the prosecution need only prove beyond a reasonable doubt that the defendant's BAC was at least 0.10 percent at the time of the alleged offense; and (3) the prosecution is entitled to a presumption that the BAC indicated by a chemical test administered in accordance with § 18.2-268 is equal to or lower than the BAC of the defendant at the time of the alleged offense.

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1Jackson v. City of Roanoke, 210 Va. 659, 173 S.E.2d 836 (1970), cited in your letter, deals with a prosecution for driving under the influence of alcohol, pursuant to § 18.2-266(ii), and the presumptions which are raised by the results of a chemical test admitted into evidence in such a prosecution. While the holding in the Jackson case is instructive, it does not address how the result of a chemical test should be viewed in a prosecution pursuant to the per se law.
2 The Rucker case can be read as implying that the test result is an element of the offense, but there is no explicit holding to that effect. Nor is there such a holding in People v. LaMontagne, also cited in Erickson, although the LaMontagne court held that "the gravamen of the crime is operation of a motor vehicle after ingestion of sufficient alcohol to produce the reading condemned by the statute within two hours of arrest." 397 N.Y.S.2d at 873.

3 Minnesota appears to have made the chemical test result an element of the offense by providing in Minn. Stat. Ann. § 169.121 that:

"Subdivision 1. Crime. It is a misdemeanor for any person to drive, operate or be in physical control of any motor vehicle within this state or upon the ice of any boundary water of this state:

* * *

(d) when the person's alcohol concentration is 0.10 or more; or

(e) when the person's alcohol concentration as measured within two hours of the time of driving is 0.10 or more."

It should be noted, however, that Subd. 2 of § 169.121 provides, in part:

"If proven by a preponderance of the evidence, it shall be an affirmative defense to a violation of subdivision 1, clause (e) that the defendant consumed a sufficient quantity of alcohol after the time of actual driving, operating, or physical control of a motor vehicle and before the administration of the evidentiary test to cause the defendant's alcohol concentration to exceed 0.10. Provided, that this evidence may not be admitted unless notice is given to the prosecution prior to the omnibus or pretrial hearing in the matter."

4 In California, for example, Cal. Veh. Code § 23152(b) provides, in part, that "[i]n any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.10 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.10 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving."
III. County Political Committee is Not Eligible to Conduct Bingo Games and Raffles

This Office has previously held, pursuant to a predecessor statute which for present purposes is virtually identical to § 18.2-340.1(1)(b), that a city or county political committee was not eligible to obtain an annual license to conduct a bingo game or raffle. See 1975-1976 Report of the Attorney General at 208. That Opinion noted that "[a] city or county political committee is an association organized for political purposes as distinguished from being organized exclusively for community or educational purposes ...." Id. at 209. My review of the Code discloses no statutory change that would in any way call into question the validity of this prior Opinion. Accordingly, I conclude that the county political committee is not qualified to conduct raffles or bingo games pursuant to § 18.2-340.1(1)(b).

IV. Whether Voters' League Is Qualified Organization Is Factual Decision to Be Made Initially by Designated Local Official

The Opinion previously cited does not necessarily answer the question whether a voters' group is a qualified organization under § 18.2-340.1(1)(b). The organization's application in the present case states only that it seeks "to aid individuals in registering to vote and in becoming actively involved citizens." It is at least arguable that such an organization is an organization which is operated "exclusively" for community or educational purposes, as required by § 18.2-340.1(1)(b). As stated in an Opinion to you dated July 2, 1986, found in this Report at 175, the decision whether a particular organization qualifies to obtain the required annual permit is a factual one to be made initially by the local official designated pursuant to § 18.2-340.2.

CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES. OFFICIAL AUTHORIZED TO INVESTIGATE ORGANIZATION'S APPLICATION FOR BINGO PERMIT MAY REQUIRE FURTHER WRITTEN RECORDS.

July 2, 1986

The Honorable Hunt A. Meadows, III
Commissioner of the Revenue for Pittsylvania County

This is in reply to your request for my opinion regarding the right of a group to conduct bingo games and lotteries in Pittsylvania County, as well as the scope of your authority to investigate the group's application for an annual permit pursuant to § 18.2-340.1 et seq. of the Code of Virginia.

I. Facts

Your letter states that "Regular Veterans Association Post #20" (the "Post") recently obtained a license from your office to conduct bingo and raffles in Pittsylvania County. Subsequently, however, a controversy arose in the community as to whether this group properly qualified to conduct such games. An investigation by the Commonwealth's Attorney for Pittsylvania County disclosed that the Post was chartered in the City of Danville and had no bylaws, minutes, constitution, or checking account. Pittsylvania County presently is honoring the permit previously issued to the Post but has informed the Post that it must file an amended application to demonstrate that it qualifies as an organization permitted to conduct bingo and raffles.

II. Applicable Statutes

Section 18.2-340.1(1)(b) defines an organization eligible to conduct raffles and bingo
Section 18.2-340.2 requires a qualifying organization to obtain an annual permit "from the governing body of each city or county . . . in which a bingo game or raffle is to be conducted, or from a local official, designated by such governing body." The permit shall only be granted after a reasonable investigation has been conducted by such locality or local official. (Emphasis added.) The statute also sets forth a form for the application for such a permit.

Section 18.2-340.3(1) provides, with certain stated exceptions, that an organization must "have been in existence and met on a regular basis" in the locality where the permit is sought for at least two years prior to making application.

Section 18.2-340.9 lists various practices which may not be engaged in by organizations, and states in subsection E that 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."

III. Whether Post Is Qualifying Organization
Is Decision Vested in Designated Local Official

Your first question is whether the Post qualifies as an eligible organization pursuant to §§ 18.2-340.1(1)(b) and 18.2-340.3(1). It is not clear from the information you have provided that the Post has established its eligibility to conduct bingo games and raffles. I note, however, that the question whether an organization does so qualify ultimately must be decided by the local official designated under § 18.2-340.2, which decision is subject to judicial review. See 1981-1982 Report of the Attorney General at 40.

IV. No Minimum or Maximum Number of Members for Organization Is Prescribed

Your next question is how many members must belong to an organization in order for it to qualify. I know of no statutorily prescribed minimum or maximum number of people necessary for an organization to qualify under § 18.2-340.1. Obviously, however, an "organization" or "association" consists of more than one individual. Furthermore, if a group applying for a permit has so few members as to raise doubts regarding such matters as its ability to operate a bingo game or the genuineness of its stated organizational aims, this fact may legitimately call into question its eligibility under § 18.2-340.1.

V. Sections 18.2-340.3(1) and 18.2-340.9(E) Do Not Conflict

Section 18.2-340.9(E) provides that a person participating in the management, operation or conduct of a bingo or raffle must first have been a member of the organization for at least ninety days. You inquire how this affects § 18.2-340.3(1) which, while requiring most qualifying organizations to have operated in the locality where the permit is sought for at least two years, also excepts certain groups from this prerequisite.

It is my opinion that these two statutory provisions are not in conflict. Statutes are to be construed, if reasonably possible, in such a way as to give effect to each. See, e.g., Albemarle County v. Marshall, Clerk, 215 Va. 756, 214 S.E.2d 146 (1975). Accordingly, in my opinion, groups not subject to the requirement that they must have existed in the community for at least two years still are effectively compelled to have operated for ninety days before conducting a lottery or bingo game. If this were not the case, then § 18.2-340.9(E) would be rendered a nullity.

VI. Group May Be Required to Document Organizational Purposes

You ask also what records must be kept by a qualifying organization and whether
you have the authority to verify such records.

Section 18.2-340.2, which sets forth the form of the application to be completed by an organization seeking a permit, requires certain limited information regarding the general purposes of each such group, as well as its background and structure. That section, however, does not prescribe in detail the records which must be supplied by a group applying for a permit to document its nature and purpose.

In my opinion you, as the local official designated by Pittsylvania County to review requests for permits, may require that written records be submitted which satisfactorily establish that the organization meets the various requirements of §§ 18.2-340.1 and 18.2-340.3. Pursuant to § 18.2-340.2, you are required to grant a permit only after conducting "a reasonable investigation." This duty necessarily contemplates that you have sufficient facts concerning the applicant to determine whether it is properly eligible to conduct a bingo or raffle. Accordingly, it is my opinion that you may require that an organization submit, or that you be allowed to examine, necessary records of the organization as a prerequisite to the granting of a permit.

VII. Application Form Prescribed in § 18.2-340.2 May Be Supplemented by Other Information

You enclose with your letter a copy of the application form filled out by the Post and inquire whether it is adequate to constitute the "reasonable investigation" mandated by § 18.2-340.2. I note that this form appears identical to the model form set forth in the statute. Given the cursory nature of the Post's responses on the form, as well as some of the questions that have arisen regarding the actual nature and purpose of this group, it is my opinion that you may properly insist upon additional information prior to issuing a permit. I note in this regard that § 18.2-340.2 states that the form "may be expanded to include any other information desired by" the reviewing body or official. I observe further that it is largely in your discretion as to what additional information you may need in a particular case to carry out your investigative duties.

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1 I assume that you are the local official designated by the county governing body.
2 Cf. 1981-1982 Report of the Attorney General, supra (swimming club membership limited to 500 members suggested that club functioned primarily as private organization for the benefit of its own members).

CRIMES INVOLVING MORALS AND DECENCY - GAMBLING. IN CONDUCTING RAFFLE USE OF WHEEL WHICH SPINS AND STOPS AT RANDOM PLACE NOT PERMITTED ACTIVITY.

January 9, 1987

The Honorable William H. Rosser, Jr.
Commissioner of the Revenue for the City of Petersburg

You ask whether an organization, as defined in § 18.2-340.1(1) of the Code of Virginia and under three sets of circumstance, you describe, is permitted to conduct a raffle using a wheel which spins and stops at a random place.

I. Facts

The information you provide indicates that, in the first situation, a winning raffle ticket is determined by random drawing, but the prize to be won is determined by a spin of the wheel prior to the drawing of the winning ticket. In the second circumstance, the winning ticket is again determined by a random drawing, but the prize is determined by a spin of the wheel after the drawing of the winning ticket. In the third situation, the wheel is used to determine the winning ticket.
II. Activity Described Neither "Bingo" Nor "Instant Bingo"

Consistent with the decision of the Supreme Court of Virginia in Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931), this Office has repeatedly concluded that an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together. See § 18.2-325; Reports of the Attorney General: 1979-1980 at 227; 1977-1978 at 238(2) and 241; 1972-1973 at 258; 1969-1970 at 167(2); 1962-1963 at 119. Section 18.2-334.2 permits the organizations defined in § 18.2-340.1(1) to conduct bingo games, instant bingo games and raffles, even though such activities otherwise would be prohibited by § 18.2-325. Section 18.2-340.14 requires, however, that the statutory definitions of "raffle," "bingo" and "instant bingo" be strictly construed by providing that "[a]ll games not explicitly authorized by this article are prohibited." (Emphasis added.)

The use of a wheel either to determine the winning ticket or the prize clearly involves the elements of prize, chance and consideration and is not a "bingo" or an "instant bingo" game. See § 18.2-340.1(2) and (4). The question, therefore, is whether any of the activities you describe would be permitted as a "raffle." If a particular activity does not meet the definition of "raffle," it would be illegal, even if conducted by a qualified organization.

III. None of Activities Described Constitutes a "Raffle"

Section 18.2-340.1(3) defines a "raffle" as "a lottery in which the prize is won by a random drawing of the name or prearranged number of one or more persons purchasing chances." While "lottery" is a generic term and embraces all schemes for distribution of prizes by chance for consideration, a raffle has been said to be the simplest form of lottery. See United States v. Baker, 384 F.2d 107, 111 (3d Cir. 1966). It contemplates the purchase of chances by one or more persons for the opportunity to win a prize to be determined by a random drawing from some container in which all the chances purchased have been placed. See 1979-1980 Report of the Attorney General at 51(2). In order to be considered a "raffle," therefore, it is my opinion that the winning ticket and the prize must be chosen or awarded by the "random drawing." This does not occur in any of the situations you pose. In the first and second activities, although the winning ticket is determined by a random drawing, the prize is determined by the spin of a wheel, either before or after the winner is chosen. In the third situation, the spin of the wheel determines the winning ticket itself. Considering the strict construction of the definition of "raffle" required by § 18.2-340.14, it is clear that none of the activities you have described would constitute a "raffle."

IV. Conclusion

Based on the above, it is my opinion that the use of a wheel, either to determine the winner of a raffle or to select the winner's prize, either before or after the selection of the winning ticket, is not a permitted activity under the gambling statutes of Virginia.

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2 It is important to note that the use of a wheel, necessarily a mechanical device, is not a "drawing," as that term is used in § 18.2-340.1(3). Further, the wheel in the situations posed would be a "gambling device," since it "operates, either completely automatically or with the aid of some physical act by the player or operator, in such a manner that, depending upon elements of chance, it may eject something of value or determine the prize or other thing of value to which the player is entitled." Section 18.2-325(2)(6) (emphasis added).

CRIMES INVOLVING MORALS AND DECENCY - SUNDAY OFFENSES. EXEMPTIONS IN § 18.2-341(a)(3), (5), (7), (11) AND (15) NOT APPLICABLE TO BUSINESSES ENGAGED IN SALE OR LEASE OF PRERECORDED VIDEO TAPES.
You ask whether a business which sells and rents video tapes is exempt from the "Sunday Closing Law," § 18.2-341 et seq. of the Code of Virginia, under any one of five possible exemptions. You state that the business in question has an arrangement with a pizza retail outlet under which a purchaser of a pizza may become entitled to free video rentals. Conversely, rental of video tapes may entitle the patron of the video rental business to a free pizza. You further ask whether either of these patron bonuses affects application of the exemptions.

I. Applicable Statute

Section 18.2-341 makes it a misdemeanor for persons to engage in work, labor or business on Sunday, except in counties or cities where § 18.2-341 does not apply. The General Assembly has also provided that certain defined industries and businesses are exempt from coverage of the prohibition. The video rental business involved in your inquiry claims that it comes within one or more of the five exemptions found in § 18.2-341(a)(3), (5), (7), (11), and (15).

II. Video Rental Business Is Not Exempt from Sunday Closing Law

A. Not Exempt as Publishing Business Under Subdivision (a)(3)

The exception in § 18.2-341(a)(3) allows the following businesses to operate on Sunday: "Publishing, including the distribution and sale of the products thereof." In determining the meaning of any statutory language, that language is to be accorded its everyday meaning, unless a contrary meaning is clearly intended. See McCarron v. Commonwealth, 189 Va. 387, 193 S.E. 509 (1937). Using that standard, this Office has previously ruled that the sale of prerecorded albums and audio tapes does not fit within the "publishing" exemption. See 1982-1983 Report of the Attorney General at 498. I am of the opinion, therefore, that the sale and rental of video tapes also falls outside this exemption.

B. Not Exempt as Motion Picture Theatre or Entertainment Facility Under Subdivision (a)(5) and (7)

The business also argues that it is exempt under subdivision (a)(5) because it is allegedly involved in the operation of "motion picture theatres" and that it is exempt under subdivision (a)(7) because it is allegedly an "entertainment" facility.

Only an expansive, inappropriate interpretation of the term "motion picture theatres" would permit its application to the business involved here. Further, this Office has previously ruled that the sale or lease of prerecorded video tapes by a business establishment does not render the establishment an "entertainment" facility within the meaning of subdivision (a)(7). See 1984-1985 Report of the Attorney General at 300. Thus, it is my opinion that neither of these subsections grants an exemption to a video rental business.

C. Not Exempt as Restaurant or Seller of Food Under Subdivision (a)(11) and (15)

In determining the status of a business for purposes of the exemptions, one looks to the principal business of the establishment applying for an exemption. See Malibu Auto Parts v. Commonwealth, 218 Va. 467, 237 S.E.2d 782 (1977); Bonnie BeLo v. Commonwealth, 217 Va. 84, 225 S.E.2d 396 (1976). Under the facts presented, it is clear that the principal business of the video rental business in question is the sale and rental of prerecorded video tapes, and not the operation of a restaurant under subdivision (a)(11), or the sale of food under subdivision (a)(15). It is my opinion, therefore, that neither the restaur-
rant nor seller of food exemption applies in this case.

III. Conclusion: Sale and Rental of Prerecorded Video Tapes Is Prohibited by Sunday Closing Law

Accordingly, it is my opinion that, because the Sunday Closing Law is still applicable in the City of Staunton, and because the business you describe does not fall within any of the five statutory exemptions upon which it relies, the sale and rental of video tapes on Sunday by that business is prohibited by § 18.2-341.

Section 18.2-342 provides that "§ 18.2-341 shall have no force or effect within any county or city in the Commonwealth which has by ordinance expressed the sense of its citizens, as provided in § 15.1-29.5, that such laws are not necessary." You state that the City of Staunton has not adopted such an ordinance pursuant to § 15.1-29.5 and that the Sunday Closing Law is still applicable to that jurisdiction.

CRIMES INVOLVING MORALS AND DECENCY - SUNDAY OFFENSES. "SUNDAY CLOSING LAW." APPLICATION OF EXCEPTIONS TURNS ON PRINCIPAL BUSINESS OF ENTITY WHICH MAY INVOLVE FACTUAL DETERMINATION BASED ON SUBSTANTIAL INFORMATION ABOUT BUSINESS.

June 29, 1987

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem

You ask whether two drugstore businesses ("A" and "B"), which also sell commodities other than drugs and close their respective pharmacies on Sundays, are exempt from the "Sunday Closing Law," § 18.2-341 et seq. of the Code of Virginia, under any of the possible statutory exceptions. You also ask whether another business ("C"), which is actually two businesses under one roof, is exempt from the "Sunday Closing Law." One of the two businesses ("C-1") in business C has a lunch counter and general merchandise section, and the second business ("C-2") has only a pharmacy. Both C-1 and C-2 operate under separate and distinct ownerships and trade names, and C-2 (the pharmacy) is closed on Sundays.

I. Applicable Statute

Section 18.2-341 makes it a misdemeanor for persons to engage in work, labor or business on Sunday, except in counties or cities where § 18.2-341 does not apply. The General Assembly has also provided that certain defined industries and businesses are exempt from the general prohibition. For example, § 18.2-341(a)(9) excepts businesses engaged in the preparation and sale of prescription and nonprescription drugs and the sale of medical and hygienic supplies and baby supplies." Section 18.2-341(a)(17) further excepts "a drugstore, the majority of the sales receipts of which consist of prescription and nonprescription drugs, health and beauty aids." Section 18.2-341(a)(18) permits the sale of novelties, cameras, photographic supplies (including film and flash bulbs), antiques, pictures, paintings, art supplies, souvenirs, animals as pets, including tropical fish, and pet supplies.

II. "Principal Business" Determination Based on Number of Factors

In determining the status of a business for purposes of the exceptions listed in § 18.2-341(a), the Supreme Court of Virginia has held that one must look to the principal business of the establishment applying for an exemption. See Malibu Auto Parts v. Commonwealth, 218 Va. 467, 237 S.E.2d 782 (1977); Bonnie BeLo v. Commonwealth, 217 Va. 84, 225 S.E.2d 395 (1976). The determination whether businesses A and B are
permitted to open on Sunday, therefore, depends on whether their principal business is one of those enumerated in the exceptions to the Sunday Closing Law.

The phrase "principal business" is not defined by statute or by Virginia case authority. Black's Law Dictionary 1073 (5th ed. 1979) defines "principal" as "[c]hief, leading; most important or considerable; primary; original. Highest in rank, authority, character, importance, or degree." In Allsbrook v. Azalea Radiator Ser., 227 Va. 600, 316 S.E.2d 743 (1984), the Supreme Court of Virginia approved a trial court's determination of the principal business of one of the parties. Although the phrase "principal business" was not specifically defined in Allsbrook, the Court pointed to the basic functions of the business, its inventory, and the fashion in which the company dealt with its customers as factors to be considered in determining the "principal business of the enterprise." Id. at 602, 316 S.E.2d at 744.

A number of other factors are important in determining the principal business of an entity. "[G]ross income ... net income or profit and its source, annual receipts and disbursements, the purpose of the corporation as stated in its corporate charter and the actual corporate function in relation to its stated corporate purpose" also should be considered. See W. R. Co. v. North Carolina Property Tax Com'n, 48 N.C. App. 245, 260, 269 S.E.2d 636, 644 (1980). Although a number of courts limit their consideration to a percentage of income or profits, this approach sometimes will yield an undesirable result.

One may safely assume that revenue received by newspapers from the sale of advertising space far exceeds that derived from the sale of newspapers, and yet few people would suggest that the principal business of newspapers is commercial advertising.

Hartford Steam Service Company v. Sullivan, 26 Conn. Supp. 277, 282-83, 220 A.2d 772, 775 (1966). A business begun for a particular purpose may have as its "principal business" some activity different from that in which more than 50% of its income is obtained.

III. Businesses A & B

A. Section 18.2-341(a)(9) Exception

The initial inquiry, therefore, is whether the principal business of businesses A and B is the "preparation and sale of prescription and nonprescription drugs and the sale of medical and hygienic supplies and baby supplies." See § 18.2-341(a)(9). Factors to be considered include the gross and net income and inventory in various categories of products, the purpose of the operation, the advertising in which the businesses engage and any other factors which may indicate the purpose or function of the businesses. The limited facts set out in your request do not permit a determination of the "principal business" of establishments A and B.

B. Section 18.2-341(a)(17) Exception

Under § 18.2-341(a)(17), the analysis is less difficult, since the exception specifically applies to a drugstore the "majority of the sales receipts of which consist of prescription and nonprescription drugs, health and beauty aids." If the business is a drugstore, as defined by §§ 54-524.2(b)(25) and 54-524.49, it satisfies the exception if more than 50% of its sales are in the specified areas.

It is my opinion that a substantial period of time should be used in the determination of the percentages of income or receipts. Any daily evaluation of the status of a business would be extremely burdensome to the business and present substantial enforcement difficulties. Requirements to report income for other purposes generally involves monthly, quarterly or yearly periods. The use of annual figures may be most appropriate, since annual figures would avoid seasonal changes which make a certain company's principal business in the summer different from that in the winter. The general nature of the business, and not its function on Sunday, is the determining factor. If the
business over the course of a reasonable period of time is shown to fall within one of the exceptions in § 18.2-341(a), it is permitted to operate on Sundays.

The definitions in Title 54 indicate that a drugstore or pharmacy continues to be such when closed or when the pharmacist is absent. Section 54-524.49 permits any place of business to call itself a drugstore if it is a pharmacy, as defined by § 54-524.2(25). The latter section defines a pharmacy as an establishment where the practice of pharmacy is conducted or where drugs or medicines are dispensed or where prescriptions are compounded or dispensed. It seems clear that a pharmacy continues to satisfy the definition, even if the pharmacy portion of the business is closed temporarily. Section 54-524.52 permits a pharmacy to continue in operation for up to ten days without the supervision of a pharmacist, "but such pharmacy may not during such period sell nor compound or dispense physicians' prescriptions."

In summary, the issue in the § 18.2-341(a)(17) exception is whether businesses A and B, which appear to be drugstores, receive the majority of their sales receipts from prescription and nonprescription drugs, health and beauty aids. Without additional facts, it is not possible to make that determination in this Opinion.

C. Section 18.2-341(a)(18) Exception

Section 18.2-341(a)(18) excepts a business from the Sunday Closing Law if the business is engaged in the "sale of novelties, cameras, photographic supplies (including film and flash bulbs), antiques, pictures, paintings, art supplies, souvenirs, animals as pets, including tropical fish, and pet supplies."

Any determination whether the exception in § 18.2-341(a)(18) applies will depend on whether the principal business of businesses A and B is the sale of the various items listed in this exception. If the businesses derive more than 50% of their income from the sale of these items, if the purpose of the business is to sell such items, or if a review of all of the factors discussed above reveal such sales to be the principal business, the businesses would fall within the exception. Without additional facts, it is impossible to determine whether this exception applies.

IV. Businesses C-1 and C-2

You note that business C is, in fact, two establishments. As a consequence, each must be considered separately. Since C-2 (the pharmacy) is closed on Sundays, no issue is presented. With respect to business C-1 (the lunch counter and general merchandise establishment), the issue is whether its principal business falls within one of the exceptions in § 18.2-341(a). Insufficient facts have been presented to enable me to render an Opinion as to whether business C-1 falls within one of the exceptions of § 18.2-341(a).

Section 18.2-342 provides that "§ 18.2-341 shall have no force or effect within any county or city in the Commonwealth which has by ordinance expressed the sense of its citizens, as provided in § 15.1-29.5, that such laws are not necessary." The City of Salem has not adopted an ordinance pursuant to § 15.1-29.5; the Sunday Closing Law, therefore, remains applicable in that jurisdiction.

The explicit incorporation of this standard in § 18.2-341(a)(17) demonstrates that a number of factors are to be considered in determining "principal business" in § 18.2-341(a)(9). If the General Assembly had desired categorization under each exception to be based solely upon the majority of sales receipts, it could have added this specificity to each exception and certainly would not have included the present "majority of the sales receipts" language solely in § 18.2-341(a)(17).
WHEN OFFICER RECEIVES RADIO MESSAGE FROM HIS DEPARTMENT THAT WARRANT FOR THAT OFFENSE ON FILE WITH ANY LAW ENFORCEMENT AGENCY.

April 10, 1987

The Honorable Neil S. Vener
Commonwealth's Attorney for Campbell County

You ask whether that portion of § 19.2-81 of the Code of Virginia, which authorizes a police officer to arrest a person without a warrant for an alleged misdemeanor not committed in the officer's presence "when the officer receives a radio message from his department that a warrant for such offense is on file," permits such an arrest when the warrant is "on file" with a police agency in this State other than the agency of the arresting officer.

I. Applicable Statute

Section 19.2-81 provides, in relevant part, as follows:

Members of the State Police force of the Commonwealth, the sheriffs of the various counties and cities, and their deputies, the members of any county police force, the members of any duly constituted police force of any city or town of the Commonwealth and the special policemen of the counties as provided by § 15.1-144, provided such officers are in uniform, or displaying a badge of office, may arrest, without a warrant, any person who commits any crime in the presence of such officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence. ... Such officers may arrest, without a warrant, persons duly charged with a crime in another jurisdiction upon receipt of a photocopy of a warrant, telegram, computer printout, facsimile printout, a radio, telephone or teletype message, in which photocopy of a warrant, telegram, computer printout, facsimile printout, radio, telephone or teletype message shall be given the name or a reasonably accurate description of such person wanted, the crime alleged and an allegation that such person is likely to flee the jurisdiction of the Commonwealth. Additionally, any such officer may arrest, without a warrant, for an alleged misdemeanor not committed in his presence when the officer receives a radio message from his department that a warrant for such offense is on file .... [Emphasis added.]

II. Phrase "on File" Must Be Given Ordinary Meaning

There is no statutory definition of the phrase "on file." The phrase, therefore, must be given its ordinary meaning, considering the context in which it is used. See 1985-1986 Report of the Attorney General at 169, 304.

Examining the context in which the phrase "on file" is used in § 19.2-81 reveals that the only other portion of the sentence containing the term which is relevant to your inquiry is the language which specifies that the officer receive the radio message "from his department." As a practical matter, however, virtually every official radio broadcast received by a police officer originates "from his department." The words "from his department," in my opinion, are intended to distinguish official police broadcasts from radio messages received from other sources, such as commercial radio stations or citizens' band operators. This conclusion comports with the obvious intent of the General Assembly in this context that an arrest warrant be based upon reliable information.

The questioned phrase "on file" appears in the third sentence of the statute as quoted above. Since this sentence begins with the word "additional," indicating an expansion of the powers of arrest set forth in the preceding sentence, reference to the previous sentence of the statute is probative in determining the scope of the phrase "on
The second sentence of § 19.2-81, as quoted above, authorizes, under certain conditions, the arrest of "persons duly charged with a crime in another jurisdiction." (Emphasis added.) This sentence authorizes the arrest for any crime, including a felony, under the circumstances stated in the statute. The purpose of the third sentence of the above-quoted statute is to authorize an arrest under similarly reliable, though less burdensome, conditions when the arrest warrant is for a misdemeanor rather than a felony. The provisions of the statute thus recognize a logical distinction. An arrest for a felony offense carries greater social stigma and the conditions of release are usually more onerous than when the arrest is for a misdemeanor. When the warrant "on file" is for a misdemeanor, therefore, an officer may arrest an accused merely upon receiving "a radio message from his department."\(^1\)

III. Policy Considerations Require Broad Interpretation of "on File"

To conclude that the phrase "on file," as used in § 19.2-81, requires that the warrant in question be on file at the department of the arresting officer would frustrate the policy underlying the statute. Section 19.2-81 was clearly designed to further cooperation between neighboring jurisdictions in the apprehension of persons charged with a crime. This policy is also embodied in Ch. 2 of Title 52, § 52-12 et seq., which creates a statewide network for the communication of information to aid law enforcement. When the offense involved is a misdemeanor which was not committed in the officer's presence, this policy dictates that the officer should be permitted to make an arrest based upon a radio message from his department that a misdemeanor warrant is on file with any law enforcement agency in his or any other jurisdiction.

IV. Conclusion: "On File" Means on File with Any Law Enforcement Agency

Based on the above, it is my opinion that a police officer may arrest a person without a warrant for a misdemeanor not committed in the officer's presence when the officer receives a radio message from his department that a warrant for that offense is on file with any law enforcement agency.

\(^1\)Although the questioned portion of § 19.2-81 was not challenged in the recent case of Bradshaw v. Commonwealth, No. 1142-85 (Va. Ct. App. Feb. 11, 1987), the court ruled in an unpublished order that a valid arrest had occurred where a Fairfax County police officer arrested the defendant, whom the officer had stopped for a traffic infraction, after the officer received a radio message from his department that a warrant charging the defendant with failure to appear in court was on file in Arlington County.

CRIMINAL PROCEDURE - ARREST. SHERIFF MUST ACCEPT ACCUSED WHO HAS BEEN ARRESTED, FOR WHOM NO COMMITTAL CARD ISSUED AND NO APPEARANCE BEFORE MAGISTRATE TO DETERMINE COMMITMENT TO JAIL OR RELEASE.

March 20, 1987

The Honorable John R. Newhart
Sheriff for the City of Chesapeake

You ask whether the Chesapeake Sheriff's Department must accept an accused who has been arrested, but for whom no committal card has been issued and who has not yet appeared before a magistrate to determine whether he should be committed to jail or released. You indicate that the Chesapeake Jail is being used to hold such persons temporarily and that magistrates will not issue committal cards until after these persons have appeared before the magistrate and the decision to commit has been made. You
also inquire whether your department will incur increased liability if an accused is in-
jured while being held temporarily, without a committal card, awaiting an appearance
before a magistrate.

I. Applicable Statutes

Section 19.2-80 of the Code of Virginia requires a law enforcement officer who
makes an arrest with a warrant to bring the arrested person before an official having
authority to grant bail "without unnecessary delay." The official is then required to
"admit the accused to bail or commit him to jail." When the arrest is made without a
warrant, § 19.2-82 requires that an arrested person be brought before a magistrate or
other issuing authority "forthwith" for determination of whether a warrant or summons
should be issued. The terms "without unnecessary delay" and "forthwith" are essentially
"Forthwith" has been defined as "with such reasonable promptness and dispatch as the
circumstances may permit." Winston v. Commonwealth, 188 Va. 386, 394, 49 S.E.2d 611,
615 (1948). The purpose of the appearance before the magistrate, under either statute, is
to make the determination whether the person should be released or committed to jail.

There is no statutory requirement that a magistrate issue a committal card, al-
though § 16.1-69.51 authorizes the Committee on District Courts to determine the form
and character of records of magistrates. The Committee has, in fact, approved a form
for a committal card.

II. Sheriff Must Detain Accused While Awaiting
Decision of Judicial Officer and Issuance of Committal Card

The purpose of the committal card is to provide objective evidence that a person
has appeared before a magistrate and that a judicial decision has been made to commit
the person to jail. Until that decision is made, it would be improper for a magistrate to
issue a committal card. It is my opinion, therefore, that you must accept an accused who
has been arrested, but for whom no committal card has been issued and who has not yet
appeared before a magistrate to determine whether he should be committed to jail or
released.

The fact that a committal card has not been issued for the temporary detention of
an accused until a magistrate becomes available would not affect the liability of either
the arresting officer or your department. Under the above statutes, however, both the
sheriff and the arresting officer have an affirmative obligation to make certain that per-
sons being held temporarily, pending an appearance before a magistrate, are afforded
that opportunity within a reasonable amount of time. What is reasonable, of course, will
depend upon the circumstances of each case.

CRIMINAL PROCEDURE - ARREST. SHERIFFS AND THEIR DEPUTIES MAY ARREST,
WITHOUT WARRANT, PERSON INVOLVED IN TRAFFIC ACCIDENT WHO HAS BEEN
TRANSPORTED TO HOSPITAL OR MEDICAL FACILITY OUTSIDE USUAL JURISDICT-
ION.

July 18, 1986

The Honorable Robert E. Maxey, Jr.
Sheriff for Campbell County

This is in reply to your request for my interpretation of § 19.2-81 of the Code of
Virginia. You state that when a person is injured in a motor vehicle accident in Campbell
County, the person is usually transported to a hospital located in the City of Lynchburg.
You question whether you or your deputies have the authority under § 19.2-81 to arrest,
in the City of Lynchburg, without a warrant, a person who was injured in an accident in
Campbell County and who has been transported to a hospital in Lynchburg.
I. Applicable Statute

Section 19.2-81 provides, in pertinent part, as follows:

[T]he sheriffs of the various counties and cities, and their deputies... may, at the scene of any motor vehicle accident or at any hospital or medical facility to which any person involved in such accident has been transported... apprehend such person without a warrant of arrest. [Emphasis added.]

II. Sheriff's Authority to Arrest Person Involved in Traffic Accident Extends to Any Hospital to Which Person Is Transported, Even if Outside His Jurisdiction

Although the authority of a sheriff is generally coextensive with his county, the General Assembly may provide otherwise by statute. See 1980-1981 Report of the Attorney General at 322. Section 19.2-81 states that a sheriff may arrest someone involved in a motor vehicle accident at "any hospital or medical facility" to which the person has been transported. (Emphasis added.) The Supreme Court of Virginia has held that the term "[a]ny" is an indefinite word and includes "all... unless restricted." County of Loudon v. Parker, 205 Va. 357, 362, 136 S.E.2d 805, 809 (1964). Finding no restrictive language in § 19.2-81, I construe the phrase "any hospital or medical facility" to mean any and all such facilities, regardless of where they are located in the Commonwealth.

I am, therefore, of the opinion that you or your deputies may arrest at a hospital or medical facility outside Campbell County, without a warrant, a person who was involved in a traffic accident in Campbell County and who has been transported to such hospital or medical facility. 1

In answering your inquiry, I am assuming that the arrest will be based upon the criteria set forth in § 19.2-81 that the officer have "reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed" by the person to be apprehended. I also note that under § 46.1-178.01, "traffic infractions" are treated as crimes for purposes of arrest.

The exception in § 19.2-81 to the general extent of a sheriff's jurisdiction is similar to the "hot pursuit" exception in § 19.2-77.

CRIMINAL PROCEDURE - BAIL AND RECOGNIZANCES - MAGISTRATES - SUPERVISION. MAGISTRATE MAY REQUIRE ADDITIONAL BAIL FOR SECOND OFFENSE ARISING FROM SAME FACTS ON WHICH ORIGINAL CHARGE BASED. COMMONWEALTH'S ATTORNEY MAY PROVIDE LEGAL ADVICE TO MAGISTRATE WITHOUT CONSULTING WITH CHIEF JUDGE.

May 30, 1987

The Honorable Johnny E. Morrison
Commonwealth's Attorney for the City of Portsmouth

You ask (1) whether a magistrate may require an accused to post a second bond when the accused has previously been arrested and admitted to bail by the magistrate, but a second arrest warrant has been issued for a second offense arising from the same facts which led to the original charge; and (2) whether a Commonwealth's attorney has authority to render legal advice directly to magistrates, without first seeking the approval of the chief judge of the circuit court.

I. Magistrate May Require Additional Bail for Subsequent Offense Arising from Same Facts Leading to Original Charge

Your first question requires an interpretation of § 19.2-130 of the Code of Virginia, and its relation to § 19.2-133. Section 19.2-130 provides, in pertinent part, as follows:
Any person admitted to bail by a judge or clerk of a district court or by a magistrate shall not be required to be admitted to bail in any subsequent proceeding arising out of the initial arrest unless the court having jurisdiction of such subsequent proceeding deems the initial amount of bail or security taken inadequate. [Emphasis added.]

Section 19.2-133 additionally provides, in pertinent part:

Although a party has been admitted to bail, if the amount thereof is subsequently deemed insufficient, or the security taken inadequate, the court having jurisdiction to try the case in which the bail was required, or the judge thereof, or the officer before whom the bail was given, may increase the amount of such bail, or may require new or additional sureties therefor, or both. [Emphasis added.]

The example you give in requesting an interpretation of these statutes is when a laboratory analysis is returned to you indicating that a second controlled substance was found, in addition to the one upon which a first criminal charge was based. The arresting officer may then secure a second warrant, charging the accused with an additional offense. In these cases, the accused often has posted bond on the first offense and is not in custody.

Section 19.2-130 does not preclude a magistrate from setting additional bail on the second charge under these facts. If a warrant has been issued for the second offense, the second charge upon which the magistrate sets bail would not be a "subsequent proceeding arising out of the initial arrest," since a second arrest has now been made for an additional, separate offense. Section 19.2-130. It is my opinion that § 19.2-133 authorizes an increase in the amount of bail in this situation.

There may also be circumstances when a continuing law-enforcement investigation into the activity of a defendant, who has already been charged with a relatively minor criminal offense, posted bond, and has been released, unearths information which warrants increased bail but which will not support an additional criminal charge. Section 19.2-133 permits a magistrate before whom a defendant posts bond on an original charge to increase the amount of bail based on these additional facts. It is my opinion that the "subsequent proceeding arising out of the initial arrest" described in § 19.2-130 was intended to apply to proceedings such as certifications of felonies from district courts to circuit courts, or the appeal of a misdemeanor conviction to a circuit court. To conclude otherwise would create a conflict between §§ 19.2-130 and 19.2-133, which should be avoided. Marchand v. Div. of Crime Victims' Comp., 230 Va. 460, 339 S.E.2d 175 (1986).

It is further my opinion, therefore, that when an accused has been admitted to bail for a particular offense and is subsequently charged with a second offense which arises from the same facts on which the original charge was based, § 19.2-130 does not prohibit a magistrate from fixing additional bail on the second offense.

II. Commonwealth's Attorney May Provide Legal Advice to Magistrate Without Consulting with Chief Judge

With respect to your second question, the provisions of § 19.2-42 are clear, unambiguous, and require a Commonwealth's attorney to render legal advice to magistrates. The chief judge of the circuit court or general district court, as the case may be, has supervisory authority over magistrates pursuant to the provisions of § 19.2-41, but that supervisory authority relates to issues other than the legal advice which a Commonwealth's attorney is required to render to magistrates under § 19.2-42. A prior Opinion of this Office has concluded that a magistrate's power to issue warrants is independent of any supervisory authority of the chief circuit court judge or chief general district court judge, and that the supervisory authority contemplated by § 19.2-41 relates only to ministerial, and not discretionary, duties. See 1985-1986 Report of the Attorney General at 133, 134. The legal advice given to magistrates by a Commonwealth's attorney is independent of the supervisory authority given to chief judges. It is my opinion, therefore,
that a Commonwealth's attorney has the authority to give such legal advice without first obtaining the approval of the supervising judge.


CRIMINAL PROCEDURE — COMPENSATING VICTIMS OF CRIME. VICTIM MUST INCUR ACTUAL EXPENSES TO BE ELIGIBLE FOR MEDICAL COMPENSATION AWARD PURSUANT TO § 19.2-368.11:1(D).

September 26, 1986

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

You ask whether a hospital that participates in the federal Hill-Burton program is entitled to payment from the Criminal Injuries Compensation Fund (the "Fund") for medical services rendered to indigent patients who are victims of crime.

I. Scope of Medical Payments from Fund Limited to Victims' "Actual Expenses Incurred"

Chapter 21.1 of Title 19.2 of the Code of Virginia establishes a compensation program for victims of crime and certain members of their families. The list of eligible recipients is specifically set forth in § 19.2-368.4, and includes, for example, the victim and a surviving spouse, parent or child of the victim. Section 19.2-368.4 does not include, however, medical facilities as eligible recipients. The medical care provider may only receive payment if the victim makes application and is deemed eligible for a medical compensation award in accordance with § 19.2-368.11:1.

Section 19.2-368.11:1 provides that those eligible to file a claim may receive an award for a portion of their lost wages, as well as compensation for certain expenses. Section 19.2-368.11:1(D) specifically provides that awards may be made to eligible applicants based upon the claimant's "actual expenses incurred as are determined by the Commission to be appropriate, for (i) unreimbursed medical expenses or indebtedness reasonably incurred for medical expenses . . . ." (Emphasis added.) Consequently, the victim is only entitled to an award for actual expenses incurred for medical care.

II. Hill-Burton Hospital Facilities Are Obligated to Furnish Uncompensated Medical Care to Eligible Individuals

A hospital that is a recipient of federal assistance pursuant to the Public Health Service Act ("Hill-Burton program"), 42 U.S.C. § 291 et seq., may be required to give assurance that it will make available a reasonable volume of services to individuals unable to pay for medical care. This federal assistance typically involves loan guarantees and interest subsidies for the construction of medical facilities in a particular locality. According to your letter, the facility in the present case is a recipient of such federal assistance.

The specific components of the Hill-Burton program are set forth in 42 C.F.R. § 124.501 et seq. (1985). The individuals who are eligible for uncompensated care are specifically identified in 42 C.F.R. § 124.506 (1985). According to these provisions, an individual who meets the income requirements set forth in the regulations is entitled to make application for uncompensated care. The medical facility, in turn, is required as a recipient of federal assistance to provide uncompensated medical care within the annual compliance level established by federal law.

III. If No Actual Expenses Incurred, Fund Not Subject to Claims of Indigent Victim

If an indigent crime victim is deemed eligible for services in accordance with the
Hill-Burton program, medical care is provided at no expense to the individual. As a consequence, the victim has not incurred "actual expenses" related to his care. Accordingly, the victim would not be entitled to an award for medical costs pursuant to § 19.2-366.11:1(D) because there were no "actual expenses incurred" by the claimant.

IV. Conclusion: Hill-Burton Hospital Provider Not Eligible for Reimbursement for Medical Services Rendered Without Cost to Indigent Victims

In view of the foregoing, it is my opinion that a crime victim who receives uncompensated medical care in accordance with the Hill-Burton program would not be eligible for a medical compensation award, and the participating hospital therefore would not be entitled to payment from the Fund.

CRIMINAL PROCEDURE - CONVICTIONS; EFFECT THEREOF. MOTOR VEHICLES. CHARGE OF DRIVING UNDER INFLUENCE AND MOVING VIOLATION OTHER THAN RECKLESS DRIVING. CONVICTION OF DRIVING UNDER INFLUENCE DOES NOT REQUIRE DISMISSAL OF REMAINING MOVING VIOLATION CHARGE.

April 10, 1987

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

You ask a question concerning the applicability of § 19.2-294.1 of the Code of Virginia when a law enforcement officer stops a person operating a motor vehicle and charges that person with driving under the influence pursuant to § 18.2-266 and a moving violation other than reckless driving. Specifically, you ask whether a conviction of driving under the influence requires dismissal of the remaining moving violation charge.

I. Applicable Statute

Section 19.2-294.1 provides that "[w]henever any person is charged with a violation of § 18.2-266 or any similar ordinances of any county, city, or town and reckless driving growing out of the same act or acts and is convicted of one of these charges, the court shall dismiss the remaining charge."

II. Prior Opinions Conclude Dismissal of Reckless Driving Violation Not Required when Defendant Convicted of Lesser Offense than Driving Under Influence

A prior Opinion of this Office concludes that, when a person is charged with driving under the influence and reckless driving growing out of the same act, and the driving under the influence charge is later reduced under former § 18.1-54 to impaired driving, § 19.1-259.1 (now § 19.2-294.1) does not bar the prosecution of the reckless driving charge. See 1966-1967 Report of the Attorney General at 182. This Opinion further notes that former § 19.1-259.1 precludes a prosecution for reckless driving only in those instances in which an accused is charged with the operation of a motor vehicle while 'under the influence' of alcoholic intoxicants in violation of § 18.1-54 [presently § 18.2-261] and is convicted of that offense. The offense defined in § 18.1-56.1 [now repealed] is that of operating a motor vehicle while one's ability to do so 'is impaired by the presence of alcohol' in his blood. . . . An individual convicted of a violation of § 18.1-56.1 has not been convicted of a violation of § 18.1-54 and has not been convicted of the specific offense which, under § 19.1-259.1 . . . requires dismissal of a reckless driving charge.

Id. at 182-83.

Another prior Opinion of this Office is also relevant to your inquiry. In interpreting
the requirements of former § 19.1-259.1, the Opinion states that

this Section [presently § 19.2-294.1] concerns itself only with reckless driv-
ing and driving under the influence of intoxicants. . . . It states 'whenever
any person is charged' with the two specifically named violations growing out
of the same act or acts, upon conviction of one of these charges, the court
shall dismiss the remaining charge.


III. Conclusion: Dismissal of Remaining Charge Not Required

Section 19.2-294.1 requires the dismissal of the remaining charge when a person has
been charged with both driving under the influence and reckless driving and has been
convicted of one of those charges. I am of the opinion, therefore, that if a person is
stopped by a law enforcement officer, is charged with driving under the influence and a
moving violation other than reckless driving, and is subsequently convicted of driving
under the influence, § 19.2-294.1 does not require dismissal of the remaining moving vio-
lation charge.

CRIMINAL PROCEDURE - DISABILITY OF JUDGE, APPOINTED COUNSEL, ETC.
RECORDING EVIDENCE AND INCIDENTS OF TRIAL. ALL CIRCUIT COURT PRO-
CEEDINGS INCIDENT TO TRIAL OF FELONY CASE SHOULD BE RECORDED.

March 30, 1987

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

You ask whether the provisions of § 19.2-165 of the Code of Virginia, requiring the
verbatim recording of the evidence and incidents of trial in felony cases, includes all
proceedings in a felony case or whether recording of "just the trial and evidentiary por-
tions" of a felony proceeding would comply with this statute.

I. Applicable Statute

Section 19.2-165 provides, in pertinent part:

In all felony cases, the court or judge trying the case shall by order entered
of record provide for the recording verbatim of the evidence and incidents of
trial either by a court reporter or by mechanical or electronic devices ap-
proved by the court.

II. Prior Opinions Define "Incidents of Trial" Broadly

This Office has previously addressed the question you pose in more specific con-
both prior Opinions, "incidents of trial" was defined as "all proceedings, such as examina-
tion of the jury, the reading of the indictment, the plea of the accused, motions of coun-
sel, objections to the admittance of evidence, rulings of the court, and all other state-
ments connected with the trial." Reports of the Attorney General: 1977-1978, supra, at
123; 1963-1964, supra.

III. Primary Purpose of Recording Felony Proceedings in
Circuit Court Is to Aid Courts in Postconviction Appeals

The primary purpose of maintaining an accurate record in a felony proceeding is to
enable a court on appeal or in a habeas corpus proceeding to determine whether the orig-
inal trial was properly conducted. "[I]t is axiomatic that an appellate court's review of
the case is limited to the record on appeal." Turner v. Commonwealth, 2 Va. App. 96, 99, 341 S.E.2d 400, 402 (1986). In many instances, evidentiary hearings in habeas corpus proceedings can be avoided if the petitioner's claim may be heard on the record in the trial court. See § 8.01-654(B)(4); Arey v. Peyton, 209 Va. 370, 164 S.E.2d 691 (1968). The record, therefore, should include all proceedings in the circuit court which are incident to the felony trial.

IV. Conclusion: All Proceedings in Circuit Court Incident to Trial of Felony Case Should Be Recorded

Based on the above, it is my opinion that all circuit court proceedings incident to the trial of a felony case should be recorded pursuant to § 19.2-165.

CRIMINAL PROCEDURE - EXTRADITION OF CRIMINALS - UNIFORM CRIMINAL EXTRADITION ACT. COURTS NOT OF RECORD - DISTRICT COURTS. JUDICIAL FUNCTIONS PERFORMED BY BOTH BRANCHES OF DISTRICT COURT UNDER ACT.

March 30, 1987

The Honorable J. R. Zepkin
Judge, Ninth Judicial District

You ask whether a district court judge may perform any of the court functions authorized under the Uniform Criminal Extradition Act, § 19.2-85 et seq. of the Code of Virginia (the "Act"), and if so, whether these functions may be performed by a juvenile and domestic relations district court judge.

I. Performance of Judicial Functions Under Act Not Limited to Judges of Courts of Record

The Act defines the term "judge" as "a judge of a court of record having criminal jurisdiction." Section 19.2-85(4). A general application of this definition is belied, however, by a reading of other sections of the Act.

Section 19.2-95, the first of three statutes in the Act making reference to a "judge of a circuit or general district court," directs that a person arrested upon the Governor's warrant "shall first be taken forthwith before a judge of a circuit or general district court in this State" to be advised of his rights under the Act, including his right to apply for a writ of habeas corpus. Section 19.2-104 then allows "any judge of a circuit or general district court" to order the arrest of a fugitive previously admitted to bail for a violation of any of the conditions of his bond. Section 19.2-114 allows an accused to waive the issuance of the Governor's warrant and all other extradition proceedings before "a judge of a circuit or general district court" and to be delivered forthwith to the custody of agents of the demanding state. Based on the above, it is clear that the judicial functions authorized by these three statutes are not limited by the definition of a "judge" in § 19.2-85(4) and are not to be performed solely by a judge of a court of record.

In contrast, a fugitive arrested under § 19.2-99 on a criminal warrant issued by "any judge, magistrate or other officer authorized to issue criminal warrants," but prior to the issuance of the Governor's warrant, is to be brought "before any judge who may be available in or convenient of access to the place where the arrest may be made, to answer the charge of complaint and affidavit." Section 19.2-100 details the procedures for the arrest of a fugitive without a criminal warrant and prior to the issuance of the Governor's warrant. Under that statute, certain procedures for a warrantless arrest are to be followed. This provision concludes with the following language: "thereafter his answer shall be heard as if he had been arrested on a warrant."

The Act then provides that, after arrest under either § 19.2-99 or § 19.2-100, the accused may be placed in jail pursuant to § 19.2-101 by the "judge" for a period up to
thirty days to provide authorities the opportunity to obtain a Governor's warrant. The period of incarceration may be extended sixty days pursuant to § 19.2-103 by any "judge" in this State.

Strictly applying the definition in § 19.2-85(4), the procedures authorized in §§ 19.2-99, 19.2-101 and 19.2-103 could be performed only by a judge of a court of record. Such an application would, however, create a lack of uniformity between these three sections and §§ 19.2-95, 19.2-104 and 19.2-114. I find no basis upon which to conclude that such a result was intended by the General Assembly.

It is a cardinal rule of statutory construction that, when construing statutes on the same subject, each section should be considered in conjunction with every other section so as to produce a harmonious result. Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953); 1980-1981 Report of the Attorney General at 265, 266. The sections comprising the Act are in pari materia and should be construed together.

Based on the above, it is my opinion that a district court judge, as well as a circuit court judge, may act in accordance with the procedures authorized by §§ 19.2-99, 19.2-100, 19.2-101 and 19.2-103. Specifically, I conclude that the references to "judge" in §§ 19.2-99, 19.2-101 and 19.2-103 were intended to include a district court judge. To conclude otherwise would lead to the anomalous result that a fugitive could be taken before a circuit or district court judge to answer a charge, but only the circuit court judge could finally dispose of the case. This interpretation also harmonizes the application of these statutes with other provisions of the Act and with § 16.1-69.25.1

II. Juvenile and Domestic Relations District Court Judge May Perform Some, but Not All, Judicial Functions Under the Act

In response to your second question concerning the authority of a juvenile and domestic relations district court judge to perform judicial functions under the Act, § 16.1-69.5(d) establishes two separate and distinct branches of "district courts," viz, "general district courts and juvenile and domestic relations district courts." Since I have already concluded that the procedures authorized by §§ 19.2-99, 19.2-100, 19.2-101 and 19.2-103 may be performed by a circuit or district court judge, I further conclude that a "district court judge" includes a juvenile and domestic relations district court judge for purposes of these four sections. Section 16.1-69.5(d).

The procedures in §§ 19.2-95, 19.2-104 and 19.2-114, however, are, by their language, specifically limited to circuit court and general district court judges. General district court judges, by the express definition set forth in § 16.1-69.5(b), do not include juvenile and domestic relations district court judges. Accordingly, the judicial functions authorized by those provisions may not be performed by a juvenile and domestic relations district court judge.

III. Conclusion

In summary, therefore, it is my opinion that any juvenile and domestic relations district court judge may (1) have a fugitive brought before him to answer the charge under §§ 19.2-99 and 19.2-100; (2) commit the fugitive to jail under § 19.2-101; and (3) extend the period of incarceration or release the fugitive under § 19.2-103, but may not perform the formal extradition procedures under §§ 19.2-95, 19.2-104 or § 19.2-114.

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1Section 16.1-69.25 provides, in part: "Except as otherwise provided by general law, a judge of a district court ... may also issue fugitive warrants and conduct proceedings thereon in accordance with the provisions of §§ 19.1-63 to 19.1-68." (Emphasis added.) Former §§ 19.1-63 through 19.1-68 are currently §§ 19.2-99 through 19.2-104, respectively. Strictly interpreting the limiting definition in § 19.2-85(4) would render the phrase "and conduct proceedings thereon" in § 16.1-69.25 meaningless. Clearly, this was not the intent of the General Assembly.

CRIMINAL PROCEDURE - GRAND JURIES - SPECIAL GRAND JURIES. INVESTIGATOR APPOINTED BY COURT PURSUANT TO § 19.2-211 MAY BE PRESENT AT REQUEST OF SPECIAL GRAND JURY WHEN WITNESSES EXAMINED.

November 21, 1986

The Honorable B. Randolph Boyd
Commonwealth's Attorney for Charles City County

You ask whether a State police investigator, appointed by a circuit court pursuant to § 19.2-211 of the Code of Virginia to assist a special grand jury in its investigation, may be present when the special grand jury is examining witnesses. You conclude that, while these investigators may not participate in the questioning of witnesses, they may be present when the witnesses are examined before the special grand jury.

I. Applicable Statutes

A special grand jury is distinct from a regular grand jury in that, among other things, its function is primarily investigatory and it has no authority to return criminal indictments. See §§ 19.2-206, 19.2-214. Recognizing this "fundamental" distinction, the 1975 Session of the General Assembly specifically detailed the function and authority of, and procedure before, the special grand jury in §§ 19.2-207 through 19.2-215. See Report of the Virginia Code Commission on Revision of Title 19.1 of the Code of Virginia, H. Doc. No. 20, 1974 Session at 5.

Section 19.2-211 provides, in part, as follows:

At the request of the special grand jury, the court may . . . provide it with appropriate specialized personnel for investigative purposes.

II. Analysis

Unlike § 19.2-209, which permits the presence of a witness' counsel before a special grand jury during that witness' testimony, and § 19.2-210, which permits the presence of the Commonwealth's attorney before a special grand jury at certain times, there is no express statutory authority in Virginia permitting the presence of investigative personnel during the examination of a witness by a special grand jury. Under basic principles of statutory construction, however, such authority should be implied from § 19.2-211.

A. The Purpose of Special Grand Juries Contemplates Presence of Investigators During Examination of Witnesses

As discussed above, the primary purpose of a special grand jury is to investigate conditions which involve, or tend to promote, criminal activity. See §§ 19.2-191(2), 19.2-206. A special grand jury is often impanelled due to law enforcement's inability to compel information or other evidence concerning suspected criminal activity from those in possession of such information or evidence.

Being present to hear a witness' testimony before a special grand jury may be the only opportunity an investigator has to compare that witness' testimony and demeanor with other statements or information previously obtained from the witness or others.

A basic rule of statutory construction is that, in considering the object and purpose of a statute, a reasonable construction should be given to promote the end for which it was enacted. See Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982). That which is necessarily implied in a statute must be included to effect the purpose of that statute.
Section 19.2-211 was enacted by the legislature to provide a special grand jury with the assistance of specialized investigative personnel. Without the presence of these specialized investigative personnel during witnesses' testimony before the special grand jury, these investigators would find it difficult at best to perform the task they were designated by the court, at the request of the special grand jury itself, to perform. This clearly could not have been the result the legislature intended. Furthermore, a circuit court also is authorized by §19.2-211 to designate special counsel to assist the special grand jury in its work. To exclude court-designated investigative personnel from the grand jury room during witnesses' testimony would also necessitate the exclusion of a court-designated special counsel during the taking of such testimony. The exclusion of either would make the meaningful functioning of a special grand jury difficult, if not practically impossible, in most cases.

B. Rule 3A:5 of the Rules of the Supreme Court of Virginia Is Inapplicable to Special Grand Juries

Rule 3A:5(a) of the Rules of the Supreme Court of Virginia, states as follows:

Only the grand jurors and the witness under examination and, if directed by the court, an interpreter shall be present during the hearing of evidence by a grand jury. Only the grand jurors shall be present during their deliberations and voting.

It is my opinion that this paragraph of Rule 3A:5 does not apply to special grand juries. In fact, much of Rule 3A:5 deals with procedures that are peculiarly functions of regular, and not special, grand juries. See Rule 3A:5(c); compare Rule 3A:5(a) with §§19.2-209, 19.2-210.

III. Conclusion

Based on my reading of §19.2-211, and what I consider to be a reasonable construction of that statute which promotes the purpose for which it was enacted, I am of the opinion that an investigator appointed by the court pursuant to §19.2-211 may be present at the request of the special grand jury when witnesses are being examined, but he may not participate in the questioning of witnesses.

1Section 19.2-213.1, giving a circuit court the authority to discharge a special grand jury that has not filed a report within six months of its impanelling, unless it determines progress is being made in its investigation, was enacted by Ch. 638, 1978 Va. Acts 1031.

CRIMINAL PROCEDURE - MAGISTRATES - THE MAGISTRATE SYSTEM. MAGISTRATE NOT CHARGED WITH DUTY OF ENFORCING LAWS OR ORDINANCES MAY SERVE AS DISPATCHER.

June 26, 1987

The Honorable P. G. Brockwell, Jr.
Sheriff for Brunswick County

You ask whether a magistrate may also be employed in the Brunswick County central dispatching office. You note that, although the dispatcher is on the payroll of the sheriff's department, he dispatches messages and information not only to the sheriff's department, but also to local fire departments, rescue squads and area police departments. You further note that the dispatcher is not a police officer and is not empowered to make arrests or serve legal papers.
I. Applicable Statute

Section 19.2-37 of the Code of Virginia provides, in pertinent part, as follows:

Any person may be appointed to the office of magistrate under this title subject to the limitations of Chapter 4 (§ 2.1-30 et seq.) of Title 2.1 . . . and of this section.

A person shall be eligible for appointment to the office of magistrate under the provisions of this title: (a) if such person or his spouse is not a law-enforcement officer; (b) if such person or his spouse is not a clerk, deputy or assistant clerk, or employee charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof, of any such clerk of a district court or police department or sheriff's office in any county or city with respect to appointment to the office of magistrate of such county or city . . . . [Emphasis added.]

II. Magistrate Not Charged with Duty of Enforcing Laws or Ordinances May Serve as Dispatcher

In 1985 the General Assembly deleted the phrase, "or otherwise charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof" at the end of clause (a), and inserted in clause (b), "charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof" preceding "of any such clerk of a district court."

Although the 1985 amendments to the above-quoted portion of § 19.2-37 result in some ambiguity, it appears from the amendment that the intent of the General Assembly was to permit a magistrate to also be an employee of a sheriff's department, as long as the person, in his role as a sheriff's department employee, does not engage in the enforcement of any of the laws of the Commonwealth or of any ordinance of any political subdivision. Since you indicate that the magistrate you wish to hire as a dispatcher would not be engaged in these activities, it is my opinion that he may be employed as a county dispatcher although, as such, he is an employee of the sheriff's department.

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1For purposes of this Opinion, I assume the prospective employee is not disqualified from employment in the sheriff's department under other prohibitions in § 19.2-37.

2It is axiomatic that magistrates, as judicial officers of the Commonwealth, must exercise independent judgment in the performance of their judicial duties. Any magistrate who receives and dispatches radio messages concerning criminal suspects may have that independent judgment tested when called upon to determine probable cause for arrest warrants and similar criminal process.

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CRIMINAL PROCEDURE - RECOVERY OF FINES AND PENALTIES. CIVIL REMEDIES AND PROCEDURE - CERTAIN INCIDENTS OF TRIAL. COURT LACKS DISCRETION TO DEFER ACCRUAL OR WAIVE PAYMENT OF POSTJUDGMENT INTEREST ON JUDGMENT FOR CRIMINAL FINES AND COSTS.

October 16, 1986

The Honorable D. Louis Parrish, Jr.
Clerk, Circuit Court of Goochland County

You ask two questions relating to the accrual and payment of interest on unpaid judgments for fines and costs in criminal cases.
I. Court May Not Defer Accrual of Interest

You ask first whether a judge may, in a sentencing order, defer accrual of interest on an unpaid judgement for fines and costs until after a defendant's release from incarceration.

Section 19.2-340 of the Code of Virginia provides that fines imposed and costs taxed in a criminal case "constitute a judgment in the favor of the Commonwealth, and, if not paid at the time they are imposed, execution may issue thereon in the same manner as upon any other monetary judgment." See also 1978-1979 Report of the Attorney General at 142. Thus, unpaid criminal fines and costs are subject to the civil judgment provisions of § 8.01-382. See 1982-1983 Report of the Attorney General at 300.

Section 8.01-382 provides, in part, that

in any action at law ... the verdict ... or ... judgment or decree ... may provide for interest on any principal sum awarded ... and fix the period at which the interest shall commence. The judgment or decree entered shall provide for such interest until such principal sum be paid. If a judgment or decree be rendered which does not provide for interest, the judgment or decree awarded shall bear interest from its date of entry ... provided, if the judgment entered in accordance with the verdict of a jury does not provide for interest, interest shall commence from the date that the verdict was rendered. [Emphasis added.]

By the plain language of § 8.01-382, it is clear that the General Assembly intended that a trial court or jury have the discretion to decide whether prejudgment interest should be allowed and from what point prejudgment interest should commence, but that postjudgment interest is mandatory until the principal sum is paid. See 1982-1983 Report of the Attorney General, supra. Accordingly, it is my opinion that a court in a sentencing order may not defer the accrual of interest on fines imposed and costs taxed until after a defendant is released from incarceration.

II. Court May Not Waive Payment of Accrued Interest

You next ask whether a judge may waive payment of such interest after it has already accrued. Given that postjudgment interest is mandatory, it logically follows that a court is precluded from waiving payment of such interest after it has already accrued.

Moreover, Rule 1:1 of the Rules of the Supreme Court of Virginia provides that the trial court retains jurisdiction over a criminal matter only for a period of 21 days after entry of final judgment. See Va. Dept. Corr. v. Crowley, 227 Va. 254 316 S.E.2d 439 (1984). It is my opinion, therefore, that a court may not waive the payment of interest after the interest has accrued.

CRIMINAL PROCEDURE - TRIAL AND ITS INCIDENTS - VENUE. JURISDICTION OF TOWN POLICE IN CRIMINAL MATTERS EXTENDS WITHIN ONE MILE OF CORPORATE LIMITS SUBJECT TO POPULATION REQUIREMENTS OF § 19.2-250.

November 28, 1986

The Honorable Elmon T. Gray
Member, Senate of Virginia

You ask whether (a) a town police officer has authority to patrol within one mile outside the town's corporate limits and to make arrests on a State warrant for criminal activity occurring there, and (b) a town police officer has authority to answer calls for assistance pertaining to criminal activity occurring within one mile outside the town's corporate limits, and to make arrests on a State warrant for this criminal activity.
I. Applicable Statute

Section 19.2-250 of the Code of Virginia, which is the successor to § 15.1-141, defines the jurisdiction of corporate authorities in criminal matters in adjoining jurisdictions. It states:

Notwithstanding any other provision of this article, the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the State 1 mile beyond the corporate limits of such town or city; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town.

II. Analysis

The particular questions you ask have been previously raised in the context of former § 15.1-141, and answered, in part, by this Office in a prior Opinion. In that Opinion, my predecessor agreed that former § 15.1-141 authorized a city police officer to make a criminal arrest in an adjoining jurisdiction if the arrest was within the one-mile limit prescribed in the statute. See 1973-1974 Report of the Attorney General at 273. Since Sussex County has a population density of fewer than 300 inhabitants per square mile, the jurisdiction of the Town of Waverly in criminal cases involving offenses against the Commonwealth does extend one mile beyond its corporate limits. I can find no statute or case law which defines "jurisdiction" so as to exclude either "patrolling" or "answering calls for assistance." Indeed, this extension of criminal jurisdiction by the General Assembly contemplates a cooperative law enforcement effort among the jurisdictions involved. Section 19.2-250 is a statute of enforcement of the effective law in the jurisdiction. Its purpose is "to prevent the territory contiguous to a city [or town] from becoming a refuge for criminals ...!" Murray v. Roanoke, 192 Va. 321, 326, 64 S.E.2d 804, 808 (1951).

III. Conclusion

Based on the clear language of § 19.2-250 and the analysis above, I am of the opinion that there is no statute or case authority which prohibits Waverly town police officers from patrolling and answering calls for assistance pertaining to criminal activity within one mile outside the town's corporate limits and making arrests for this activity on a State warrant. It is important to understand, however, that effective law enforcement in any area of the Commonwealth depends largely on a cooperative effort among all appropriate departments.

DRUG TESTING. EMPLOYER MAY ADMINISTER DRUG TEST TO PUBLIC SAFETY EMPLOYEES BASED ON REASONABLE SUSPICION.

February 27, 1987

The Honorable John A. Rollison, III
Member, House of Delegates

You ask several questions regarding mandatory drug testing for public employees. It is important to note at the outset that legal issues involving drug testing are quite fact-oriented. Whether testing is appropriate, the extent of testing and the nature of the test all depend on the particular circumstances of each case. It would be inappropriate, therefore, to give a single answer to each question and represent that the answer has universal application. Each public employer considering a drug testing program should do so in light of that employer's own peculiar fact situation and the nature of its interest in
establishing a testing program. My responses are, therefore, general and may not be wholly applicable to every public employer situation or testing program.1

I. Discussion of Legal Issues in
Drug Testing Requires Specific Facts

You first ask whether there is any legal impediment to mandatory drug testing (urinalysis) for all State and municipal employees. As discussed above, the legal issues involving urinalysis testing for State and municipal employees are quite fact-oriented and, as a result, a case-by-case determination of these issues is required. Your inquiry has not detailed specific facts upon which a precise conclusion may be drawn. When such case-by-case determinations are required, this Office has refrained from rendering an Opinion on general, hypothetical questions without specific facts being set forth. See 1986-1987 Report of the Attorney General at 274.

II. Random Mandatory Drug Testing of Public Safety Employees Suspect Under Existing Case Authority

You next ask whether random drug testing is permitted for State and local employees whose jobs are related to public safety. To date, the legality of random drug testing (testing in the absence of "reasonable suspicion" or "probable cause") has been upheld only with regard to an administrative search conducted in a highly regulated industry. See Shoemaker v. Handel, 619 F. Supp. 1089 (D. N.J. 1985), aff'd, 795 F.2d 1136 (3d Cir. 1986), cert. denied, _ U.S. __, 93 L. Ed. 2d 580, 107 S. Ct. 577 (1986) (testing of jockeys in horse racing industry).

Courts addressing this issue have pointed to several distinctions between this one industry where random testing was upheld and other occupations where such random testing has not been upheld. First, horse racing, unlike most public safety jobs, is an intensely regulated industry within the administrative search exception to the Fourth Amendment. Capua v. City of Plainfield, 843 F. Supp. 1507, 1518 (D. N.J. 1986), and cases cited therein. Such pervasive regulation puts jockeys on notice that they will be subject to the intrusive authority of local regulatory racing commissions. See id.

Second, racing commissions have historically exercised their rule-making authority in ways that reduce the justifiable privacy expectations of participants in the horse racing industry. Therefore, jockeys who become involved in the sport do so with the full knowledge that racing commissions will exercise their authority to assure public confidence in the integrity of horse races. Id.

Finally, great emphasis is placed on the state's interest in maintaining the integrity of such races, and it is recognized that drug testing is the only effective means the state can employ to dispel long-standing public suspicion of criminal influence on race results. Shoemaker, 619 F. Supp. at 1141.

Public safety jobs are clearly distinguishable from the horse racing industry. Public safety jobs are not, in general, highly regulated. Historically, there has been no exercise of rule-making authority relating to public safety jobs that rises to the level of that traditionally exercised by a racing commission. Finally, there is no generalized public perception of criminal influences permeating public safety jobs. See id.

In light of the foregoing, it is clear that the balance of interests in most work situations requires that drug testing be conducted only on the basis of at least "reasonable suspicion." See Lovvorn v. City of Chattanooga, Tenn., 647 F. Supp. 875, 881 (E.D. Tenn. 1986); National Treasury Employees Union v. Von Rabb, 649 F. Supp. 380 (E.D. La. 1986); Capua v. Plainfield; Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985). Therefore, it is my opinion that random drug testing is not permissible in most work settings, including public safety occupations. Moreover, any employer instituting random drug testing in appropriate circum-
stances should do so based on objective policy standards and preferably have the random selection computer-generated.

III. Drug Testing as Precondition to Employment

As a third question, you ask whether the Commonwealth may impose mandatory drug testing for all new employees as a precondition to employment. The reasonableness of a drug test is based on several factors, one of which is the justification for initiating the search. See Bell v. Wolfish, 441 U.S. 520, 559 (1979). In determining whether sufficient justification for a search exists, courts generally consider the nature of the job and the stated reason for the search. Adequate justification is usually found either where an employee has significant involvement in maintaining public safety or where the job involves extremely hazardous duties and there is concern that an employee's drug use could endanger his safety or the safety of other employees or the general public. See National Federation of Federal Employees, Local 2058 v. Weinberger, No. 86-0681, slip op. (D.D.C. filed June 23, 1986).

There is little basis for finding adequate justification where an employee's job is not, or is only tangentially, related to public safety and there is little or no potential for individual endangerment. See Jones v. McKenzie. Moreover, at least one federal court has ruled that it is unconstitutional for the federal government to condition public employment on consent to an unreasonable search. See Treasury Employees v. Von Rabb. It, therefore, is my opinion that the Commonwealth could not legally impose mandatory drug testing for all new employees as a precondition to employment. While an employer may, in my opinion, impose mandatory testing on all applicants for public safety jobs as part of a pre-employment physical, it is my opinion that to do so for applicants in all positions would violate the Fourth Amendment.

IV. Commonwealth Personnel Policy Based on Consensual Testing Must Ensure Voluntariness of Consent

Your fourth inquiry is whether the Commonwealth "[w]ill . . . adopt" a position that "a public employee who is told that drug testing is a condition of employment, and who does not quit his job has consented to the testing." It is not the function of this Office, of course, to mandate personnel rules for public employees. Several recognized legal principles may be helpful, however, in the consideration of such rules.

It is well settled that consent to drug testing which is "coerced" or which is not freely and intelligently given, will be ruled invalid by a reviewing court. National Treasury Employees Union, 649 F. Supp. at 387-88. The totality of the circumstances and the individual facts of each case must, therefore, be evaluated to determine the effectiveness and voluntariness of consent in this context.

It has been held that any coercion, whether immediate and explicit, or indirect and subtle, can invalidate consent. See, e.g., McDonell v. Hunter. Also, consent given under threat of substantial economic penalty has been held to be invalid. See Lefkowitz v. Turley, 414 U.S. 70 (1973). Finally, consent to an unreasonable search where the price of not consenting is loss of government employment or some other government benefit has been held to be involuntary and, therefore, invalid. See National Treasury Employees Union, 649 F. Supp. at 388. Although I cannot predict what rules, if any, the Commonwealth will adopt on this subject, any policy adopted and based on the premise of consensual testing must ensure that such consent is in fact voluntary based on the principles outlined above.

It is also important to note that mandatory drug testing for employees is a relatively new and rapidly developing area of the law. Most existing case authority results from federal district court decisions. Neither the Supreme Court of the United States nor the
Supreme Court of Virginia has yet ruled on the major questions with which this Opinion deals.

EDUCATION - PUBLIC SCHOOL FUNDS - STATE AND LOCAL FUNDS. COUNTIES, CITIES AND TOWNS - BUDGETS. CONSTITUTION OF VIRGINIA - EDUCATION - SCHOOL BOARDS. INSURANCE CLAIM PAYMENT RECEIVED BY SCHOOL BOARD SUBJECT TO APPROPRIATIONS AUTHORITY OF LOCAL GOVERNING BODY.

March 10, 1987

Mr. J. G. Overstreet
County Attorney for Bedford County

You ask whether an insurance claim payment made to the Bedford County School Board must be paid into the general fund of the county or may be assigned directly to the independent contractor who is to repair the property for which the claim was paid.

I. Facts

Several months ago, the school board was advised that a "Koppers" roof installed at Montvale Elementary School may be defective. The insurance carrier for Koppers has offered to pay the school board a sum in settlement of any claim it may have based on the defective roof. The school board has contracted with a contractor to replace the roof.

You ask whether the school board may have the insurance carrier pay its claim check directly to the roofing contractor rather than have the check paid to the school board and placed in the general fund of the county.

II. Statutes Govern Payment of School Expenses

The supervision of local schools is vested in the school board. See Art. VIII, § 7 of the Constitution of Virginia (1971). This supervisory authority includes the management, control and maintenance of all school property and holding title to this property. See §§ 22.1-79(3) and 22.1-125 of the Code of Virginia. The funding of school expenditures, however, is governed by a comprehensive statutory process. See Ch. 8 of Title 22.1, §§ 22.1-88 through 22.1-124. Section 22.1-88 defines school funds as

[1]he funds available to the school board of a school division for the establishment, support and maintenance of the public schools in the school division [and] shall consist of state funds appropriated for public school purposes and apportioned to the school board, local funds appropriated to the school board by a local governing body or such funds as shall be raised by local levy as authorized by law, donations or the income arising therefrom, and any other funds that may be set apart for public school purposes.[1] [Emphasis added.]

Section 22.1-94 authorizes the local governing body to appropriate the funds necessary for school expenditures based on the estimate of the division superintendent developed pursuant to § 22.1-92. Section 15.1-162, concerning the development of budgets by local governing bodies, provides, in pertinent part, as follows:

In no event, including public school budgets, shall such preparation, publication and, in the case of public school budget, approval be deemed to be an appropriation. No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body, except funds appropriated in a county having adopted the county executive form of government, out-
standing grants may be carried over for one year without being reappropriated. [Emphasis added.]

The supervisory authority vested in the school board over school funds, therefore, takes effect when the governing body appropriates the funds. Bd. of Sup'rs v. County Sch. Bd., 182 Va. 266, 28 S.E.2d 698 (1944); 1980-1981 Report of the Attorney General at 9. Once funds are appropriated to the school board, the board has the exclusive right to determine and control their expenditure. See 1979-1980 Report of the Attorney General at 300.

III. Prior Opinions Conclude Outside Revenues Collected by School Boards Subject to Appropriations Authority of Local Governing Bodies

In this instance, the insurance claim payment constitutes unexpected and unappropriated revenue accruing to the school board. The necessity of replacing the "Koppers" roof is also an unexpected expense for which the school board is responsible. The question presented by your inquiry is whether the settlement payment is subject to the appropriations power of the local governing body.

Prior Opinions of this Office have considered the character of revenue generated by school operations or accruing to a school board. These Opinions conclude that such revenue is subject to the appropriations power of the local governing body and must be included in the revenue estimates prepared by school officials and presented to the local governing body in the budget process. See, e.g., Reports of the Attorney General: 1982-1983 at 16 (textbook rental revenue subject to appropriations power and may not be expended absent appropriation by local governing body), and at 407 (cafeteria revenues); 1981-1982 at 328; and 1974-1975 at 371 (proceeds from sale of surplus property subject to appropriations power). 3

IV. Conclusion: Assignment Must Be Supported by Appropriation

As discussed above, the replacement of the defective roof will require an expenditure by the school board. The proposed assignment of the insurance claim payment to the roofing contractor does not alter the character of this expenditure. Section 15.1-162 requires that no expenditures be made without an appropriation by the local governing body. It is my opinion, therefore, that the school board may not expend funds to replace the defective roof without an appropriation by the board of supervisors or pursuant to an earlier appropriation by the board of supervisors for capital improvements or building maintenance. Accordingly, any assignment of the insurance payment must be supported by an appropriation by the local governing body.

1 A school board is empowered to "manage and control the funds made available" to it. Section 22.1-89 (emphasis added). As discussed, infra, until the insurance payment is appropriated to the board, these funds have not yet been "set apart" for public school expenditures and "made available" to the school board for its management and control.

2 The conclusion reached in this Opinion has been modified by statute. See § 22.1-89.1.

3 Relying on Howard v. School Board, 203 Va. 55, 122 S.E.2d 891 (1961), several earlier Opinions conclude that accrued revenue relating to real property owned by the school board vests in that board, independent of the appropriations authority, to the same extent that the property from which the revenue was derived vests in the school board. See Reports of the Attorney General: 1961-1962 at 222 (damage award from State Department of Highways), at 223 (proceeds of sale of school property), and at 225 (insurance proceeds after destruction of school building by fire). The Howard Court, however, constitutionally invalidated a statute divesting a school board of the authority to determine whether property held by the board was necessary for school purposes. The Howard decision did not consider the disposition of revenue collected by the school board and is, for that reason, inapposite.
EDUCATION - PUPIL TRANSPORTATION. INSURANCE PROVISIONS. SEAT BELTS ON SCHOOL BUSES.

July 18, 1986

The Honorable Shirley F. Cooper
Member, House of Delegates

This is in reply to your request for my opinion concerning the installation of seat belts on public school buses. You ask two questions:

In view of the Board of Education's authority pursuant to § 22.1-177 of the Code of Virginia to promulgate regulations relating 'to the construction, design, operation, equipment, and color of public school buses...' and because neither [State] regulations nor the federal Department of Transportation regulations include specifications for installation of safety belts at this time, are local school boards empowered, without prior approval from the Board of Education, (i) to retrofit standard school buses manufactured before April 1, 1977, with safety belts; (ii) to retrofit standard school buses manufactured after April 1, 1977, with safety belts; or (iii) to purchase new buses equipped with safety belts? [Emphasis in original.]

In the event local school boards choose to retrofit standard buses with safety belts or to purchase new standard buses equipped with safety belts, what potential for liability would be incurred in view of the fact that no specifications presently exist at the federal or State level if occupants should fail to utilize the safety belts, or such safety belts should fail to protect occupants from injury or should contribute to the injuries of the occupants?

I. School Boards May Purchase or Retrofit School Buses with Safety Belts Only with Approval of State Supervisor of Pupil Transportation

Section 22.1-177 authorizes the State Board of Education (the "Board") to establish school bus safety requirements. Accordingly, in 1980, the Board promulgated "Minimum Standards for School Buses in Virginia," which set minimum specifications for bus chassis, brakes, lights, steering mechanisms, interior reinforcements and similar safety related components. These regulations do not require safety belts on Type I school buses, but they do set minimum safety standards consistent with current federal standards. The regulations, in pertinent part, state:

Any variation from the specifications, in the form of additional equipment or changes in style of equipment, without prior approval of the Supervisor of Pupil Transportation is prohibited.


The interpretation of the agency charged with administration of State statutes is entitled to great weight. See County of Henrico v. Mgt. Rec., Inc., 221 Va. 1004, 277 S.E.2d 163 (1981). The Board's regulations requiring prior approval for exceptions to school bus specifications have been in effect since 1980 and have not been modified by legislative action of the General Assembly, thereby indicating that the General Assembly has acquiesced in them. See Peyton v. Williams, 206 Va. 595, 145 S.E.2d 147 (1965). Accordingly, it is my opinion that local school boards may purchase new school buses with safety belts, or retrofit existing school buses with safety belts, only with prior approval of the Supervisor of Pupil Transportation.

II. School Board Liability Depends upon Facts of Each Case

Turning to your second question, ordinarily a school board is immune from liability
for negligence because it shares in the Commonwealth's sovereign immunity. See Reports of the Attorney General: 1981-1982 at 336; 1980-1981 at 317; see also 78 C.J.S. Schools § 322 (1952); Annot., 34 A.L.R.3d 1210 (1970). The General Assembly has provided by law, however, that school boards may be liable, to the extent of their insurance coverage in force, for injuries arising from the transportation of students on school buses. See § 22.1-194. Notwithstanding this potential liability, Virginia law provides that "in no case shall any member of a school board be liable personally in the capacity of school board member solely." Id. The facts of each case and the terms of insurance coverage must therefore be evaluated to determine actionable negligence and the extent of school board liability.

1Federal legislation, the Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 201, 88 Stat. 1470, 1484-85 (1974), directed the U.S. Department of Transportation to issue motor vehicle safety standards for school buses and school bus equipment. In response, the National Highway Traffic Safety Administration ("NHTSA") issued minimum performance standards which apply to each school bus or item of school bus equipment manufactured after April 1, 1977. See 49 C.F.R. § 571. The Virginia Board of Education has incorporated these federal requirements in its "Minimum Standards for School Buses in Virginia." See Bylaws and Regulations of the Board of Education of the Commonwealth of Virginia (1980), pp. 193-225. For lighter school buses (i.e., less than 10,000 pounds), seat belts are required for all seating positions; for heavier (Type I) school buses (i.e., over 10,000 pounds), compartmentalization, special padding and seat construction are required to protect passengers, whether or not safety belts are worn. Safety belts for passengers on heavier buses are not required equipment, except on the driver's seat, which is outside the compartmentalized and padded passenger area. See 50 Fed. Reg. 41,368 (1985).


School boards are required to obtain insurance coverage for their transportation operations. See § 22.1-190.

EDUCATION - PUPILS - HEALTH PROVISIONS. PROFESSIONS AND OCCUPATIONS - MEDICINE AND OTHER HEALING ARTS. CIVIL REMEDIES AND PROCEDURE - EVIDENCE. PRESCHOOL PHYSICAL EXAMINATIONS; IMMUNIZATION REQUIREMENTS. CHIROPRACTOR MAY NOT CERTIFY. GENERAL RISKS INSUFFICIENT FOR EXEMPTION FROM IMMUNIZATION.

October 25, 1986

Mr. Thomas W. Athey
County Attorney for York County

You ask three questions regarding the meaning of the physical examination and immunization requirements for admission of students to public schools as set forth in §§ 22.1-270 and 22.1-271.2 of the Code of Virginia. More specifically, you ask:

(1) whether an individual licensed to practice chiropractic by the Virginia State Board of Medicine is a "qualified licensed physician" for purposes of performing a physical examination within the meaning of § 22.1-270(A)(i);
(2) whether such an individual is a "licensed physician" who may give a written certification that "one or more of the required immunizations may be detrimental to the student's health" as contemplated by § 22.1-271.2(C)(ii); and

(3) whether a general statement to the effect that the vaccines used for preschool immunization are contraindicated because each of the vaccines is accompanied by a listing of certain potentially harmful side effects, where the statement does not relate the general potential for harmful side effects to specific medical conditions or circumstances of the child, satisfies the requirements for an exemption from immunization which are set forth in § 22.1-271.2(C)(ii).

I. Chiropractor Is Not "Qualified Licensed Physician" for Purposes of § 22.1-270(A)(i)

Section 22.1-270(A) provides, in pertinent part:

No pupil shall be admitted for the first time to any public kindergarten or elementary school in a school division unless such pupil shall furnish, prior to admission, (i) a report from a qualified licensed physician of a comprehensive physical examination of a scope prescribed by the State Health Commissioner performed no earlier than twelve months prior to the date such pupil first enters such public kindergarten or elementary school or (ii) records establishing that such pupil furnished such report upon prior admission to another school or school division and providing the information contained in such report. [Emphasis added.]

No definition of the term "physician" is found in Title 22.1; however, the term is defined in § 4-2(19) as "any person duly authorized to practice medicine pursuant to the laws of Virginia," and in § 8.01-581.1 as "a person licensed to practice medicine or osteopathy in this Commonwealth pursuant to Chapter 12 (§ 54-273 et seq.) of Title 54."

Section 54-273(3) defines the "practice of medicine or osteopathy" 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 chiropractic" is distinguished from the practice of medicine or osteopathy in § 54-273(6) and is therein defined to mean "the adjustment of the twenty-four movable vertebrae of the spinal column, and assisting nature for the purpose of normalizing the transmission of nerve energy. It does not include the use of surgery, obstetrics, osteopathy, nor the administration nor prescribing of any drugs, medicines, serums or vaccines."

A prior Opinion holds that diagnosis is contemplated as an element of the healing arts, including chiropractic. See 1981-1982 Report of the Attorney General at 193. The extent of the examination necessary to make a diagnosis, however, was not addressed. The physical examination required by § 22.1-270 is "comprehensive" and is to be of a scope prescribed by the State Health Commissioner. The standard School Entrance Physical Examination and Immunization Certification Form MCH 213B prescribes the scope of that examination to include laboratory testing, such as urinalysis, hemoglobin and tuberculin tests, as well as the certification of the immunizations about which you inquire.

I am not aware whether the training the chiropractor in question has received would enable him to interpret the required laboratory tests. I note, however, that the second portion of the form requires the examiner to certify that the child has received a proper immunization. Because chiropractors are specifically forbidden to prescribe or administer serums or vaccines under § 54-273(6), it is my opinion that it would be contrary to the intent of the General Assembly to allow chiropractors to certify to the administration of immunizations which they themselves are not authorized to administer.
In summary, because the scope of the preschool physical examination, including the certification of immunization, exceeds those areas to which a chiropractor's scope of practice is limited by § 54-273(6), I am of the opinion that a chiropractor is not a "qualified licensed physician" as contemplated by § 22.1-270.

II. Chiropractor is Not "Licensed Physician" as Contemplated by § 22.1-271.2(C)(ii)

Section 22.1-271.2(C)(ii) provides an exception to the immunization requirements of Art. 2 of Ch. 14 of Title 22.1, if "the school has written certification from a licensed physician or a local health department that one or more of the required immunizations may be detrimental to the student's health, indicating the specific nature and probable duration of the medical condition or circumstance that contraindicates immunization." (Emphasis added.)

Because, as noted above, the administration or prescription of any drugs, medicines, serums or vaccines is specifically excluded from the definition of the practice of chiropractic in § 54-273(6), it is my opinion that a chiropractor may not render a professional opinion on the possible effects of such drugs, medicines, vaccines or serums. Furthermore, because a chiropractor may testify as an expert witness in a court of law only with respect to matters within the scope of practice of chiropractic as defined in § 54-273, I am also of the opinion that a chiropractor may not render an opinion to the State Health Department on a subject about which he may not render an opinion in a court of law. As a result, it is my opinion that the certification required by § 22.1-271.2(C)(ii) is outside the scope of the practice of chiropractic and that the "licensed physician" to which the statute refers does not include a doctor of chiropractic.

III. Statement that Specific Vaccines Are Contraindicated Because of Potential Side Effects Does Not Satisfy Requirements of § 22.1-271.2(C)(ii)

Your third question asks whether a statement by a "licensed physician" that "[t]he vaccines are specifically contraindicated because of potential allergic reactions including fever, convulsion, brain damage, encephalopathy, ataxia, hyperactivity, seizure, retardation, aseptic meningitis, hemiparesis, and death and the condition is permanent" (emphasis in original) satisfies the requirement of § 22.1-271.2(C)(ii). Because § 22.1-271.2(C)(ii) requires that the statement indicate "the specific nature and probable duration of the medical condition or circumstance that contraindicates immunization" (emphasis added), a statement of potential side effects, without more, is, in my opinion, insufficient to satisfy the statutory requirement.

The obvious purpose of § 22.1-271.2(C)(ii) is to exempt children from the immunization requirement when it has been demonstrated that immunization poses a higher risk to the student's health than the risk of contracting one of the diseases against which the immunization is directed. The statement proffered above is a generalization not meeting the purpose or intent of the certification requirement set forth in the statute. Accordingly, I am of the opinion that the statement is not legally sufficient.

1This interpretation is consistent with the language of § 8.01-401.2, which authorizes chiropractors to testify as expert witnesses in a court of law as to "etiology, diagnosis, prognosis, and disability, including anatomical, physiological, and pathological considerations within the scope of the practice of chiropractic as defined in § 54-273," but not as to other subjects of medicine. Reading §§ 8.01-401.2 and 54-273 together, the General Assembly has specifically limited the authority of chiropractors to render opinions in a court of law to matters involving the spinal column and the transmission of nerve energy.

2See supra note 1.
You ask whether a local school board may require its students to obtain additional units of credit beyond the credit units presently prescribed by the Board of Education (the "Board") in order to obtain a standard diploma. You also ask whether it is permissible for magnet schools to impose additional units of credit for their diplomas. You indicate that magnet schools offer only an "Advanced Studies Program" and require their students to complete more than the 22 units of credit prescribed by the Board.

I. Relevant Constitutional, Statutory and Regulatory Provisions

In Virginia, authority for the daily supervision of public schools is constitutionally vested in local school boards. See Art. VIII, § 7 of the Constitution of Virginia (1971). The authority of the local school boards, however, is neither plenary nor immune from lawful State control. In Virginia, public education is both a State and local concern. See § 22.1-79(5) (empowering school boards to operate the public schools and determine the studies to be pursued "[i]nsofar as not inconsistent with state statutes and regulations of the Board.")

Article VIII, § 1 places ultimate authority in the General Assembly to "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth." Subject to this authority, the Board has the primary responsibility and authority for effectuating the elementary and secondary school educational policy of the Commonwealth. See Art. VIII, § 5(d).

Specifically, the Board is empowered to determine and prescribe standards of quality governing the school divisions in Virginia, subject to revision only by the General Assembly. See Art. VIII, § 2. These standards of quality are presently codified in Ch. 13.1 of Title 22.1, §§ 22.1-253.1 through 22.1-253.13. Section 22.1-253.1(D.1) provides, in pertinent part: "To receive a diploma from a public high school, a student shall earn the units of credit prescribed by the Board...."

With regard to advanced studies programs, § 22.1-253.1(D)(4) provides:

Students who participate in postsecondary programs before graduating from high school, whether academic or vocational, shall be awarded appropriate course credit and/or high school diplomas upon satisfactory completion of the advanced instruction, in accordance with regulations prescribed by the Board....

Section 22.1-253.10(A) also provides that the Board shall promulgate Standards of Accreditation which shall include "course and credit requirements for graduation from high school."

The Board regulations set minimum course and credit requirements. The Standards for Accrediting Schools in Virginia, 2:22 Va. R. 2080, July 21, 1986, provide, in pertinent part:

To graduate from high school, a student shall meet the minimum requirements for the 20-credit diploma as outlined below for grades 9-12.

Id. at 2091 (emphasis added).
As an elective for students, each high school shall offer an Advanced Studies Program which requires a minimum of 22 units of credit as outlined below for grades 9-12.

_Id._ (Emphasis added.)

The transcript of a student who graduates or transfers from a Virginia secondary school shall show that a minimum of 20 units of credit in 9th-12th grade courses are required for graduation.

_Id._ at 2092 (emphasis added).

II. Local School Boards May Require Additional Credit Units for Standard Diploma

As noted above, § 22.1-253.1(D.1) governs the award of a standard diploma. A student must demonstrate minimum competence in certain areas, and earn "the units of credit prescribed by the Board." Section 22.1-253.1(D.1). The Board's regulations do not prescribe a uniform credit requirement which precludes local option to exceed State requirements. As quoted above, the Board's regulation establishes 20 credits as a minimum for a high school diploma.


The Board clearly possesses the constitutional and statutory authority to establish basic standards for achieving a high school diploma. The Board consistently has exercised its authority by establishing minimum credit requirements which may be exceeded by the local school divisions. While the General Assembly has legislatively amended the Board's Standards of Quality, it has not expressly nullified the policy of the Board setting minimum credit hour requirements. I am further unable to find in any legislative study any indication that the General Assembly disagrees with the position of the Board.

Absent legislative direction to the contrary, the regulations of the Board, the body which is constitutionally responsible for effectuating educational policy, provide the answer to your question. It is my opinion, therefore, that local school boards may impose additional credit hours above the minimum presently established by the Board for the standard diploma.

III. Local School Boards May Require Additional Credit Units for Advanced Studies Diploma

Eleven magnet schools have been organized across the Commonwealth through local and state cooperation. These schools are operated on a regional basis to provide talented and gifted students with learning experiences beyond those available in the traditional high school setting. Some of the magnet schools operate on a regular school year calendar and provide full high school programs. _See Governor's Magnet School Program Evaluation Report_ (1986). As you note, these schools offer only an "Advanced Studies Program" and require their students to complete more than the minimum 22 units of credit generally prescribed by the Board.

Regulations of the Board presently prescribe "a minimum of 22 units of credit" for an advanced studies diploma. _See 2:22 Va. R., supra_, at 2091. The regulation explicitly allows local school boards to exceed the 22-unit minimum. Furthermore, the statutes quoted above clearly provide the Board with broad regulatory flexibility in fashioning the conditions for obtaining an advanced studies diploma. With respect to a program offered at a magnet school, therefore, it is my opinion that a local school board is not prohibited
from requiring more than the minimum of 22 hours of credit presently prescribed by the Board.

1Magnet schools are special regional school programs designed to attract highly talented and gifted students and offer them educational challenges beyond those routinely provided in the regular school setting.

2This standard of accreditation also lists those courses and corresponding credits which may be counted toward the minimum of 20 credits.

Historically, the Board's standards have been minimum requirements. Prior to the adoption of this standard in 1983, the Board's regulation required a minimum of eighteen units of credit in grades nine-twelve for graduation from a secondary school. See Standards for Accrediting Schools in Virginia 14 (Board of Education 1978).

3This standard of accreditation also lists those courses and corresponding credits which may be counted toward the minimum of 22 credits.

4Instruction which qualifies for a "unit of credit for graduation" is specified in the Board regulations as follows:

"The standard unit of credit for graduation shall be based on a minimum of 150 clock hours of instruction. . . . To award credit on a basis other than that of the standard unit of credit, the locality shall develop a written policy approved by the superintendent and school board which ensures: (1) that the scope of the course for which credit is awarded is comparable to 150 clock hours of instruction; and (2) that upon completion, the student will have met the aims and objectives of the course through the mastery of certain predetermined skills, knowledge, and values as indicated by such measures as criterion-referenced or standardized tests." 2:22 Va. R., supra, at 2085 (emphasis added).

5The wisdom of the Board's policy is beyond the purview of this Office. I do note that while the regulation has the advantage of providing some limited opportunity for local discretion, input and flexibility, it nonetheless may create the inequity of making credit hour requirements a function of residence. I also recognize, however, that local school boards in Virginia have historically established differing academic requirements for graduation, for grading, and for instructional time which counts toward academic credits. So long as local requirements are not inconsistent with State law or regulation, they are permissible. See § 22.1-79.

6The General Assembly has noted the regional differences existing among school divisions in requiring minimum competency testing. See Report of the Joint Subcommittee on Minimum Competency Testing, H. Doc. No. 25, at 4 (1981). It has not, however, explicitly required uniformity in high school credit requirements.

EDUCATIONAL INSTITUTIONS - STATE COUNCIL OF HIGHER EDUCATION. COMMISSIONS, BOARDS AND INSTITUTIONS - VIRGINIA MUSEUM OF FINE ARTS. ADMINISTRATION OF THE GOVERNMENT GENERALLY - STATE OFFICERS AND EMPLOYEES GENERALLY. MUSEUM UNDER COUNCIL'S COPYRIGHT POLICY GUIDELINES.

October 25, 1986

Mr. Paul N. Pert
Director, Virginia Museum of Fine Arts

You ask whether the Virginia Museum of Fine Arts (the "Museum") is governed by (1) the Governor's Executive Memorandum 2-86 ("Governor's memorandum"), which sets forth the State's intellectual property policy, effective July 15, 1986, and which was issued under the authority of § 2.1-20.1:1 of the Code of Virginia, or by (2) the patent and copyright policy guidelines of the State Council of Higher Education to be issued pursuant to § 23-9.10:4.

I. Relevant Statutes and Policies

Section 2.1-20.1:1, which fixes ownership of patents and copyrights developed by
State employees within the scope of their employment with the Commonwealth, provides:

Patents, copyrights or materials which were potentially patentable or copyrightable developed by a state employee during working hours or within the scope of his employment or when using state-owned or state-controlled facilities shall be the property of the Commonwealth of Virginia. The Governor shall set such policies as he deems necessary to implement this provision.

This provision shall not apply to employees of state-supported institutions of higher education who shall be subject to the patent and copyright policies of the institution employing them. [Emphasis added.]

Consistent with § 2.1-20.1:1, the Governor's memorandum was issued to all executive branch agency employees. See Memorandum from the Honorable Carolyn J. Marsh, Secretary of Administration, dated August 29, 1986, to "All Employees in Executive Branch Agencies." This State intellectual property policy, however, does not apply to employees of State-supported institutions of higher education because, under § 2.1-20.1:1, such employees are subject instead to the patent and copyright policies of the institution which employs them.

II. Museum is Institution of Higher Education

In its enabling legislation, the Museum is "constituted and declared an educational institution and an institution of learning" and it has authority to confer "the honorary degree of patron of arts." See § 9-81. The Museum is also "deemed to be an institution of higher education within the meaning of § 23-9.2." See § 9-84; 1976-1977 Report of the Attorney General at 265. The management and control of the Museum are also vested in a board of trustees. See § 9-81(1). Finally, the Museum is identified among the colleges and universities of the Commonwealth on the statutory roster of State "Educational Institutions." See § 2.1-1.5.

III. Conclusion: Museum is Subject to Intellectual Property Policy of State Council of Higher Education

Based upon the enabling legislation of the Museum and the General Assembly's recognition, evidenced in § 2.1-1.5, that the Museum is both an educational institution and a State institution of higher education, it is my opinion that Museum employees are employees of a State-supported institution of higher education within the meaning of § 2.1-20.1:1. The Museum is, therefore, exempt from the Governor's memorandum issued under § 2.1-20.1:1, unless that policy is adopted by the Museum's board of trustees as the patent and copyright policy of that institution. Any policy governing intellectual property which is adopted by the Museum must conform to the patent and copyright policy guidelines of the State Council of Higher Education to be issued under § 23-9.10:4.2

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1 Section 23-9.2 sets forth the State's policy that the availability of endowment funds and unrestricted gifts from private sources will not be used to reduce State appropriations to State institutions of higher education.

2 Many institutions of higher education have adopted policies governing the ownership of intellectual properties developed by faculty and employees under university auspices. See P. Lachs, "University Patent Policy," 10 J. Coll. & Univ. L. 263 (1983-84). To standardize the patent and copyright policies of the Virginia institutions of higher education, the State Council of Higher Education has been authorized by the General Assembly to promulgate, and periodically revise, patent and copyright policy guidelines for institutions of higher education. Section 23-9.10:4 became law on July 1, 1986, and the State Council of Higher Education is currently developing such guidelines.
You ask whether a person may be a candidate for the United States House of Representatives from a congressional district of which he is not a resident if he meets all other qualification criteria.

I. Facts

You state that a candidate who has filed for the eighth congressional district for the November 4, 1986 general election has indicated on his candidate qualification form that he is not a resident of the eighth congressional district for which he seeks office.

II. Virginia Law Does Not Impose District Residency Requirement

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 .... [Emphasis added.]

See also § 24.1-167 of the Code of Virginia (parallel statutory provision).

Article II, § 1 requires that to be qualified to vote, each voter must be a resident of the precinct where he votes. Section 24.1-6 provides that members of the House of Representatives "shall be chosen by the qualified voters of the respective congressional districts."

If a congressional representative were an "office of the Commonwealth" within the meaning of Art. II, § 5, then the above constitutional and statutory provisions collectively would impose a district residency requirement. The office of a congressional representative, however, is created by the Constitution of the United States, rather than by a state constitutional or statutory provision. It is my opinion, therefore, that a congressional representative is not an "office of the Commonwealth" within the meaning of Art. II, § 5. See Preston v. Edmondson, 263 F. Supp. 370 (N.D. Okla. 1967); Danielson v. Fitzsimmons, 232 Minn. 149, 44 N.W.2d 484 (1950). Accordingly, it is my opinion that Virginia law does not impose a district residency requirement on persons seeking election as a congressional representative.

III. Federal Law Imposes No District Residency Requirement and Federal Constitution Prohibits States from Imposing One

I note also that U.S. Const. Art. I, § 2, cl. 2, known as the "qualifications clause," provides:

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Numerous courts have held that these constitutional qualifications are exclusive, and neither Congress nor the states may impose additional qualifications. See, e.g.,
1986-1987 REPORT OF THE ATTORNEY GENERAL


Considering all of the above, it is my opinion that U.S. Const. Art. I, § 2, cl. 2 prohibits states from imposing a district residency requirement on persons who seek to be candidates for a seat in the House of Representatives, and your question is therefore answered in the affirmative.

ELECTIONS. ELECTORAL BOARDS. CONSTITUTION OF VIRGINIA - FRANCHISE AND OFFICERS. LOCAL BOARD CONSTITUTIONALLY AND STATUTORILY PROHIBITED FROM APPOINTING ANY PERSON EMPLOYED BY FEDERAL, STATE OR ANY LOCAL GOVERNMENT AS GENERAL REGISTRAR.

January 21, 1987

Mrs. Susan H. Fitz-Hugh
Secretary, State Board of Elections

You ask whether a local electoral board can appoint to the office of general registrar a person who, at the time the appointment is made, is employed by a federal, State or local government. You note that § 24.1-43 of the Code of Virginia requires a local electoral board to make this appointment at a meeting held in the first week of March each four years and that the term of office for a general registrar begins on April 1 following this appointment. See § 24.1-44.

I. Applicable Constitutional Provision and Statute

The pertinent language of Art. II, § 8 of the Constitution of Virginia (1971), which is substantively identical to § 24.1-33, reads as follows:

No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or general registrar.

II. Prior Opinions Conclude Appointment Not Permitted

Prior Opinions of this Office have consistently concluded that the constitutional provision quoted above prohibits the appointment of any person who holds any of the governmental offices or employments listed as a member of the electoral board, registrar or officer of election. See Reports of the Attorney General: 1982-1983 at 229, 236; 1981-1982 at 151; 1980-1981 at 269; 1975-1976 at 118; 1974-1975 at 166; 1972-1973 at 343; 1971-1972 at 171, 186, 329. Both the constitutional and statutory prohibitions of the appointment you question are clear and unambiguous; their plain meaning should be accepted, therefore, without resorting to rules of interpretation. See Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).
III. Conclusion: Appointment of Federal, State or Local Government Employee as General Registrar Prohibited

Based on the above, I am of the opinion that a local electoral board is constitutionally and statutorily prohibited from appointing any person employed by the federal, State or any local government as general registrar.

ELECTIONS - PRIMARY ELECTIONS. IN DESIGNATING METHOD OF NOMINATION UNDER § 24.1-172 INCUMBENT LEGISLATOR LIMITED TO THOSE METHODS PROVIDED IN PLAN OF POLITICAL PARTY OF WHICH HE SEeks NOMINATION.

October 27, 1986

The Honorable William A. Truban
Member, Senate of Virginia

You ask whether, in designating a method of nomination under § 24.1-172 of the Code of Virginia, an incumbent legislator is restricted to those methods of nomination approved by his political party or whether the incumbent may designate any method of nomination which meets constitutional requirements.

I. Applicable Statutes

Section 24.1-171 provides that the duly constituted authorities of any political party of a district which elects a General Assembly member shall have the right to provide that a party nomination be made by a direct primary or by some other method.

Section 24.1-172 provides, in part, as follows:

Each party shall have the power to make its own rules and regulations, call conventions to proclaim a platform or ratify a nomination, or for any other purpose, and perform all functions inherent in such organizations.

Each 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, and the nomination and election of its state, county or city committee, except (i) that the party shall choose to nominate its candidate for election for a General Assembly district where there is only one incumbent of such party for such district by the method designated by such incumbent, or absent any designation by him by the method of nomination determined by the party; (ii) that no party shall choose to nominate its candidates for election for a General Assembly district where there is more than one incumbent of such party for such district by any method other than a primary without the consent of all such incumbents, provided that if there are no incumbents as candidates under clause (i) or (ii) hereof then the party shall determine the method of nomination; and (iii) that no party which at the immediately preceding election for a particular office other than the General Assembly nominated its candidate for such office by a primary, or such candidate filed for a primary but was not opposed, and such nominee was elected at the general election, shall choose to nominate a candidate for the next election for such office by any method other than by a primary, without the consent of all incumbents of the same party for such office. For the purposes of this section, any officeholder who offers for reelection to the same office shall be deemed an incumbent notwithstanding that the district which he represents differs in part from that for which he offers for election.[1]
II. Nomination of Candidates for Public Office

A political party has been generally defined as a body of persons voluntarily associated to promote certain views or principles with respect to government. Absent legislation, political parties have plenary powers to regulate their own affairs. Political parties have certain inherent functions, among which is the nomination of candidates for election to public office. The nomination of candidates, however, is a political privilege subject to regulation by the legislature. Such regulations are in turn subject to constitutional limitations. See generally 29 C.J.S. Elections §§ 84, 87, 89, 91 (1965); 25 Am. Jur. 2d Elections §§ 116-119, 128-131 (1966).

Section 24.1-172 is a limitation imposed upon the right of political parties to designate a method of nomination for certain offices when there is an incumbent or incumbents for the office. A prior Opinion of this Office, in interpreting § 24.1-172 prior to the 1978 amendments, stated:

These provisions were added by the General Assembly with the intention of assuring to elected public officials who had achieved their nominations by popular vote that they could not be deprived of the same opportunity for successful nomination should they choose to run for re-election. At the same time, these provisions assured those voters who had supported a candidate previously that their majority voice could not be bypassed in succeeding elections by means of intra-party maneuvering without the consent of the person they had elected.

1973-1974 Report of the Attorney General, supra, at 153. The current provisions of § 24.1-172, in my opinion, serve the same purpose of protecting an incumbent by granting the incumbent the determinative voice in selecting the method of nomination of the candidate for election to his office.

III. Party Rules Designate Multiple Methods for Nomination of Candidates

I am advised by the State Board of Elections that only the Republican and Democratic parties satisfy the statutory requirements of § 24.1-1(7) and are, therefore, the only "political parties" subject to § 24.1-172. I have reviewed the rules of organization of both parties. The methods of nomination available to legislative district committees of both parties are controlled by the rules adopted by the statewide party organization. The rules of both parties provide for multiple methods of nomination of candidates for election to General Assembly seats. See Virginia Democratic Party Plan, Art. 7, § 7.2; Art. 12, § 12.3 (1985); Plan of Organization, Republican Party of Virginia, Art. V, § B(1)(a) (1986). The rules of both parties provide detailed instructions governing the conduct of the available methods of nomination. See Democratic Plan, Arts. 13 through 16; Republican Plan, Art. VIII.

You present the question of whether an incumbent, exercising his authority under § 24.1-172, is limited to those methods of nomination provided in his party's plan.

IV. Incumbent Limited to Those Methods of Nomination Provided in Party Plan

Section 24.1-172 limits the authority of political parties to choose a method of nomination by granting an incumbent the determinative voice in selecting the method. The privilege granted by § 24.1-172 is available only to an "incumbent of such party" when the incumbent seeks that party's nomination. As a member of a political party seeking its nomination, it is my opinion that the incumbent is limited to designating a method of nomination provided by the party plan. The intent of § 24.1-172 is not, in my
opinion, to negate the operation of party rules but, rather, to provide a degree of protection against intra-party maneuvering at the district or local level, which could result in depriving an incumbent of a legitimate opportunity to seek the party's nomination.

It is my opinion, therefore, that, in designating a method of nomination under § 24.1-172, an incumbent legislator is limited to those methods provided in the party plan. To conclude otherwise would make possible the situation where an incumbent could choose a method of nomination unfamiliar to local or State party officials and for which no guidelines or rules governing its conduct exist. It is my opinion that such an impractical result is not intended by the protection afforded to incumbent candidates.

1 The current provisions of § 24.1-172 were enacted by Ch. 778, 1978 Va. Acts 1311, 1327-28. Prior to the 1978 amendment, § 24.1-172 provided that a party could not nominate its candidate for a particular office, including a seat in the General Assembly, by a method other than by primary, without the consent of all incumbents for such office. This provision was construed as giving incumbents a veto over nominations by methods other than by primary. See generally Reports of the Attorney General: 1977-1978 at 139; 1973-1974 at 152; 1970-1971 at 125, 133, 139, 153, 170; 1968-1969 at 90.

2 Section 24.1-1(7) defines the terms "party" and "political party" for the purpose of establishing certain rights and obligations pursuant to Title 24.1.

FIRE PROTECTION - FIRE DEPARTMENTS AND FIRE COMPANIES - RELIEF FOR FIRE FIGHTERS AND DEPENDENTS. MEMBERS OF VOLUNTEER FIRE DEPARTMENT WHO RECEIVE HOURLY WAGE OR SALARY NOT VOLUNTEER FIRE FIGHTERS WITHIN MEANING OF § 27-42; EXPENSE REIMBURSEMENT DOES NOT CONSTITUTE "PAY" UNDER § 27-42.

April 10, 1987

Mr. Joseph L. Howard, Jr.,
County Attorney for Washington County

You ask two questions concerning death or disability benefits for volunteer fire fighters who are killed or injured while fighting fires as part of a volunteer fire department1 ("department") organized within Washington County (the "county").

I. Facts

There are currently nine such independent departments organized within the county. These departments receive contributions from the county each year in the budgetary and appropriations process.2 The county, however, neither employs fire fighters nor owns the property upon which any of the departments have located their buildings. In the past, the county has assisted departments in purchasing equipment through funding, but fire trucks and other equipment are titled to the individual departments and maintained by them. You state that these departments are, in essence, independent, non-profit organizations which are supported, in part, by donations from the county.

At least one of the departments provides an hourly wage for its members when responding to fire calls. Another department pays its chief a full-time salary. Another department provides a flat fee as "reimbursement" for mileage and as a clothing allowance to its members.

II. Members of Departments Who Receive "Pay" for Services Are Not "Volunteer Fire Fighters" Within Meaning of § 27-42

You first ask whether § 27-42 of the Code of Virginia disqualifies individuals who receive pay for answering fire calls from receiving death and disability benefits.
Article 2, Ch. 4 of Title 27 ("Art. 2") provides for financial relief to "volunteer fire fighters" who are killed or injured in the performance of their duties. This relief is provided by the local governing body. See § 27-41 et seq. The provisions of Art. 2, however, are effective only when the local governing body has adopted the article's provisions by formal resolution. See § 27-50. In defining the term "volunteer fire fighters," § 27-42 provides:

For the purposes of this article the term 'volunteer fire fighters' shall include only members of any organized fire-fighting company which has in its possession and operates fire-fighting apparatus and equipment, whose members serve without pay and whose names have been duly certified by the secretary of such company as active members thereof to the clerk of the circuit court of the county or city as the case may be. The respective clerks shall keep a complete and accurate record of all names so certified in a book provided by the governing body of such county or city. Names shall be added to or stricken from such record upon the certificate of the secretary of any such company that such action has been decided by his organization in due form.

Members of departments who are "volunteer fire fighters" as defined in this statute, are entitled to the relief provided by Art. 2 in those localities which have adopted the article's provisions by resolution. Compare 1982-1983 Report of the Attorney General at 772. The question presented by your inquiry, therefore, is whether the receipt of an hourly wage, salary, or reimbursement is "pay" within the meaning of § 27-42.

The word "pay" is defined as "compenation; wages; salary; commissions; fees. The act or fact of paying or being paid." Black's Law Dictionary 1016 (5th ed. 1979). Applying this definition, it is my opinion that the receipt of an hourly wage or a salary is "pay" within the meaning of § 27-42. Accordingly, a member of a department who receives an hourly wage or a salary would not be a volunteer fire fighter within the meaning of § 27-42. The receipt of a mileage or clothing reimbursement would not, in my opinion, constitute "pay" within the meaning of § 27-42, provided the level of reimbursement is reasonably related to the actual expenses incurred by the members of the department for mileage and clothing.

III. Section 27-39 Does Not Require County Which Does Not Operate Fire-Fighting Equipment to Provide Disability Benefits for Members of Departments

You next ask whether § 27-39 requires a county to provide disability benefits for members of independent departments organized within the county.

Section 27-39 provides, in part, as follows:

Any county, city or town which operates fire-fighting equipment may provide for the relief of (1) any children and surviving spouse of any fire fighter who dies (2) and on or before July 1, 1977, shall provide for the relief of any fire fighter who is disabled by injury or illness as the direct or proximate result of the performance of his duty, including the presumption under § 27-40.1, in the service of the county, city or town or any political subdivision with which it contracts or has contracted for fire protection, whether such fire fighter be a member of a fire company of the county in which the injury occurred or of a political subdivision with which it contracts for fire protection.

Section 27-39, by its terms, applies only to a county which "operates fire-fighting equipment." Under the facts you present, the county does not operate fire-fighting equipment. It is my opinion, therefore, that § 27-39 does not require such a county to provide disability benefits for members of independent departments organized within the county.
Section 27-23.6 does authorize a county to contract with volunteer fire-fighting companies for fire protection services and, in those circumstances, a county is authorized to provide benefits under § 27-39.

1By use of the term "volunteer fire department," I assume, for the purpose of this Opinion, that you refer to a "fire company" as defined in § 27-8.1 of the Code of Virginia.  
2See § 15.1-25.  
3Section 27-9 details the recordation requirements for the "writing stating the formation of such company."

FIRE PROTECTION - LOCAL FIRE MARSHALS. COUNTIES, CITIES AND TOWNS - GENERAL. JURISDICTION TO INVESTIGATE FIRES IN TOWNS WITHIN COUNTY PROVIDED TOWN HAS NOT APPOINTED TOWN FIRE MARSHAL.

April 29, 1987

The Honorable Dennis L. Hupp  
Commonwealth's Attorney for Shenandoah County

You ask whether a fire marshal appointed by a county board of supervisors has jurisdiction and authority within the limits of an incorporated town located within the county, if the town has not specifically appointed a fire marshal.

I. Facts

The Board of Supervisors of Shenandoah County has appointed a fire marshal for the county. There are six incorporated towns within the county, none of which has appointed a fire marshal. To date, the county fire marshal has carried out his responsibilities throughout the county without regard to the boundaries of the towns. The town attorney for one of the towns within the county has questioned the county fire marshal's authority in the towns.

II. Applicable Statutes

Section 27-30 of the Code of Virginia provides, in part, as follows:

An officer, who shall be called a 'fire marshal,' may be appointed for each county, city or town, by the governing body thereof, whenever, in the opinion of such body, the appointment shall be deemed expedient.

Section 27-31 provides:

Such fire marshal shall make an investigation into the origin and cause of every fire occurring within the limits for which he was appointed, and for any such service he shall receive such compensation as the governing body may allow.

A fire marshal is empowered to summon witnesses, take evidence, and exercise certain police powers, and is required to report the results of his investigations. See §§ 27-32, 27-33, 27-34.1, 27-34.2, 27-34.2:1, and 27-34.3. Both counties and towns are authorized to provide for the enforcement of the Statewide Fire Prevention Code and to adopt fire prevention regulations more restrictive than the statewide code. See §§ 27-97 and 27-98.

III. Towns Are Integral Part of County, Generally

The above statutory scheme establishes the concurrent authority of counties and
towns to appoint local fire marshals, to enforce the Statewide Fire Prevention Code, and to adopt fire prevention regulations. Towns are an integral part of a county and are generally subject to the jurisdiction of county authorities. See Nexsen v. B'rd of Supervisors, 142 Va. 313, 128 S.E. 570 (1925). See also Reports of the Attorney General: 1982-1983 at 212; 1978-1979 at 288; 1977-1978 at 131, 133. The county fire marshal, therefore, would have jurisdiction in the towns unless his jurisdiction was restricted by statute. I am unaware of any statute that expressly limits the authority of a county fire marshal to the unincorporated areas of the county. The question presented, therefore, is whether the concurrent powers of counties and towns in this area necessarily restrict a county fire marshal's authority.

IV. County Fire Marshal's Duties Constitute County-Wide Purpose Sufficient to Establish Jurisdiction in Town Absent Appointment of Town Fire Marshal

In instances when the General Assembly has delegated concurrent police powers to both counties and towns, this Office has previously concluded that certain county ordinances do not apply in a town because of the legislative determination that the police power granted is not for a county-wide purpose. See 1982-1983 Report of the Attorney General, supra (county animal warden may not enforce county ordinance prohibiting dogs from running at large within an incorporated town). Compare 1978-1979 Report of the Attorney General, supra (county ordinance regulating the sale of disposable beverage containers effective within town, there being no express or necessarily implied restriction). Counties and towns may, however, generally provide for the shared enforcement of delegated police powers pursuant to § 15.1-21 or other statutory authority. See Reports of the Attorney General: 1982-1983, supra; 1977-1978, supra. See also 1977-1978 Report of the Attorney General at 470; § 36-105 (shared enforcement of Uniform Statewide Building Code).

Applying these principles to the facts you present, it is my opinion that a county fire marshal's jurisdiction is not limited to the unincorporated areas of the county. Although counties and towns have the concurrent authority to appoint fire marshals, there is no express restriction on a county fire marshal's jurisdiction if a town located within the county chooses not to appoint a fire marshal. A fire marshal's primary duty under § 27-31 is to investigate the cause of every fire "within the limits for which he was appointed." It is my opinion that this investigative duty is a county-wide purpose sufficient to establish a county fire marshal's jurisdiction and authority within the corporate limits of a town located within the county provided the town has not appointed a town fire marshal.\(^1\)

\(^1\)If the town appoints a fire marshal, the town fire marshal's authority would supersede the authority of the county fire marshal within the town's corporate limits.

A formal agreement between the county and a town pursuant to § 15.1-21, while not required, would provide both jurisdictions with greater certainty in determining the duty of the county fire marshal to investigate fires with the town.

GAME, INLAND FISHERIES AND DOGS - COMPREHENSIVE ANIMAL LAWS. LOCAL GOVERNING BODIES MAY ADOPT ORDINANCE PROHIBITING RUNNING AT LARGE OF DOGS IN CERTAIN AREAS AT ALL TIMES.

April 29, 1987

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

You ask whether § 29-213.63 of the Code of Virginia authorizes counties to adopt an ordinance prohibiting the running at large of dogs in certain areas of the county at all times.
I. Applicable Statute

Section 29-213.63 provides:

The governing bodies of the counties, cities and towns of this Commonwealth are hereby authorized to prohibit the running at large of all or any category of dogs in all or any designated portion of such county, city or town during such months as they may designate. Governing bodies may also require that dogs be confined, restricted or penned up during such periods. For the purpose of this section, a dog shall be deemed to run at large while roaming, running or self-hunting off the property of its owner or custodian and not under its owner's or custodian's immediate control. Any person who permits his dog to run at large, or remain unconfined, unrestricted or not penned up shall be deemed to have violated the provisions of this section.

II. County May Prohibit Running at Large of Dogs in Certain Areas of County at All Times

It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning. See 1985-1986 Report of the Attorney General at 24, 25, at 65, 66, and at 69. Where the language of a statute is clear and unambiguous, rules of statutory construction are not required. Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982).

Section 29-213.63 expressly authorizes the governing bodies of counties, cities and towns to prohibit the running at large of dogs in all or in part of the locality during such months as the local governing body may designate. See 1983-1984 Report of the Attorney General at 132. The language of § 29-213.63 does not limit this power to certain months of the year. It is my opinion, therefore, that § 29-213.63 authorizes counties to adopt an ordinance prohibiting the running at large of dogs in certain areas of the county at all times.

HEALTH - ENVIRONMENTAL HEALTH SERVICES - SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT. COMMISSIONERS OF COMPACT COMMISSION MAY VOTE TO EXTEND TIME TO DESIGNATE HOST STATE WITHOUT ADVERSE EFFECT.

July 18, 1986

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia

You ask whether the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") has established a mandatory requirement that the Southeast Interstate Low-Level Radioactive Waste Management Compact Commission (the "Commission") identify a host state within three years of the Commission being constituted, i.e., by July 21, 1986, or whether the Commission may vote to extend the time to identify a host state.

I. Facts

You state that the Commission was constituted on July 21, 1983, when the member states held their first organizational meeting. You further advise that, despite the diligent efforts of the Commission to develop a plan to identify a host state, several states have raised concerns about the validity of the technical report which will form the basis for identification of a host state. Some states believe it may be necessary to extend consideration of the report so that those technical concerns may be addressed before a
host state is identified.

II. Applicable Statute

Article IV, § e(6) of the Compact, § 32.1-238.6:1 of the Code of Virginia, provides, in part, that "the Commission shall identify a host state for the development of a second regional disposal facility within three years after the Commission is constituted as provided for in Article VII, section d." (Emphasis added.)

III. Applicable Case Law

Although use of the word "shall" usually is mandatory in meaning, it is frequently construed to be only directory when used to specify a time within which a public official is to act. The United States Court of Appeals for the Second Circuit has recently stated the general rule as follows:

In numerous cases construing similar statutes directing that administrative action 'shall' be completed within a specific time, courts have enunciated a general rule that

[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time and specifies a consequence for failure to comply with the provision.


Similarly, in Huffman v. Kite, 198 Va. 196, 93 S.E.2d 328 (1956), the Supreme Court of Virginia quoted the following language with approval:

'The general rule most certainly is that where a statute directs a public officer to do a thing within a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be regarded as merely directory, and not as a limitation upon his authority.'

'In many cases, statutory provisions as to the precise time when a thing is to be done are not regarded as of the essence, but are regarded as directory merely. This rule applies to statutes which direct the doing of a thing within a certain time without any negative words restraining the doing of it afterwards...'

Id. at 200, 93 S.E.2d at 331 (citations omitted) (emphasis in original). See also Ladd v. Lamb, 195 Va. 1031, 81 S.E.2d 756 (1954). The rule is generally the same in other states. See, e.g., Carrigan v. Illinois Liquor Control Commission, 19 Ill.2d 230, 166 N.E.2d 574 (1960) (a statute which specifies the time for performance of an official duty will ordinarily be considered directory only where the rights of the parties cannot be injuriously affected by failure to act within the time indicated); see generally 82 C.J.S. Statutes § 379 (1953), 73 A.M. Jur. 2d Statutes § 18 (1974), 17 M.J. Statutes § 76, and cases cited therein.

IV. Compact Time Requirements Are Directory, Not Mandatory

A. No Sanction Is Imposed for Failure to Act Within Time Allowed

I find no language in the Compact that could be construed as negative words which would serve as a limitation of the Commission's power. Nor is there any sanction imposed on failure to identify the host state within three years which would render the time period mandatory.
B. Compact Purposes May Be Frustrated if Deliberative Process Is Truncated

The Supreme Court of Virginia has stated that "[w]hen the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered in deciding whether the time prescribed is directory or mandatory." Ladd v. Lamb, 195 Va. at 1035, 81 S.E.2d at 759. Among the purposes of the Compact listed in Art. I are to "limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region" and to "ensure the ecological management of low-level radioactive wastes."

The Compact was enacted in response to the Low-Level Radioactive Waste Policy Act (Pub. L. No. 96-573) which required each state to provide for the disposal of low-level radioactive waste generated within its borders, but allowed the states to discharge that responsibility by entering into an interstate compact for such disposal. In fact, the stated policy of that Act is that "the disposal of low-level radioactive waste can be most safely and effectively managed on a regional basis." 42 U.S.C. § 2021(d)(a)(1).

To construe the three-year time period as mandatory would deny the Commission the power to designate a host state after July 21, 1986. Each of the eight Compact states would have to develop its own facility in order to comply with the Act. Such a proliferation of facilities would defeat the explicit policy of the Act in favor of regional facilities and the explicit purpose of the Compact to limit the number of facilities in the region.

Moreover, to interpret the three-year period as mandatory would require the Commission to designate a host state where, despite its best efforts, it may not have a sound technical basis for the designation. Such a consequence would defeat the purpose of the Compact to ensure sound, ecological management of low-level radioactive wastes. It is my opinion, therefore, that the three-year time period is not mandatory but merely directory.

V. Conclusion: Commissioners May Vote to Extend Time to Designate Host State Without Adverse Effect

Based on this conclusion, it is my opinion that Virginia's Commissioners may vote to postpone the vote for designation of a host state for a reasonable period of time without violating their charge as commissioners; that a court may not compel the designation of a host state before July 21, 1986; and that designation of a host state after July 21, 1986 would be valid. It is also my view that the plain language of Art. IV, § 4(m.1) of the Compact provides the members of the Commission with immunity from personal liability for actions taken by them in their official capacities.²

¹That section provides that "[m]embers of the Commission shall not be personally liable for action taken by them in their official capacity."

HEALTH - POSTMORTEM EXAMINATIONS AND SERVICES - ANATOMICAL GIFTS. PROPERLY SIGNED DONOR CARD VALID WITHOUT AGREEMENT TO CARD BY NEXT OF KIN. ACCEPTANCE OF DONATION DISCRETIONARY WITH DONEE; DONEE INCURS NO LIABILITY IF DONE IN GOOD FAITH. NO SUPERSEDED STATUTORY REQUIREMENT.

December 16, 1986

The Honorable Mitchell Van Yahres
Member, House of Delegates

You ask whether an organ donor card, legally signed by the deceased, is valid only
when agreed to by the next of kin. You also ask whether another relative can force the harvesting institution to abide by the legally valid request of the deceased. Finally, you ask whether the harvesting institution, acting alone, is on firm ground in harvesting an organ if that institution possesses a legally signed organ donor card from the deceased.

I. Applicable Statutes

Section 32.1-289 et seq. of the Code of Virginia deals with anatomical gifts. Section 32.1-292(B) provides for anatomical gifts by the use of a donor card and states:

A gift of all or part of the body... may also be made by document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, must be signed by the donor in the presence of two witnesses who must sign the document in his presence. If the donor cannot sign, the document may be signed for him at his direction and in his presence and in the presence of two witnesses who must sign the document in his presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid.

Section 32.1-293 provides for delivery of the document reflecting the gift made and states, in part, as follows:

If the gift is made by the donor to a specified donee, the will, card or other document, or an executed copy thereof, may be delivered to the donee to expedite the appropriate procedures immediately after death, but delivery is not necessary to the validity of the gift.

Section 32.1-295 provides for the rights and duties of various persons at the death of the donor and provides, in part, as follows:

A. The donee may accept or reject the gift.

***

D. A person who acts in good faith in accord with the terms of this article, or under the anatomical gift laws of another state or a foreign country is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act.

II. It Is Not Necessary for Next of Kin to Have Agreed to Organ Donor Card

Section 32.1-292(B) provides only that a donor card be signed by the donor in the presence of two witnesses who must sign the document in the presence of the donor. This section also provides that the gift becomes effective upon the death of a donor. Section 32.1-293 provides that delivery of the card, or an executed copy thereof, is not necessary to the validity of the gift. The plain language of these statutes indicates that it is not necessary for the next of kin to have signed the organ donor card, that the gift becomes effective at the death of the donor, and that delivery of the card to the donee, if one is indicated on the card, is not necessary. When a statute is unambiguous, effect must be given to its plain meaning. See, e.g., School Board v. State Board et al., 219 Va. 244, 247 S.E.2d 380 (1978).

III. Another Relative Cannot Force Harvesting Institution to Abide by Legally Valid Request of Deceased

Section 32.1-295 provides that, where a particular donee has been specified to receive an anatomical gift, the donee may accept or reject it. Therefore, if the donee chooses not to accept the gift, another relative of the deceased could not force the har-
vesting institution to abide by the valid request of the deceased to give an anatomical gift.

IV. Harvesting Institution Would Be Protected from Civil or Criminal Liability if There Was Good Faith Reliance on Legally Signed Donor Card

Section 32.1-295(D) provides that a person, acting in good faith in relying on a legally signed donor card and acting in compliance with the terms of Virginia's anatomical gift statute or under the anatomical gift laws of another state or a foreign country is not liable civilly or criminally.¹

V. Conclusion

I am of the opinion, therefore, that a next of kin need not have agreed to an organ donor card before it is valid, that another relative cannot force a harvesting institution to comply with the request of the donor, and that the harvesting institution generally will not be liable if it acts in reliance on a legally signed donor card and complies with the requirements of the relevant anatomical gifts statute.

¹The term "harvesting institution" is not defined in the Code of Virginia. For purposes of this Opinion, I assume that this term means those persons who may become donees of gifts of bodies or parts thereof, as provided in § 32.1-291 of the Code of Virginia.²

²For purposes of this Opinion, I assume that the existence of the organ donor card is known by all relevant parties at the time of death of the donor or immediately thereafter.³

³Section 32.1-295(E) does provide, however, that the statutes dealing with anatomical gifts are subject to the provisions of § 32.1-285, which concerns autopsies. Sections 32.1-283 and 54-325.8, dealing with investigations of death by the Medical Examiner and requirements for post mortem examinations respectively, should also be considered prior to taking any action under the anatomical gift statute.⁴

⁴Autopsy requirements, investigations by medical examiners, and post mortem examinations could take precedence, however. See supra note 3.

HEALTH - VITAL RECORDS. CERTIFICATE OF BIRTH MAY NOT BE PHOTOCOPIED BY LOCAL DEPARTMENT OF SOCIAL SERVICES TO PLACE IN ITS FILES FOR ELIGIBILITY PURPOSES.

September 26, 1986

The Honorable David V. Williams
Commonwealth's Attorney for Henry County

You ask whether § 32.1-272 of the Code of Virginia would prohibit a local department of social services from making a photocopy of a certificate of birth of an applicant for various public assistance programs and placing that photocopy in the applicant's file in order to be able to determine eligibility for those programs.

I. Applicable Statute

Section 32.1-272(E) provides that "[n]o person shall prepare or issue any certificate which purports to be an original, certified copy, or copy of a vital record except as authorized in this chapter or regulations adopted hereunder."¹ I am informed that, for at least the last ten years, the State Registrar of Vital Records has interpreted this section to prohibit duplication by photocopy of a certificate of birth, and language prohibiting such duplication is printed on the certified copy when issued by the State Registrar.
II. Long-Standing Administrative Interpretation by State Registrar of Vital Records Is Entitled to Great Weight

In construing a statute, the construction of that statute by a State official charged with its administration is entitled to great weight. See Forst v. Rockingham, 222 Va. 270, 279 S.E.2d 400 (1981); Dept. Taxation v. Prog. Com. Club, 215 Va. 732, 213 S.E.2d 759 (1975). The State Registrar's interpretation of § 32.1-272(E) is reasonable in that the obvious intent of the statute is to control the issuance of vital records in an efficient and proper manner. Moreover, he has interpreted the statute in this manner for over ten years. See County of Henrico v. Mgt. Rec., Inc., 221 Va. 1004, 277 S.E.2d 163 (1981); see also 1983-1984 Report of the Attorney General at 331.

III. Conclusion: Local Department of Social Services May Not Photocopy Birth Certificate

I am of the opinion that § 32.1-272(E) prohibits the photocopying of certificates of birth. Accordingly, I answer your opinion in the affirmative.\(^1\)

\(^1\) No regulations have been adopted by the State Board of Health governing the photocopying of birth certificates in the circumstances you describe.

\(^2\) While I recognize that the purpose of § 32.1-272(E) is to protect the integrity of the system of vital records and that such purpose is an important governmental objective, I also recognize that a large number of the members of the general public frequently make copies of such records for personal and semi-official uses. The General Assembly may well wish to consider modifying the statutory prohibition in cases such as you present. Where a proper certificate of birth is presented and there is no statutory or regulatory mandate that the original of such certificate be maintained in the file, it would appear reasonable to permit the person to whom the original certificate was presented to make a photocopy as evidence that a proper certificate was presented. This procedure would eliminate the necessity for the applicant to secure multiple certified copies at additional expense to the applicant for each program for which eligibility is sought. I wish to emphasize that I am not suggesting that a photocopy of an original certificate of birth should be sufficient for determining eligibility if the eligibility worker is not presented the original certificate by the applicant.

HIGHWAYS, BRIDGES AND FERRIES - COMMONWEALTH TRANSPORTATION BOARD, ETC. - ABANDONMENT AND DISCONTINUANCE OF ROADS IN SECONDARY SYSTEM. COUNTY AUTHORIZED TO REMOVE GATE FROM ROAD WHICH HAS BEEN DISCONTINUED FROM STATE SYSTEM OF SECONDARY ROADS.

November 28, 1986

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

You ask whether a county or the State Department of Highways and Transportation has the authority to remove a gate from a road that has been discontinued from the State system of secondary roads.

I. Discontinued Road Remains Public Road

Discontinuance of a road under § 33.1-150 of the Code of Virginia merely removes that road from the State system of secondary roads and constitutes a determination that the road no longer warrants maintenance at public expense. See Ord v. Highway Commissioner, 207 Va. 752, 152 S.E.2d 54 (1967). Discontinuance does not eliminate the road

II. Discontinuance Divests State Highway and Transportation Department of Authority over Road

By removing a road from the State secondary system, the State Highway and Transportation Department relinquishes its authority to regulate the road. See 1976-1977 Report of the Attorney General at 100, 105. Since the discontinued road remains a public road, it is subject to regulation by a county. See id. at 105. In exercising its police powers, a county may temporarily barricade a discontinued road. See Reports of the Attorney General: 1978-1979 at 131; 1974-1975 at 205. As a result, if a county is authorized to exercise its police powers to barricade temporarily a discontinued road, it is also authorized to exercise its police powers to remove such a barricade from a discontinued road.

III. Conclusion: County is Authorized to Remove Gate from Discontinued Road

I am of the opinion, therefore, that a county is authorized to remove a gate from a road which has been discontinued from the State system of secondary roads.

HIGHWAYS, BRIDGES AND FERRIES - COMMONWEALTH TRANSPORTATION BOARD, ETC. SECONDARY SYSTEM OF STATE HIGHWAYS. STREETS NOT ELIGIBLE FOR ACCEPTANCE INTO SECONDARY SYSTEM PURSUANT TO § 33.1-72.1 WHERE REQUIRED COUNTY ORDINANCE DOES NOT MEET STATUTORY REQUIREMENTS.

October 27, 1986

Mr. A. Willard Lester
County Attorney for Wythe County

You ask whether § 33.1-72.1 of the Code of Virginia is applicable to a particular street in Wythe County. You advise that the street in question was developed prior to the enactment of the county subdivision ordinance, and the present ordinance would require the street in question to meet State standards if it were constructed today.

I. Applicable Statute

Section 33.1-72.1 provides that a portion of the cost to upgrade county streets to meet construction standards of the Department of Highways and Transportation (the "Department") will be paid by the Department under certain conditions. One of the conditions, required by subsection (B) of § 33.1-72.1, is that the county must adopt a "local ordinance for control of the development of subdivision streets to the necessary standards for acceptance into the secondary system." Another condition is that the street must have been shown on a recorded plat and been open to and used by motor vehicles prior to July 1, 1977. See § 33.1-72.1(A). Both conditions must be met in order for a street to be eligible for funding pursuant to this section.

II. County Ordinance Must Control All Subdivision Street Development

Your letter states that the current Wythe County subdivision ordinance requires subdivision roads to be built to the Department's standards, except for those subdivisions with lots of five acres or more. The applicability of § 33.1-72.1 to a county ordinance with a large lot exception was previously addressed in detail. See 1983-1984 Report of the Attorney General at 195. That Opinion holds that "an ordinance with a large lot exception fails to satisfy the statutory requirement and defeats the purpose of the statute." See id. at 196. The Opinion further holds that the provisions of § 33.1-72.1(B)
implicitly require that the local ordinance must control all subdivision street develop-
ment to meet the statutory requirement.

III. Conclusion: Section 33.1-72.1 Not
Applicable to Street in Question

The prior Opinion controls1 the question you have presented even though the street
in question was platted and recorded prior to July 1, 1977, and, if constructed today,
would be required to meet State standards. It is my opinion that § 33.1-72.1 is inappli-
cable to the factual situation you present because there is no authority in § 33.1-72.1 to
make exceptions for local ordinances which only control the development of some subdi-
vision streets but fail to control other such streets.

1"The legislature is presumed to have had knowledge of the Attorney General's inter-
pretation of the statutes, and its failure to make corrective amendments evinces legisla-

HOUSING - HOUSING AUTHORITIES LAW. COMMISSIONERS, OFFICERS, AGENTS
AND EMPLOYEES - REGIONAL AND CONSOLIDATED HOUSING AUTHORITIES. LIM-
ITATIONS ON COMMISSIONERS IMPOSED BY § 36-11 APPLY TO COMMISSIONERS OF
REGIONAL, AND SINGLE JURISDICTION, HOUSING AUTHORITIES.

February 28, 1987

The Honorable William F. Green
Member, House of Delegates

You ask several questions concerning whether certain persons may serve as com-
misioners of a regional housing authority1 encompassing a portion of your legislative
district.

I. Facts

You state that four counties participate in the regional housing authority in ques-
tion. Each county appoints one commissioner. See § 36-45 of the Code of Virginia. Two
of the commissioners are employed as school principals by the school boards of the ap-
pointing counties. The fifth commissioner, who was appointed by the other commis-
ioners, is employed by the local planning district commission.

II. Applicable Statutes

Section 36-11, concerning the appointment of commissioners for single jurisdiction
housing authorities, provides, in part, as follows:

When the need for an authority to be activated in a city or county has been
determined in the manner prescribed by law, the governing body of the city
or county shall appoint not more than nine or less than five persons as com-
misioners of the authority created for such city or county. The commis-
ioners who are first appointed shall be designated to serve for terms of one,
two, three, four and five years, respectively, from the date of their ap-
pointment, but thereafter commissioners shall be appointed as aforesaid for
a term of office of four years except that all vacancies shall be filled for the
unexpired term. Except as may be otherwise expressly provided in the char-
ter of a city or town specifically pertaining to such authority, no commis-
sioner of any authority may be an officer or employee, directly or indirectly,
of the city or county for which the authority is created.2 [Emphasis
added.]
Section 36-45 details provisions concerning the appointment, terms and removal of commissioners of regional housing authorities.

Section 36-46 provides, in part, as follows:

Except as otherwise provided herein, a regional housing authority and the commissioners thereof shall, within the area of operation of such regional housing authority, have the same functions, rights, powers, duties, privileges, immunities and limitations provided for housing authorities created for cities or counties and the commissioners of such housing authorities, and all the provisions of law applicable to housing authorities created for cities or counties and the commissioners of such authorities shall be applicable to regional housing authorities and the commissioners thereof . . . .

III. Limitation Imposed by § 36-11 Applies to Commissioners of Regional Housing Authorities

The threshold question is whether the limitation imposed by § 36-11 on an individual's eligibility for appointment as a commissioner applies to commissioners of regional housing authorities.

A. Section 36-11 Limits Eligibility for Commissioner Appointment

Section 36-11 limits an individual's eligibility for appointment as a commissioner by requiring that a commissioner may not be an officer or employee of the locality for which the authority was created. Section 36-45, which provides for the appointment of commissioners for regional housing authorities, does not contain a parallel limitation. Section 36-46, however, expressly extends those limitations provided by law for single jurisdiction housing authorities and their commissioners to regional housing authorities and their commissioners, except as provided otherwise in Art. 6, Ch. 1 of Title 36. The question presented by your inquiry, therefore, is whether the provisions of § 36-45, dealing with the appointment of commissioners for regional housing authorities, effectively removes such commissioners from the provisions of § 36-11.

B. Prior Opinion Interpreting § 36-11 Concludes School Board Employee May Serve as Commissioner

Sections 36-45 and 36-46 do not expressly except commissioners of regional housing authorities from the limitation imposed by § 36-11. The statutes, when read together, are ambiguous on this question. The primary objective in interpreting an ambiguous statute, of course, is to give effect to legislative intent. See Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1985-1986 Report of the Attorney General at 83, 84, and at 319. A prior Opinion of this Office interpreting § 36-11 prior to the 1986 amendment concluded that

[t]he general prohibition contained in § 36-11 . . . serves to reinforce the status of the Redevelopment and Housing Authority as a separate entity from the city government, in its area of public responsibility. The apparent purpose of the prohibition is to insulate the authority's board of commissioners, in performing its decision-making and policymaking functions, from conflicting influences or pressures which otherwise might be present if its members were regularly employed by the city and subject to city government supervision in their daily occupations.

1985-1986 Report of the Attorney General at 159 (footnotes omitted) (school board employee not precluded from serving as a city housing authority commissioner since employee employed by school board and not city).
The same necessity exists for insulation of a regional housing authority's decision-making and policymaking functions from conflicting influences or pressures which could result from a commissioner's employment by a local government served by the regional housing authority. The potential for conflicting influences or pressures on commissioners of regional housing authorities is, to an extent, diffused because of the multi-jurisdictional operations of the regional authority. Nevertheless, § 36-45 does not address the question of whether a commissioner of a regional housing authority may be employed by one of the counties served by the authority. Section 36-46 requires that all provisions of law applicable to housing authorities shall also apply to regional housing authorities, except as otherwise provided. It is my opinion, therefore, that the limitation imposed on commissioners by § 36-11 applies to commissioners of regional housing authorities as well as commissioners of single jurisdiction housing authorities.

IV. Section 36-11 Prohibits Appointment
of School Board Employee as Commissioner

You ask whether § 36-11 prohibits the appointment by a county of an employee of the county school board as a commissioner of a regional housing authority. As discussed above, a recent Opinion of this Office concluded that a school board employee was not precluded from serving as a commissioner of a housing authority under § 36-11. See 1985-1986 Report of the Attorney General, supra. Since that Opinion, however, the General Assembly has amended this statute to exclude as commissioner any person who is "an officer or employee, directly or indirectly, of the city or county for which the authority is created." (Emphasis added.) The 1986 amendment to § 36-11, in my opinion, indicates a legislative intent to broaden the limitation in § 36-11 to include persons who are indirectly employed by the local governing body which created the housing authority or, in the case of regional housing authorities, to include persons who are indirectly employed by one of the creating counties.

School boards are vested with supervisory authority over schools in each school division. See Art. VIII, § 7 of the Constitution of Virginia (1971); § 22.1-28 of the Code. The Supreme Court of Virginia has held that this constitutionally mandated supervision extends to "the application of local policies, rules, and regulations adopted for the day-to-day management of a teaching staff." School Board v. Parham, 218 Va. 950, 957, 243 S.E.2d 468, 472 (1978). See also 1984-1985 Report of the Attorney General at 277 (school board's authority to assign teachers and principals). County boards of supervisors, in some jurisdictions, appoint school board members and make appropriations to fund the county's portion of the cost of operating the county's schools. A county board of supervisors, therefore, does not exercise any direct control over individual school board employees. A board of supervisors, however, exercises a significant degree of control over local school boards by virtue of the supervisors' powers to appoint school board members and to appropriate the necessary funds for the operation of the school system. In light of the legislative intent to broaden the limitation imposed by § 36-11 by the 1986 amendment, therefore, it is my opinion that school board employees are indirectly employed by the appointing county within the meaning of § 36-11. Accordingly, it is further my opinion that § 36-11 prohibits a county from appointing an employee of the county's school board as a commissioner of a regional housing authority.

V. Section 36-11 Prohibits Appointment of Employee
of Planning District Commission as Commissioner

You next ask whether § 36-11 prohibits the appointment of an employee of a planning district commission as a commissioner of a regional housing authority in the circumstances discussed above. Planning district commissions ("PDCs") are created pursuant to the Virginia Area Development Act, §§ 15.1-1400 through 15.1-1452. PDCs generally
represent a number of governmental subdivisions and are a public body corporate separate from the participating subdivisions. See §§ 15.1-1403, 15.1-1404(a). The operations of PDCs are funded by State aid and contributions by the participating subdivisions. See §§ 15.1-1412, 15.1-1413. A PDC is governed by its commissioners, at least a majority of whom are required to be elected officials of the participating subdivisions. See § 15.1-1403(b)(4). See also Reports of the Attorney General: 1984-1985 at 105-06; 1970-1971 at 293. Section 15.1-1403(b)(4) requires that a member of each participating subdivision's governing body serve as a commissioner. 1984-1985 Report of the Attorney General, supra. The question presented, therefore, is whether a PDC employee, under this statutory structure, is "indirectly" an employee of a county for the purposes of § 36-11.

In these circumstances, at least one member of each county board of supervisors participating in a regional housing authority and the PDC will also be a member of the PDC. The PDC employee who serves as a commissioner of the regional housing authority is subject to direct supervision and control by a PDC, which includes members of the boards of supervisors served by the regional housing authority. In my opinion, this relationship is sufficient to establish the "indirect" employment of the PDC employee by the participating counties within the meaning of § 36-11. This relationship permits the regional housing authority commissioner to be subjected to conflicting influences or pressures resulting from his regular employment. It is my opinion, therefore, that § 36-11 prohibits the appointment of a PDC employee as a regional housing authority commissioner.

VI. Section 36-11 Is Not Unconstitutionally Vague

Your final question is whether the language of § 36-11 (you refer particularly to the word "indirectly") is so vague and lacking in precision as to render all or part of the relevant sentence unconstitutional. A challenge to a statute's validity on the ground of vagueness generally involves the allegation that the challenged statute operates to deprive a person of a protected property or liberty interest without due process of law, in violation of the U.S. Const. Amend. XIV.

The void-for-vagueness doctrine, while originally adopted in the context of criminal statutes, has been applied to statutes which deter substantial conduct protected by the First Amendment. See Kolender v. Lawson, 461 U.S. 352, 358 (1983). The doctrine requires that a statute not be so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Interstate Circuit v. Dallas, 390 U.S. 676, 689 (1968); Connally v. General Construction Co., 269 U.S. 385, 391 (1926). A statute that is void for vagueness suffers from two defects: it fails to give a person of ordinary intelligence fair notice of the conduct proscribed or required and it encourages arbitrary enforcement by those officials charged with enforcing the statute. The appropriate standard for judging statutes, such as § 36-11, which do not involve criminal offenses or deter a substantial amount of constitutionally protected conduct is whether the statute commands compliance in terms "so vague and indefinite as really to be no rule or standard at all," or is "substantially incomprehensible." Applying these standards, it is my opinion that the use of the word "indirectly" in § 36-11 does not render § 36-11 unconstitutionally vague.

VII. Conclusion

To summarize, it is my opinion that: (1) the limitations imposed by § 36-11 apply to commissioners of regional housing authorities as well as to commissioners of single jurisdiction housing authorities; (2) § 36-11 prohibits the appointment of a school board employee as a commissioner of a regional housing authority; (3) § 36-11 prohibits the appointment of an employee of a planning district commission as a regional housing authority commissioner in the circumstances you present; and (4) § 36-11 is not so vague and lacking in precision as to render the statute unconstitutional.
Regional housing authorities are created pursuant to Art. 6, Ch. 1 of Title 36, by the action of two or more contiguous counties. See § 36-40 of the Code of Virginia. Section 36-11 was amended in 1986 to add the phrase "directly or indirectly" in the language quoted above. See Ch. 357, 1986 Va. Acts 589, 590.

See Arts. 2 through 4, Ch. 5 of Title 22.1. See also Reports of the Attorney General: 1982-1983 at 409; 1981-1982 at 323.


I. Local Code Official Has Authority to Obtain Warrant to Inspect Premises for Compliance with 1984 Maintenance Code

Your first inquiry is, "[i]f the [C]ode official or his designee is denied access to the premises to be inspected, may the inspector obtain a warrant that would require the owner or occupier of the premises to grant him such access?" If such a warrant may be issued, you also ask for the authority which permits the use of a warrant.

The 1984 Maintenance Code § 102.3 provides that "[e]ach local enforcing agency shall have an executive official in charge, hereinafter referred to as the [C]ode official." According to § 102.4, "[t]he [C]ode official shall be appointed by the local government." Virginia Code § 36-105 provides, in part, that "[e]nforcement of the [USBC] shall be the responsibility of the local building department." Thus, the local Code official is the proper person to exercise enforcement authority.

The authority for the local Code official to make an inspection is found in Va. Code § 36-105, which provides, in part, that a "building may be inspected at any time before completion" and that the "local government may inspect and enforce the building regulations promulgated by the Board [of Housing and Community Development] for existing buildings." When a local government has elected to enforce the provisions of the 1984 Maintenance Code, "the [C]ode official may inspect buildings to which it applies to assure continued compliance." Section 103.4 of the 1984 Maintenance Code. The fact that there is no express statutory procedure created by the General Assembly to support the right of the Code official himself to inspect buildings for Code enforcement purposes does not, in my opinion, prevent such official from obtaining a warrant to inspect the building. See 1978-1979 Report of the Attorney General at 80.
It is my opinion, therefore, that a warrant may be obtained to gain access to the premises for inspection purposes if such access has been denied to the Code official or his designee.

II. Administrative Search Warrant May Be Obtained

You next ask, "[i]f such a warrant can be obtained, would it be an inspection warrant or a search warrant?" The term "inspection warrant" is defined by § 19.2-393 as an "order ... to a state or local official, commanding him to enter and to conduct any inspection, testing or collection of samples for testing required or authorized by state or local law or regulation in connection with the manufacturing, emitting or presence of a toxic substance ..." (Emphasis added.) Given this narrow definition of an "inspection warrant," § 19.2-393 does not provide appropriate authority to obtain an "inspection warrant" under the facts you present. Accordingly, the warrant sought should be an administrative search warrant. See Michigan v. Tyler, 436 U.S. 499 (1978); 1978-1979 Report of the Attorney General, supra.

III. Issuance of Administrative Warrant Based upon "Reasonable Standards"

You further ask, "[w]hat would constitute probable cause for the issuance of such a warrant and what would be the procedure for obtaining it?" "Probable cause" in the criminal sense is not required. For purposes of an administrative search, probable cause justifying the issuance of a warrant may be based, not only upon specific evidence of an existing violation, but also upon a showing that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]." Camara v. Municipal Court, 387 U.S. 523, 538 (1967). More specifically, the "warrant application must provide the judicial officer with factual allegations sufficient to justify an independent determination that the inspection program is based on reasonable standards and that the standards are being applied ... in a neutral and nondiscriminatory manner." Mosher Steel v. Teig, 229 Va. 95, 103, 327 S.E.2d 87, 93 (1985).

The Court in Mosher Steel also stated that, "[i]n addition to describing the procedure by which an employer is selected for an administrative inspection, the affidavit must provide the specific facts underlying each step of the selection process." Id. In obtaining the administrative search warrant, therefore, the local official should follow the procedure outlined by the Supreme Court of Virginia in the Mosher Steel decision and set out above.

IV. Code Official May Require Inspection upon Change of Use of Building

You next ask whether "the City [could] implement a policy of requiring the owner of premises to obtain an occupancy permit or a certificate of compliance whenever premises are vacated before it can be reoccupied, the issuance of the permit being conditioned on the owner granting access for an inspection and any violations found being removed." The 1984 Maintenance Code § 102.1.1 states that "[t]he local governing body may inspect existing buildings to enforce the Building Maintenance Code, as authorized by § 36-105 ...."

While there are a number of provisions in the 1984 Maintenance Code addressing its enforcement, I am unable to find any authority for the issuance of a certificate of compliance such as described in your inquiry. Occupancy permits, however, are provided for in 1 New Construction Code of the USBC § 117.0 (1984 ed.) ("1984 New Construction Code"), both as to newly constructed buildings (§ 117.3), buildings changed in use (§ 117.4; compare with § 121.1), and existing buildings upon written request from the owner or his agent (§ 117.6). Section 117.4 specifically prohibits the reoccupancy of a building when there is a change in the use of a building until the occupancy permit has been issued. In addition, § 117.5 provides as follows:
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After a change of use has been made in a building, the re-establishment of a prior use that would not have been legal in a new building of the same type of construction is prohibited unless the building complies with all applicable provisions of the USBC. A change from one prohibited use, for which a permit has been granted, shall not be made to another prohibited use.

Other than in those circumstances detailed above (e.g., §§ 117.4 through 117.6), occupancy permits are not authorized for building vacations. I am, therefore, of the opinion that the city may implement a policy requiring a new occupancy permit for vacated buildings only if those vacated buildings will be changed in use, or if the owner (or his agent) requests such a permit in writing.

V. Periodic Inspections Treated Similarly

You next ask, "[i]f the City adopted an inspections program whereby the City would inspect all of the buildings in a given area of the City on a periodic basis, how would the City obtain access to the premises to conduct such inspections if access was denied by the owner or occupier?" My previous responses regarding the issuance of warrants and the restrictions on the use thereof also address this question.

VI. Demolition of Unsafe Buildings Authorized by § 15.1-11.2

You ask finally, "[u]nder what conditions could the City proceed with the demolition of an unsafe building under §§ 109.0 and 110.0 of [the 1984 Maintenance Code]?"] Section 110.1 requires that "[w]henver a building is to be demolished pursuant to any provision of this Code, the work shall be carried out in compliance with the requirements of [the 1984] New Construction Code . . . ." No provision of the USBC or the 1984 Maintenance Code provides specific authority for the city to proceed with demolition of a building under the conditions described in § 109.0. Virginia Code § 15.1-11.2 does, however, empower the governing body of a city to enact an ordinance which would allow the city, under certain circumstances, to remove a building which might endanger the public health and safety of its citizens. Under such an ordinance, the city could demolish an unsafe building.

1As stated in the Preface to the 1984 Maintenance Code, p. li: "Enforcement procedures are provided that must be used when the Building Maintenance Code is enforced by local agencies. Local enforcement of the Code is optional."

INSURANCE - LIFE INSURANCE POLICIES - GROUP LIFE INSURANCE POLICIES. PROFESSIONS AND OCCUPATIONS - FUNERAL SERVICE. PERMITTED ACTIVITIES OF BURIAL ASSOCIATION.

December 30, 1986

The Honorable James P. Jones
Member, Senate of Virginia

You ask a number of questions concerning the activities of a group life insurance burial association established under § 38.1-471.1 of the Code of Virginia. As you are aware, § 38.1-471.1 was repealed by Ch. 562, 1986 Va. Acts 1104, 1394. Accordingly, my remarks will address the operations of a "burial association" operating pursuant to §§ 38.2-3318 through 3339.1

I. Burial Association May Not Use Licensed Insurance Agents to Solicit Applications For Pre-need Funeral Service Contracts

You ask whether a burial association may utilize its licensed insurance agents (as provided in § 38.2-1015) to solicit applications for pre-need funeral service contracts.
A. Applicable Statutes

Section 54-260.73:1 provides:

It shall be unlawful for any person to engage in the funeral service profession or to operate a funeral service establishment, to act as a funeral director or embalmer or hold himself out as such unless he is duly licensed by the Board [of Funeral Directors and Embalmers].

Section 54-260.67(2) defines the "practice of funeral services" to include "making arrangements for funeral service ... or making financial arrangements for the rendering of such services or the sale of [funeral] supplies."

B. Solicitation of Applications for Pre-Need Funeral Contracts Constitutes Practice of Funeral Services

The question presented, therefore, is whether a burial association's employment of insurance agents to solicit applications for pre-need funeral contracts constitutes the "practice of funeral services."

A prior Opinion of this Office, found in the 1985-1986 Report of the Attorney General at 231, considered a similar question and concluded that a licensed funeral director in charge of a funeral home could not employ a nonlicensed person to prearrange services which the funeral home would later provide.

The solicitation of applications for pre-need funeral contracts, when engaged in by an unlicensed person, in my opinion, clearly constitutes the practice of funeral services, in that the activities involve the sale of funeral supplies, the making of arrangements for funeral services, and the financing of those services. Accordingly, it is my opinion that a burial association may not utilize its licensed insurance agents to solicit applications for pre-need funeral contracts. See 1986-1987 Report of the Attorney General at 266.

II. Insurance Agents Employed by Burial Association May Not Solicit Applications for Pre-Need Funeral Contracts Even When Acceptance of Contracts Must Be by Licensed Funeral Director

You next ask whether a burial association may use its licensed insurance agents to solicit applications for pre-need funeral contracts when the agents operate with restricted authority to solicit applications only. In such circumstances, only a licensed funeral director could execute the applications and make the resulting contract binding. The question presented by this inquiry is whether the restriction on the agent's authority to solicit applications only and the reservation of the right to accept the applications to a licensed funeral director operate to insulate the transaction from the prohibition against unlicensed funeral practice.

As noted in Part I above, the solicitation of pre-need funeral contracts constitutes the practice of funeral services in that such activities involve the sale of funeral supplies, making arrangements for funeral services, and the financing of those services. The prohibition against unlicensed funeral practice is manifestly intended to prohibit such activities by persons who lack the necessary expertise. The mere formality that completed applications for pre-need funeral contracts be executed by a licensed funeral director does not, in my opinion, satisfy the requirement of § 54-260.73:1 that only licensed persons engage in these activities. Accordingly, it is my opinion that a burial association may not use its licensed insurance agents, operating under restricted authority, to solicit applications for pre-need funeral contracts. See 1986-1987 Report of the Attorney General at 266.
III. Multi-Line Agent May Not Solicit Applications For Pre-Need Funeral Contracts

Your third inquiry is whether an "agency agreement" may legally establish and provide for a "multi-line agent" working for three different principals—a burial association, a life insurance company, and a funeral home. Under the proposed agency agreement, the agent wears "three different hats":

(1) To solicit applications for membership in the burial association as an agent of the association;

(2) To solicit applications under § 38.2-1815 for certificates of group life coverage as an agent of the life insurance company; and

(3) To solicit applications for pre-need funeral service as an agent with restricted authority to solicit such applications only under the direction and supervision of a licensed funeral provider.

I am unaware of any statute prohibiting the solicitation of applications for membership in a burial association provided the soliciting agent is properly licensed. See § 38.2-1815. Similarly, I am unaware of any statute prohibiting the solicitation of certificates of group life coverage by a properly licensed agent. Finally, no statute prohibits a single agent from soliciting as a multi-line agent.

The third "line," however, involves the solicitation of applications for pre-need funeral contracts by an agent with restricted authority to solicit applications only. In Part II above, I express my opinion that the solicitation of applications for pre-need funeral contracts constitutes the practice of funeral services. Accordingly, completing such applications by unlicensed persons is prohibited by § 54-260.73:1. It is my opinion, therefore, that an agency agreement may not legally establish a multi-line agent and authorize that agent to engage in the unlicensed practice of funeral services. See 1986-1987 Report of the Attorney General at 266.

IV. Prohibition Against Solicitation by Funeral Directors Applies to Employment of Insurance Agents in Certain Circumstances

You next ask whether an incorporated funeral home which has amended its charter and which has received approval from the Bureau of Insurance of the State Corporation Commission of its "Agency Application for a License" may solicit through its employees or agents certificates of group life insurance provided to members of a burial association.

A prior Opinion of this Office concludes that a licensed insurance agent may sell life insurance policies, the proceeds of which are revocably assigned to a funeral home for burial and funeral expenses without violating the prohibition against unlicensed funeral practice. See 1983-1984 Report of the Attorney General at 338. I assume, for the purpose of this Opinion, that the insurance policies to be marketed to members of a burial association are similar to those policies discussed in the 1983-1984 Opinion. See § 38.2-3318 (purpose of burial associations). See also § 38.2-3321 (prohibition against conditioning burial association membership on members' designation of specific funeral director as insurance policy's beneficiary). The question presented by this inquiry, therefore, is whether the agent's activities on behalf of the funeral home violate the prohibition against solicitation and certain solicitation-related activities applicable to licensed funeral providers.

Section 54-260.74(2) prohibits licensed funeral directors from engaging in unprofessional conduct. Among the activities prohibited are certain types of solicitation of busi-
ness, the payment of commissions for the securing of business, and the employment of agents to obtain business. See subsections (d), (e), (f), (h) and (k) of § 54-260.74(2). A licensed funeral provider who employs an agent to sell insurance policies to members of a burial association would, in my opinion, violate the prohibitions of § 54-260.74(2)(d), if the sale of such insurance steers the insured, the insured's family or next of kin to the employing funeral home. In such circumstances, a funeral provider could have his license revoked if he employs an agent who directly or indirectly steers business to his funeral home or if the licensee himself solicited in person rather than in response to an inquiry. Accordingly, it is my opinion that a funeral home may employ insurance agents to solicit burial association members for the sale of insurance certificates. If, however, the policy designates the employing funeral home as the beneficiary of the certificate, it is my opinion that such activity would violate the prohibition of § 54-260.74(2).

V. Solicitation of Contracts of Insurance by Insurance Agency Subsidiary of Funeral Home Risk Violation of Solicitation Prohibition or Prohibition Against Control of Insurance Purchasers in Choice of Funeral Establishment

Your fifth inquiry is whether an incorporated funeral home may establish a subsidiary incorporated insurance agency and have the agency solicit burial association members for the purchase of certificates of group life insurance through its licensed employees or agents.

My comments concerning the application of the prohibition against solicitation and solicitation-related activities made in Part IV above are equally applicable in the case where the funeral home has established a subsidiary insurance company. Furthermore, § 54-260.74(2) provides, in part, as follows:

No company . . . engaged in the business of providing any insurance . . . under which contract of insurance any obligation might or could arise to care for the remains of the insured, shall contract to pay or shall pay any such insurance . . . to any funeral establishment . . . in any manner which might or could deprive the [heirs] or in any way control them . . . in procuring such funeral establishment . . . . [Emphasis added.]

See also § 38.2-3321 (similar but less restrictive provision concerning burial associations).

Such a close relationship between the funeral establishment and the insurance company may result in a contract of insurance which might control insurance purchasers in procuring funeral services. This type of arrangement, therefore, clearly risks violating § 54-260.74(2). It is my opinion, therefore, that while not expressly prohibited, the creation of an insurance subsidiary by a funeral home to market certificates of group life insurance to burial association members would likely violate the prohibition against solicitation-related activities and the prohibition against contracts that deprive the insured or the appropriate survivors of the deceased from making a free choice of a funeral establishment.

VI. Solicitation of Contracts of Insurance by Agents or Employees of Partnership of Funeral Directors Risk Violation of Solicitation Prohibition or Prohibition Against Control of Insurance Purchasers in Choice of Funeral Establishment

Your final question is whether licensed funeral directors may create a partnership and, after receiving the necessary agency license from the Bureau of Insurance, solicit through its agents or employees burial association members for the purchase of certificates of group life insurance.

This inquiry is closely related to your questions discussed in Parts IV and V except for the nature of the business entity involved (partnership rather than corporation or single funeral home). Accordingly, the same problems are present—the prohibitions against solicitation-related activities and contracts that might control insurance purchasers. In accord with my opinion expressed in Part IV, it is my opinion that a partnership of il-
censed funeral directors would violate the prohibition of § 54-260.74(2)(d) if the partnership employed agents to solicit burial association members for the purchase of certificates of group life insurance and the sale of such certificates steers the insured, the insured's family or next of kin to one of the funeral homes who make up the partnership for funeral services.

Similarly, in accord with the opinion expressed in Part V, the single identity of the participating funeral homes and the insurance agency could result in a contract of insurance which might control insurance purchasers in procuring funeral services. See § 54-260.74(2). A partnership of funeral directors, rather than a single funeral director, acting as the insurance agency, does not, in my opinion, restore the free choice of insurance consumers in procuring funeral services that is intended to be preserved by § 54-260.74(2). Accordingly, it is my opinion that the creation of a partnership of licensed funeral directors to act as an insurance agency to solicit burial association members for the purchase of certificates of group life insurance, while not expressly prohibited, would be likely to violate the prohibition against contracts that deprive the insured or the appropriate survivors of the deceased from making a free choice of a funeral establishment.

1 "burial association" is now provided for in § 38.2-3318. Although similar in some respects to a "burial society," organized under Ch. 40 of Title 38.2, § 38.2-4000 et seq., a burial association is not subject to the general provisions of Ch. 40. See also Ch. 160, 1963 Va. Acts 174 (predecessor statute to § 38.2-3318).

2 For the purposes of this Opinion, a "pre-need funeral service contract" is an agreement for burial services as defined in § 11-24.

3 A funeral director's license is not necessary to sell insurance policies when the sale of such policies does not involve arrangements for providing funeral supplies and services but is limited to the sale of insurance policies, the benefits of which may be used to pay for funeral services. See 1983-1984 Report of the Attorney General at 338. See also § 38.2-3318 (defining the purpose of burial associations).

LABOR AND EMPLOYMENT - LABOR UNIONS, STRIKES, ETC. - DENIAL OR ABRIDGEMENT OF RIGHT TO WORK. APPLICATION OF VIRGINIA'S RIGHT TO WORK LAW TO METROPOLITAN WASHINGTON AIRPORTS AUTHORITY; "CLOSED SHOP" AGREEMENT PROHIBITED.

June 8, 1987

The Honorable S. Vance Wilkins, Jr.
Member, House of Delegates


Section 6005(c)(6)(D) of the federal legislation requires MWAA to "continue all collective bargaining rights enjoyed before the date the lease takes effect by employees of the Metropolitan Washington Airports." The Virginia legislation does not contradict this federal requirement. See Ch. 598, 1985 Va. Acts 1095, 1097.

Since employees of the present Metropolitan Washington Airports are Federal Aviation Administration ("FAA"), and thereby federal, employees, the FAA could not have negotiated a "closed shop" agreement prior to the effective date of the federal legislation without violating federal law. See 5 U.S.C. § 7102 (employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely
and without fear of penalty or reprisal). If no "closed shop" agreement with federal employees was permitted prior to the effective date of the lease, none can be negotiated by MWAA subsequent to this date, since Art. 28 of the lease provides that "the powers of the Airports Authority [MWAA] with respect to this lease shall be construed in accordance with and governed by Virginia law." A "closed shop" agreement is prohibited by Virginia's Right to Work Law. See §§ 40.1-60 and 40.1-62. Further, § 6007(c)(5) of the federal legislation authorizes MWAA only "to make and maintain agreements with employee organizations to the extent that the [FAA] is so authorized on the date of enactment of this title." Based on the above, it is my opinion that Virginia's Right to Work Law will apply to MWAA employees and that MWAA would exceed the authority granted it by federal and State legislation if it negotiates a "closed shop" agreement with a labor organization.  

3. This lease has now been approved by Governor Baliles, and the official ceremony commemorating the airports' transfer was today, June 8, 1987.  
5. This conclusion is further supported by other provisions of both the federal and State legislation. Compare Pub. L. No. 99-591, § 6009(c) with Ch. 598, 1985 Va. Acts at 1098-99 (Commonwealth of Virginia granted concurrent police power over airports); see, e.g., Pub. L. No. 99-591, § 6009(b) (MWAA not subject to any federal law merely because of the retention of fee ownership of the airports' property by the federal government).

MECHANICS' AND CERTAIN OTHER LIENS - MECHANICS' AND MATERIALMEN'S LIENS. 150-DAY LIMITATION FOR LABOR OR MATERIALS TO BE INCLUDED IN FILING OF MEMORANDUM OF MECHANIC'S LIEN RELATES TO LAST DAY ON WHICH LABOR PERFORMED OR MATERIAL FURNISHED TO JOB, NOT TO DAY MEMORANDUM ACTUALLY FILED.

April 15, 1987

The Honorable George F. Allen
Member, House of Delegates

You ask whether the 150-day limitation for labor or materials to be included in the filing of a memorandum of mechanic's lien pursuant to § 43-4 of the Code of Virginia relates to the date the memorandum is filed or to the last day on which labor was performed on, or material furnished to, the job.

I. Applicable Statute

Section 43-4, which details the requirements for the perfection of a mechanic's lien by general contractors and other lien claimants, provides, in pertinent part, as follows:

A general contractor, or any other lien claimant under §§ 43-7 and 43-9, in order to perfect the lien given by § 43-3, shall file at any time after the work is commenced or material furnished, but not later than ninety days from the last day of the month in which he last performs labor or furnishes material, but in no event later than ninety days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated ... a memorandum showing ... the amount and consideration of his claim ... . The lien claimant may file any number of such memoranda but no memorandum filed pursuant to this chapter shall include sums due for labor or materials furnished more than 150 days prior to the last day on which
labor was performed or material furnished to the job preceding the filing of such memorandum. [Emphasis added.]

II. Language is Product of Legislative Study

The emphasized language in § 43-4, as quoted above, was added by an amendment to that statute in 1980. Chapter 491, 1980 Va. Acts 579, 580. The 1980 amendment, not including the phrase "preceding the filing of such memorandum," was the product of a legislative study of Virginia's mechanic's lien laws. Report of the Joint Subcommittee of the Courts of Justice Committees of the Senate and House of Delegates Studying Virginia's Mechanic's Lien Laws Under House Joint Resolution No. 229, H. Doc. No. 32, 1980 Sess. at 8. Although a majority of the seven-member joint subcommittee recommended the addition of the 150-day limitation on the inclusion of labor and materials in the filing of a mechanic's lien memorandum, three members of the joint subcommittee felt that even the 150-day limitation recommended was "too restrictive on the contractors, subcontractors and material suppliers that the mechanic's liens law was designed to protect." Id. at 7. One advisory member of the joint subcommittee also dissented from the subcommittee's recommendation on this basis. Id.

III. Statute Must Be Construed, if Possible, to Give Effect to Every Word

It is a fundamental rule of statutory construction that a statute is passed as a whole and not in parts and is animated by one general purpose and intent. Each part or section, therefore, should be construed in connection with every other part to produce a harmonious whole. Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984); Rockingham Bureau v. Harrisonburg, 171 Va. 339, 344, 198 S.E. 908, 910 (1938). Effect must be given, if possible, to every word, clause and sentence of a statute. Gallagher v. Commonwealth, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964); 17 M.J. Statutes § 42 (Repl. Vol. 1979); 2A N. Singer, Sutherland Statutory Construction § 46.06 (4th ed. 1984). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A N. Singer, supra, at 104.

To construe § 43-4 in a way which would limit the coverage of the mechanic's lien memorandum to labor or material furnished no more than 150 days prior to the actual filing of the memorandum would render the phrase "on which labor was performed or material furnished to the job" superfluous. Based on the authority cited above, this result should be avoided. Such a restrictive construction would also result in a myriad of practical problems. A lien claimant, for example, would be forced to file his memorandum of lien immediately after he completes 150 or fewer days of work. No time would be allowed for actual payment of the underlying debt for fear either of losing priority over other lien claimants or losing coverage for labor or materials furnished. Since memoranda of liens are often mailed for recordation, the actual date and time of filing may not be known. The labor or materials to be included in the lien, therefore, would be uncertain, especially for labor or materials furnished over an extended period of time.

IV. Intent of Statute Given Effect by Running Limitation from Last Day Labor or Materials Furnished

Effect can be given to the entire statute, as well as to the obvious intent of the joint subcommittee recommending the amendment to § 43-4, by running the 150-day limitation in § 43-4 from the last day on which labor was performed on, or material furnished to, the job and not from the actual date and time of filing the memorandum of lien. It is my opinion that the "last day" provision of § 43-4 refers to the "last day on which labor was performed or material furnished to the job," not the "last day . . . preceding the filing of such memorandum." The phrase "preceding the filing of such memorandum," therefore, limits the lien memorandum's coverage to the labor or materials fur-
nished prior to actual filing, as opposed to labor or material contracted for, but not yet
furnished, on the day the memorandum is filed.

V. Conclusion: 150-Day Limitation Relates to Last Day Labor or Materials Furnished

Based on the above, it is my opinion that the 150-day limitation in § 43-4 relates to "the last day on which labor was performed or material furnished to the job," and not to the day the memorandum is actually filed.

MENTAL HEALTH GENERALLY - ADMISSIONS AND DISPOSITIONS IN GENERAL.

July 31, 1986

Mr. Robert N. Baldwin
Executive Secretary, Supreme Court of Virginia

You ask for my opinion on several due process issues involving mental health preliminary civil commitment hearings under § 37.1-67.2 of the Code of Virginia and payment of fees under § 37.1-89 to physicians and attorneys who are participants in those hearings.

I. Attorney Required to be Present at Preliminary Hearing

You first ask whether an attorney is required to be present to represent the person who is the subject of a preliminary hearing conducted prior to a mental health commitment hearing, and, if he is not required to be present but is in fact present, whether he may be compensated for services rendered.

Section 37.1-67.2 requires a judge to hold a preliminary hearing when a person is produced pursuant to a temporary order of detention, to ascertain if the person is willing to seek and is capable of seeking voluntary admission and treatment. Section 37.1-67.2 makes no provision for representation by counsel at the preliminary hearing stage. Prior to the full commitment hearing, however, § 37.1-67.3 requires the judge to determine if the person whose admission is sought is represented by counsel, and if not, to appoint an attorney to represent him.

Civil commitment constitutes a significant deprivation of liberty that requires due process protection. See Addington v. Texas, 441 U.S. 418 (1979). The person subject to involuntary commitment is entitled to representation of counsel at all significant stages of the commitment process. See Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968). The right to counsel includes the right to representation at the preliminary hearing. See Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). The preliminary hearing is a significant stage in the commitment process, in that the individual subject to involuntary commitment must make a knowing and informed decision whether to seek voluntary admission and treatment and forego the full civil commitment hearing. "The knowing and intelligent waiver of constitutional safeguards required in involuntary commitment proceedings is acceptable, provided that the waiver is made by counsel with the informed consent of the subject and with the approval of the court." Lynch v. Baxley, 386 F. Supp. at 396. It is my opinion, therefore, that an attorney is required to be present at the preliminary hearing and is entitled to compensation for services rendered in accordance with § 37.1-89.

II. Physician Not Required to be Present at Every Preliminary Hearing

You next ask whether a physician is required to be present at the preliminary hearing and, if he is not required to be present but is in fact present, whether he may be
compensated for services rendered. Section 37.1-67.2 does not require that the judge at
the preliminary hearing consider a physician's testimony concerning the capacity of the
person to accept voluntary admission and treatment. The judge in the full commitment
hearing held pursuant to § 37.1-67.3 may, in his discretion, accept the written certifica-
tion of the examiner's findings in lieu of the examiner's direct testimony if the exami-
ation has been made personally within the preceding five days and if there is no objec-
tion by the person or his attorney. The physician, therefore, is not always required to be
present at either the preliminary hearing or the full commitment hearing.

Section 37.1-89 provides for the compensation of physicians who are "required to
serve as a witness." (Emphasis added.) Because a physician is not required to be present
at either the preliminary hearing or full commitment hearing, it is my opinion that any
such physician who is not required to be present, but who is in fact present, is not enti-
tled to compensation under § 37.1-89.

In certain cases, however, testimony concerning the person's capacity to consent to
voluntary admission may be necessary. In such cases, it is my opinion that the judge, in
his discretion, may require the physician's presence at the preliminary hearing and that
the physician may then be compensated in accordance with § 37.1-89.

III. Preliminary Hearing Not Required on Recommitment

You further ask whether a preliminary hearing is required on a recommitment
where the individual has been committed originally for 180 days and a petition for
recommitment has been filed. The civil commitment statutes make no distinction
between an original commitment and the recommitment of an individual. In both cases,
§ 37.1-67.3 clearly contemplates that the judge ascertain if a person is incapable of
accepting or unwilling to accept voluntary admission and treatment. The person who is
subject to recommitment, however, is not being held pursuant to a temporary order of
detention under § 37.1-67.1. A preliminary hearing to determine continued confinement
on a detention order pending a full commitment hearing would, therefore, not be neces-
sary. It is my opinion that the preliminary hearing may be merged into the full commit-
ment hearing as long as the judge makes a threshold determination as to whether the per-
son is willing to seek and is capable of seeking voluntary admission and treatment. Thus,
it is my opinion that a preliminary hearing is not required on recommitment.

Inasmuch as on recommitment the preliminary hearing may be merged into the full
commitment hearing, neither an attorney nor a physician would be required to attend and
render services at a preliminary hearing. They, therefore, may be compensated in accor-
dance with § 37.1-89 only for required attendance and services rendered at the full hear-
ing on recommitment.

1 Section 37.1-89 provides, in pertinent part: "Every physician, clinical psychologist
or interpreter for the deaf appointed pursuant to § 37.1-67.5 who is not regularly
employed by the Commonwealth of Virginia who is required to serve as a witness or as an
interpreter for the Commonwealth in any proceeding under this chapter shall receive a
fee of twenty-five dollars and his necessary expenses for each preliminary hearing, each
commitment hearing and each certification hearing in which he serves. . . . Every attor-
ney appointed under §§ 37.1-65.1, 37.1-67.1 through 37.1-67.4 or § 37.1-134.2 shall
receive a fee of twenty-five dollars and his necessary expenses for each preliminary
hearing, each commitment hearing, each certification hearing and each proceeding under
§ 37.1-134.2 for which he is appointed."

MILITARY AND EMERGENCY LAWS - MILITARY LAWS OF VIRGINIA - PRIVILEGES
OF UNITED STATES RESERVE, NATIONAL GUARD, AND NAVAL MILITIA. COM-
MONWEALTH AND ITS POLITICAL SUBDIVISIONS HAVE REASONABLE ADMINISTRA-
TIVE LATITUDE IN DEFINING "WORKDAY" FOR PURPOSE OF PROVIDING PAID MIL-
ITARY LEAVE.
You ask for my interpretation of the word "workdays" in § 44-93 of the Code of Virginia and whether certain proposed administrative regulations of the City of Alexandria defining "workday" for firefighters are consistent with this section.

I. Section 44-93 Provides that Public Employees Shall Receive up to Fifteen "Workdays" of Paid Military Leave Per Year

Section 44-93 provides that public employees are entitled to military leaves of absence "without loss of seniority, accrued leave, or efficiency rating" and that "[t]here shall be no loss of pay" except that paid leaves of absence "shall not exceed fifteen workdays per federal fiscal year."

II. Reasonable Administrative Latitude Granted in Determining "Workday"

The term "workday" is not defined in the Code and could have any one of a number of meanings. If the General Assembly had intended to define a workday in terms of a standard 8-hour work period, for example, it could have merely provided for a maximum of 120 hours paid military leave per year. It did not do so; instead it used the undefined term "workday." It would have been difficult for the General Assembly to have addressed the countless number of periods that may constitute a workday for public employees across the State. It is my opinion, therefore, that the General Assembly intended that both the Commonwealth and its political subdivisions have reasonable administrative flexibility in defining a "workday."

III. Definition of "Workday" in Proposed Administrative Regulation Constitutes Reasonable Interpretation Not Violative of Equal Protection

Alexandria's firefighters work 24-hour shifts and, for purposes of computing "workdays" to be charged to military leave, the City proposes by regulation that each 24-hour period should constitute two 12-hour workdays. Based on this formula, firefighters may be authorized a maximum of 180 hours (15 workdays x 12 hours) paid military leave per year. While your inquiry indicates some differences in leave periods among classes of personnel because different work schedules result in different administrative definitions of "workday," "[a] classification having some reasonable basis does not offend against [the U.S. Const. equal protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." Lake Carriers' Ass'n v. Kelley, 527 F. Supp. 1114, 1129 (E.D. Mich. 1981) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1910)).

IV. Conclusion

In light of the foregoing, it is my opinion that the definition of "workday" proposed by the City of Alexandria is consistent with § 44-93 and does not violate the equal protection clause of the United States Constitution.

I am advised that pay, sick leave, and annual leave are also based on 12-hour workdays and have been so based for approximately 20 years.

MOTOR VEHICLES - DRIVER'S LICENSE ACT - HABITUAL OFFENDERS. OPERATION OF BACKHOE ON PUBLIC HIGHWAYS UNLAWFUL.

July 31, 1986
You ask whether a person who has been adjudged an habitual offender under § 46.1-387.6 of the Code of Virginia may legally operate a backhoe on a public highway in Virginia. You point out that no operator's license is required to operate a backhoe on a public highway pursuant to §§ 46.1-45 and 46.1-352, and you question whether those provisions would allow an habitual offender to operate such equipment on a public highway.

I. Applicable Statutes

An individual adjudged an habitual offender has been ordered by a court not to operate a motor vehicle on the public highways of Virginia for an indefinite period of time, pursuant to § 46.1-387.6. Section 46.1-387.8 then provides, in part, as follows:

It shall be unlawful for any person to operate any motor vehicle in this State while the order of the court prohibiting such operation remains in effect, except that such an order shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of land shall not exceed five miles.

II. Applicable Case Law

The Supreme Court of Virginia was faced with a similar question in Triplett v. Commonwealth, 212 Va. 649, 186 S.E.2d 16 (1972). Triplett had been convicted of violating an order adjudging him an habitual offender by operating a farm vehicle on a public highway. He argued that he could not be so convicted because, pursuant to §§ 46.1-45 and 46.1-352, no operator's license was required for operation of a farm vehicle on a public highway. The Court rejected that argument and held that § 46.1-387.8 contains the only exemption to the law which prohibits the operation of a motor vehicle on the public highways by an habitual offender.

III. Conclusion: Habitual Offenders May Not Operate Backhoes on Public Highways

The exemption in § 46.1-387.8 is for the operation of farm tractors only, and does not include the operation of any other type of motor vehicle, even those vehicles for which no driver's license is required. Accordingly, in light of the holding in Triplett, it is my opinion that it is unlawful for an individual adjudged an habitual offender to operate a backhoe on the public highways of Virginia.

1 I am mindful that two earlier Opinions of this Office might be read as holding otherwise. See Reports of the Attorney General: 1969-1970 at 180; 1965-1966 at 198. The decision of the Supreme Court in Triplett, of course, would have the effect of overruling any contrary Opinion expressed earlier by this Office.

The Honorable Joseph H. Campbell
Chief Judge, Norfolk General District Court
You ask whether: (1) a registered guard of a private security services business is authorized to issue a summons for driving on a suspended operator’s license; and (2) a private security services business may in any way develop or modify a summons form for its own use.

I. Facts

The City of Norfolk has contracted with a private security services business to provide guards on certain property owned by the city. The guards have not been appointed by the circuit court as special policemen or conservators of the peace.

On March 15, 1987, a guard employed by the private security services business issued a summons for driving on a suspended operator’s license, in violation of § 46.1-350 of the Code of Virginia. The alleged offense occurred on the premises which the guard was contracted to protect.

II. Private Security Guard Has Authority to Issue Summons for Driving on Suspended Operator’s License

As a general rule, a registered private security guard has authority to arrest or issue a summons for a misdemeanor committed in his presence and on the premises he has contracted to protect. See § 54-729.33. See also Reports of the Attorney General: 1982-1983 at 19; 1978-1979 at 13. Notwithstanding the general rule, a prior Opinion of this Office has concluded that private security guards are not empowered to enforce Chs. 1 through 4 of Title 46.1. That Opinion, with which I concur, was based upon the provisions of § 46.1-6, requiring that the enforcement of motor vehicle statutes contained in Chs. 1 through 4 be "through the agency of any peace or police officer, sheriff or deputy...." 1981-1982 Report of the Attorney General at 280, 281. Your inquiry, however, is controlled by the general rule and not the exception. The prohibition against driving on a suspended operator’s license is not contained in Chs. 1 through 4 of Title 46.1. It is my opinion, therefore, that a registered private security guard may issue a summons for a violation of § 46.1-350 which is committed in his presence on the premises he has contracted to protect.

III. Private Security Services Business May Not Modify or Develop Summons Form for Its Own Use Which Is Not Identical to Uniform Summons for Motor Vehicle Law Violations

Your second inquiry is whether a private security services business may develop or modify a summons for its own use.

Section 19.2-74(C) provides that "[t]he summons used by a law-enforcement officer pursuant to this section shall be in form the same as the uniform summons for motor vehicle law violations as prescribed pursuant to § 46.1-416.1." The use of the word "shall" is mandatory. See 1985-1986 Report of the Attorney General at 133-34. The plain language of this statute requires that all law-enforcement officers issuing a summons use the form prescribed. For the purposes of this section, a registered guard of a private security services business is included within the term "law-enforcement officer." See § 54-729.33.

It is my opinion, therefore, that a private security services business may not modify or develop a summons form for its own use. This Opinion should not be construed, however, to prohibit a private security services business from actually printing the authorized form itself. If the legislature intended that only the forms prepared by State or local authorities be acceptable, the language "in form the same as the uniform summons" would be unnecessary. It is a fundamental principle of statutory construction that, if possible, effect is to be given to every word in a statute. Burnette v. Commonwealth, 194 Va. 785, 789-90, 73 S.E.2d 492, 494-95 (1953); 1977-1978 Report of the Attorney General at 21.
IV. Conclusion

To summarize, it is my opinion that (1) under proper circumstances, a registered guard employed by a private security services business is authorized to issue a summons for driving on a suspended operator's license; and (2) a private security services business may not modify or develop a summons form for its own use. The form used must be the same as the uniform summons for motor vehicle law violations prescribed pursuant to § 46.1-416.1.

1 I assume, for purposes of this Opinion, that the guards in question are properly registered and the private security services business which employs them is properly licensed pursuant to §§ 54-779.27 through 54-729.29 of the Code of Virginia.

2 See § 46.1-350.

MOTOR VEHICLES - DRIVER'S LICENSE ACT - REQUIREMENT OF LICENSE. REVOCA- TION OR SUSPENSION OF LICENSE FOR FAILURE OR REFUSAL TO PAY FINES AND COSTS. NOTICE OF SUSPENSION OR REVOCATION OF LICENSE. DEFENDANT WHO SIGNED NOTICE FORM STATING DRIVING PRIVILEGES WILL BE SUSPENDED IF FINES AND COSTS NOT PAID BY DATE CERTAIN, WHO FAILS TO SO PAY AND THEREAFTER OPERATES MOTOR VEHICLE, HAS RECEIVED SUFFICIENT NOTICE TO SUPPORT PROSECUTION UNDER § 46.1-350.

July 2, 1986

The Honorable Paul M. Peatross, Jr.
Judge, Sixteenth Judicial District

This is in reply to your request for my opinion concerning the application of §§ 46.1-350, 46.1-423.3 and 46.1-441.2 of the Code of Virginia to a hypothetical fact situation you present.

I. Hypothetical Fact Situation

1. A defendant, upon being convicted of a traffic violation, is unable to pay the fine and costs due. The court grants the defendant ten days to pay the fine and costs after the defendant has executed a notice form which is based upon § 46.1-423.3 and which advises him, inter alia, that if the aggregate sum due is not paid within ten days, his driver's license will be suspended.

2. The defendant fails to pay the fine and costs within ten days and his license is suspended.

3. The defendant, however, is not served with an order of suspension as permitted by § 46.1-441.2, and, at the time of a subsequent arrest for driving on a suspended license in violation of § 46.1-350, he denies having knowledge that his license has been suspended.

II. Question Presented

Based upon the foregoing, you ask whether, by signing the court's form which is set forth in footnote 2, the defendant has had sufficient notice to support his conviction for a violation of § 46.1-350.

III. Court's Power to Revoke Not Dependent on Statutory Notice Procedures

Section 46.1-423.3(a) declares that a motorist's privilege to drive on the highways of Virginia is conditioned upon his payment of fines and costs incurred as a result of any
conviction of a traffic violation. I refer you also to § 19.2-354, which provides that whenever a defendant is convicted and is unable to pay his fine and costs, the court on its own motion may set the terms and conditions for such payment, including the time in which payment is to be made. Accordingly, when a court, upon convicting a defendant of a traffic violation, conditions the defendant's continued privilege to operate a motor vehicle on the highways of Virginia upon payment of the fine and costs so incurred, it imposes terms and conditions as contemplated by § 19.2-354 and implements the aforementioned policy declaration found in § 46.1-423.3(a). See also 1984-1985 Report of the Attorney General at 214. Such action also is consistent with the mandate in § 46.1-423.3(b) that the court "forthwith revoke" the driving privilege of a person failing or refusing to pay traffic violation fines and costs within the ten-day period specified.

While § 46.1-423.3(c) states that the clerk "shall send such person written notice" that his license will be suspended if the fines and costs are not paid in ten days, nothing in that statute or in any of the other statutes discussed above prevents the giving of actual notice in a more certain manner. Moreover, although both §§ 46.1-350 and 46.1-441.2 contain suspension notice procedures, they contain no indication that the General Assembly intended these procedures to be the exclusive means whereby a defendant may receive actual notice of the suspension of his driving privileges.

In the hypothetical fact situation presented, prior to the defendant's driving privileges being suspended he has been informed of every material fact relevant to his prior conviction which might bear on the future status of his driving privileges. The fact that the possible suspension of those privileges is conditioned upon a contingency under the defendant's own control does not render invalid the notice so provided.

IV. Conclusion

Taking all of the above into consideration, it is my opinion that, on the hypothetical facts present, the defendant has been sufficiently apprised of the suspension of his driving privileges so as to justify a prosecution under the criminal provisions of § 46.1-350 for driving while his license to do so has been suspended or revoked. Accordingly, I answer your question in the affirmative.

1Section 46.1-350 provides that no person "whose driver's license or instruction permit or privilege to drive a motor vehicle has been suspended or revoked or who has been directed not to drive by any court or by the Commissioner of the Department of Motor Vehicles or by operation of law pursuant to the provisions of this title . . . shall thereafter drive any motor vehicle . . . on any highway in this Commonwealth unless and until the period of such suspension or revocation shall have terminated."

Section 46.1-423.3 provides, in relevant part, 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 (e) 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 . . .

(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. Section 46.1-441.2 provides that "[w]henever it is provided in this title that a driver's license may or shall be suspended or revoked . . . notice of such suspension or revocation . . . may be sent by the Department by certified mail to the last known address supplied by such driver and on file at the Department . . . ."

Your form reads as follows:

"FAILURE TO PAY FINE AND COSTS NOTICE
Commonwealth of Virginia Va. Code § 46.1-423.3 File No.___

Juvenile & Domestic Relations District Court
General District Court

Name of Accused/Juvenile__________________________ Conviction Date________

$________________________
Total Unpaid Fine and Costs

TO THE ACCUSED:

Because you have failed to pay your fine and costs today, this notice has been given to you to inform you of the following:

1. To avoid additional penalties, the court must receive payment of the fine and costs within ten (10) calendar days from the conviction date. Use the mail at your own risk.

2. If the court does not receive payment by the tenth day, your driver's license will be suspended until fines and costs are paid to the court plus an additional reinstatement fee is paid to the Division of Motor Vehicles (DMV).

I ACKNOWLEDGE RECEIPT OF THIS NOTICE.

__________________________ Date__________________________

__________________________ Accused/Juvenile__________________________

NO PERSONAL CHECKS WILL BE ACCEPTED

Form DC-222 4/84 (114:2-102 2/85) File No.___
FAILURE TO PAY FINE AND COSTS NOTICE (Emphasis in original.)

MOTOR VEHICLES - REGISTRATION AND LICENSING - FEES FOR REGISTRATION. EMERGENCY MEDICAL SERVICES AGENCIES. QUALIFICATION OF AMERICAN RED CROSS.

July 9, 1986

The Honorable C. Hardaway Marks
Member, House of Delegates

This is in reply to your request for my opinion regarding the proper allocation of certain motor vehicle registration funds returned to localities pursuant to
I. Applicable Statute

Section 46.1-149(a)(12), which was amended by Ch. 333, 1985 Va. Acts 409, 410, states as follows:

An additional fee of one dollar shall be charged and collected at the time of registration of each pickup or panel truck and each motor vehicle under paragraphs (a)(1) through (11). All funds collected pursuant to this paragraph shall be paid into the general fund of the state treasury. Except as provided by the next sentence, all funds collected pursuant to this paragraph shall be used for emergency medical service purposes. Twenty-five percent of the funds so collected shall be returned to the locality wherein such vehicle is registered to provide funding for training of volunteer or salaried emergency medical service personnel of licensed, nonprofit emergency medical services agencies and for the purchase of necessary equipment and supplies for use in such locality for licensed, nonprofit emergency medical and rescue services.

II. Eligibility for Emergency Medical Service Funds Approved by 1985 Va. Acts

Chapter 333 amended the final sentence of § 46.1-149(a)(12) by adding the phrases underlined above. It is clear from the language of this amendment that the General Assembly intended localities to earmark the returned funds solely for the training of personnel of, and purchase of equipment by, licensed, nonprofit emergency medical services agencies.

III. Conclusion: Eligibility for Funds Depends on Services Performed

If the American Red Cross in a particular locality operates as a licensed, nonprofit emergency medical service agency or trains personnel for such agencies, the American Red Cross would be an appropriate recipient of the returned funds. You state in your letter, however, that the American Red Cross chapter in Hopewell performs neither of these functions. On the facts you present, therefore, it is my opinion that the allocation of one-third of the returned funds to the American Red Cross by the city council would violate the amended statute.
in addition, the delinquent-personal property taxes owed on any other vehicle by the applicant.

I. Applicable Statutes

Section 46.1-65(c) provides:

A county, incorporated city, or town may require that no motor vehicle, trailer or semitrailer shall be locally licensed until the applicant for such license has produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid and satisfactory evidence that any delinquent motor vehicle, trailer or semitrailer personal property taxes owing have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town. [Emphasis added.]

II. Treasurer Has No Authority to Require Proof of Personal Property Tax Payment in Another Taxing Jurisdiction Under Licensing Provisions of § 46.1-65(c)

Inasmuch as § 46.1-65(c) is clearly intended as a means of enforcing collection of taxes on motor vehicles, trailers and semitrailers, the treasurer's authority to effect the collection of taxes must be read in the context of his overall authority to collect local taxes. Sections 58.1-3127 and 58.1-3910, therefore, are relevant to your first question. Section 58.1-3127(A) provides, in part:

Each treasurer shall receive the state revenue and the levies and other amounts payable into the treasury of the political subdivision of the Commonwealth served by the treasurer.

Section 58.1-3910 provides:

Each county and city treasurer shall receive the local taxes and other amounts payable into the treasury of the political subdivision of the Commonwealth served by the treasurer....

These two statutes support the argument that a county treasurer may deny a motor vehicle license to an applicant only where personal property taxes are owed to the issuing jurisdiction and not to another jurisdiction. It is my opinion, therefore, that a local tax-collecting official has no authority to require proof of payment of personal property taxes in another jurisdiction before issuing a local motor vehicle license to an applicant located in his jurisdiction.

III. 1979 Amendment to § 46.1-65(c) Merely Added Proof of Payment of Delinquent Taxes to Licensing Requirements

The emphasized portion of § 46.1-65(c) quoted above was added to the original statute by Ch. 185, 1979 Va. Acts 244. Prior to the 1979 amendment, the statute addressed only the proof of payment of personal property taxes upon the motor vehicle sought to be licensed. The paragraph now authorizes a county to require satisfactory evidence from an applicant that personal property taxes imposed by the issuing jurisdiction have been paid on the vehicle sought to be licensed as well as delinquent taxes owed on other vehicles. See 1980-1981 Report of the Attorney General at 254. It is my opinion, therefore, that the language which appears at the end of the subsection, concerning the locality's authority to assess personal property taxes on motor vehicles located within its jurisdiction, is intended to apply to both the vehicle sought to be licensed as well as any other vehicle upon which taxes are owed to the issuing jurisdiction by the applicant.

IV. Conclusion

Based on the above, it is my opinion that a local tax collecting official may require
satisfactory proof of payment of personal property taxes on a vehicle sought to be li-
censed, and may require satisfactory proof of payment of delinquent personal property
taxes owed on any other vehicle by the applicant, where the taxes were imposed by the
jurisdiction issuing the vehicle license.

MOTOR VEHICLES - REGISTRATION AND LICENSING. TREASURER MAY REQUIRE
PRESENTATION OF VIRGINIA REGISTRATION FOR ISSUANCE OF LOCAL LICENSE.

October 16, 1986

The Honorable Mary F. Altemus
Treasurer for Gloucester County

You ask whether a treasurer may require the presentation of a Virginia motor vehi-
cle registration prior to issuing a local license for a newly acquired motor

I. Applicable Statute

Section 46.1-65 of the Code of Virginia permits the imposition of a local license fee
and states, in pertinent part, as follows:

(a) . . . Counties, incorporated cities and towns may levy and assess taxes
and charge license fees upon motor vehicles, trailers and semitrailers. . . .
The situs for the imposition of licensing fees under this section shall in all
cases be the county, city or town in which such motor vehicle, trailer or
semitrailer is normally garaged, stored or parked. 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.

II. Information Contained on State Motor Vehicle Registration
Relevant for Purposes of Issuing Local Motor Vehicle License

Every person owning a motor vehicle intended to be operated upon any highway in
Virginia must obtain a Virginia registration and title. See § 46.1-41. Such registration
indicates (1) the identity of the owner of the vehicle, (2) the home or business street
address of such owner, and (3) the locality wherein the vehicle is claimed to be normally
garaged or parked. See §§ 46.1-32.1, 46.1-41 and 46.1-79(a).

"Only vehicles required to be registered in this State may be subject to local license
requirements." 1976-1977 Report of the Attorney General at 182. The information con-
tained on a Virginia motor vehicle registration is, therefore, relevant to the issuance of a
local license.

III. Conclusion: Requirement to Produce Satisfactory
Evidence of Domicile/Situs Is Permissible

A local treasurer has the duty to collect taxes and other revenues, such as license
fees, which are payable into the local treasury. See 1984-1985 Report of the Attorney
General at 15. Accordingly, the treasurer may require an applicant for a local license to
produce satisfactory evidence of the situs of his vehicle or, alternatively, the ownership
gible personal property tax on motor vehicles depends upon situs, and commissioner of
the revenue may require evidence establishing where vehicle is normally garaged or
parked). It therefore is my opinion that a requirement that such applicant present a
Virginia registration for a vehicle is a reasonable prerequisite for the issuance of a local
license.
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You note that the Department of Motor Vehicles' annual listing of addresses for registrants and licensees furnished to localities is not helpful for licensing newly acquired motor vehicles. See § 46.1-32; 1982-1983 Report of the Attorney General at 359.

Section 46.1-41.1 provides a thirty-day grace period to a new resident where the vehicle is properly registered in another state or country and displays the license plate or plates issued by that other state or country.

MOTOR VEHICLES - REGULATION OF TRAFFIC. DESIGNATION OF PRIVATE ROADS AND PRIVATE STREETS AS HIGHWAYS FOR LAW-ENFORCEMENT PURPOSES.

August 18, 1986

The Honorable Raymond R. Guest, Jr.
Member, House of Delegates

You ask whether a new resident is required to register a newly acquired motor vehicle within the thirty-day grace period established by section 46.1-41.1. You state that you have received an inquiry from a client and that the client is interested in the requirement that a newly acquired motor vehicle be registered within the grace period.

I. Relevant Statutes

Section 46.1-181.5 of the Code of Virginia authorizes the governing body of a county, city or town to "adopt an ordinance designating, for law-enforcement purposes only, the private roads and private streets located within any residential development containing five hundred or more lots as highways as defined by § 46.1-1." (Emphasis added.) Section 46.1-1(10) defines a highway, "for law-enforcement purposes," as "the entire width between the boundary lines of all private roads or private streets which have been specifically designated 'highways' by an ordinance adopted by the governing body of the county, city or town in which such private roads or streets are located."

II. Words Should Be Given Their Usual Meaning

It is a general rule of statutory construction that words in a statute should be given their usual, commonly understood meaning. See 1984-1985 Report of the Attorney General at 14. The commonly understood meaning of "only" is "alone in its class or kind: sole." Webster's New Collegiate Dictionary 802 (1977).

III. Conclusion: County May Designate Private Roads in Subdivision as "Highways" for Law-Enforcement Purposes Only

Based on the above, I am of the opinion that a board of supervisors may designate the roads in a residential development containing 500 or more lots as "highways" for law-enforcement purposes only and that such roads otherwise remain private roads. I therefore answer your question in the negative.

MOTOR VEHICLES - REGULATION OF TRAFFIC. FAILURE TO YIELD RIGHT-OF-WAY AFTER STOPPING AT STOP SIGN CONSTITUTES TRAFFIC VIOLATION.

July 16, 1986

The Honorable Paul Whitehead, Jr.
Judge, Twenty-Fourth Judicial District

You ask whether a driver, who, after stopping at a stop sign, enters an intersection into the path of an oncoming vehicle, resulting in a collision, is guilty of a traffic violation for failure to yield the right-of-way. You state that a defendant has cited the case of Umberger v. Koop, 194 Va. 123, 72 S.E.2d 370 (1952), for the proposition that an indi-
individual cannot be convicted of a traffic violation once he has actually stopped at the stop sign. You ask, therefore, whether that case is controlling.

I. Umberger v. Koop Is Not Controlling

In my opinion, the Umberger case should not be considered controlling in this situation because of amendments to the pertinent statutory language since that case was decided in 1952. As you note, the language of § 46.1-247 of the Code of Virginia presently states that a driver approaching a stop sign shall stop "and before proceeding shall yield the right-of-way to the driver of any vehicle approaching on such other highway from either direction." The quoted language was added by Ch. 489, 1972 Va. Acts 560.1 Prior to this 1972 amendment, the statute required only that the driver stop. In fact, the language which the Supreme Court had before it in Umberger was the language of § 46-255, the predecessor of § 46.1-247, which stated as follows:

All vehicles when entering a highway, which is improved and hard surfaced and is a part of the State Highway System, from the side thereof, shall, immediately before entering such highway, stop.

II. Conclusion

The present language of § 46.1-247 has two requirements: first, that the driver stop and, second, that he yield to oncoming traffic. Thus, it is my opinion that a driver who stops at a stop sign but fails to yield the right-of-way to approaching traffic may be convicted of a traffic violation notwithstanding the language of Umberger.2

1The amendment which made these provisions of § 46.1-247 applicable to intersections controlled by stop signs was added by Ch. 347, 1974 Va. Acts 539, 545.

2This is not to say that a driver who stops and is then involved in a collision has necessarily failed to yield the right-of-way. See, e.g., Temple v. Ellington, 177 Va. 134, 12 S.E.2d 826 (1941). If the fact-finder determines that a driver stopped at a stop sign but then failed to yield the right-of-way, however, such a finding would be sufficient to find a violation of § 46.1-247.

MOTOR VEHICLES - REGULATION OF TRAFFIC. LOCAL PARKING ORDINANCES. COLLECTION OF PENALTIES FOR PARKING CITATIONS; PROCEDURES. DESIGNATION OF ADMINISTRATIVE OFFICIALS.

March 20, 1987

The Honorable Francis X. O'Leary, Jr.
Treasurer for Arlington County

You ask several questions concerning the collection of outstanding parking fines imposed under an Arlington County ordinance.

I. Facts

Arlington County is considering transferring the responsibility for the collection of outstanding parking fines from the police department to the county treasurer. There are currently over 120,000 outstanding parking citations in the county amounting to over $2.5 million in unpaid fines, plus an additional $3 million in late payment penalties. It is proposed that the appropriate local ordinances be amended to accomplish the transfer so that your office can establish a collection program.

If the transfer is accomplished, you propose commencing a massive collection effort in the next few months. This effort would include a public relations plea for voluntary payment of all outstanding fines for a month-long period immediately followed by a
major enforcement program over several months by the police department. One of the features of the program you propose, as an inducement to increase collections during the public relations segment, is a waiver of the late payment penalty for any person who pays his outstanding fine during the period prior to the enforcement effort.

II. County Treasurer May Be Designated as "County Administrative Official" to Collect and Account for Payment of Uncontested Penalties

You first ask whether the county treasurer can be the "county administrative official" who collects and accounts for uncontested parking citation fines and penalties, under a local ordinance passed pursuant to § 46.1-254.1 of the Code of Virginia.

A. Applicable Statutes

Section 46.1-252.1 provides, in part, as follows:

The governing body of any county may, by ordinance, provide for the regulation of parking on county-owned or leased property, and, in the case of a county which maintains its own system of secondary highways, and in the Counties of Chesterfield, Fairfax, Henry, Prince George, Prince William and Campbell provide for prohibition of parking within fifteen feet of any fire hydrant or in any way obstructing such hydrant and for the regulation of parking on its streets and roads, including the right to install and maintain parking meters and to require the deposit therein of a coin of a denomination to be prescribed in such ordinance and to determine the time during which a vehicle may be parked, and may designate the official or officer of the county to put the regulations into effect, including specifically the right and authority to classify vehicles with reference to parking and to designate the time, place and manner such vehicles may be allowed to park on county-owned property; and may delegate to the appropriate administrative official or officials the authority to make and enforce such additional rules and regulations as parking conditions may require and may prescribe penalties for failure to conform thereto. [Emphasis added.]

Section 46.1-254.1(a) provides:

Any ordinance regulating parking by a city or county under the provisions of §§ 46.1-252, 46.1-252.1 or § 46.1-254 shall contain provisions that require:
1. that uncontested payment of parking citation penalties be collected and accounted for by a city or county administrative official or officials who shall be compensated by the city or county;
2. that contest by any person of any parking citation shall be certified in writing, on an appropriate form, to the appropriate district court, by such administrative official or officials; and
3. that such administrative official or officials shall cause complaints, summons or warrants to be issued for delinquent parking citations. [Emphasis added.]

B. Prior Opinion Concludes City Treasurer May Be Designated as Appropriate "County Administrative Official"

A prior Opinion of this Office interpreting § 46.1-254.1(a) concludes that a city council may delegate the duty of collecting parking fines to the city treasurer. See 1975-1976 Report of the Attorney General at 137. In accord with this prior Opinion, it is my opinion that a county treasurer may be the "county administrative official" who collects and accounts for uncontested parking citation penalties under § 46.1-254.1(a).

III. Administrative Official Who Collects Uncontested Payments Need Not Be Same Official Who Certifies Contested Parking Citations to District Court

You next ask whether the administrative official who collects the uncontested
payments under § 46.1-254.1(a)(1) must be the same official who certifies the contest of a parking citation to the district court under § 46.1-254.1(a)(2).

In providing for the enforcement of parking ordinances, both §§ 46.1-252.1 and 46.1-254.1(a) refer to the delegation of authority to an "administrative official or officials." Section 46.1-254.1(a) does not expressly require that a single official be delegated the duties detailed in § 46.1-254.1(a)(1) and (2). Accordingly, it is my opinion that a local governing body may delegate the disparate duties under § 46.1-254.1(a)(1) and (2) to separate officials. It is further my opinion, therefore, that the administrative official who collects uncontested payments need not be the same administrative official who certifies the contest of a parking citation to the district court.

IV. Administrative Official May Not Exercise Discretion to Waive Late Payment Penalties

Your third question is whether the administrative official designated to collect payments for uncontested parking citation fines and penalties under § 46.1-254.1(a)(1) may exercise discretion to waive the late payment penalties in an effort to effectuate the collection of the fines.

Section 46.1-252.1 authorizes the board of supervisors of a county to regulate parking on its streets and roads by ordinance and to prescribe penalties for violations of the ordinance. Section 46.1-254.1(a)(1) authorizes the designated administrative official to collect these penalties. Violations of an ordinance adopted pursuant to § 46.1-252.1 are "traffic infractions" punishable by a fine of not more than $100. See §§ 46.1-16.01, 46.1-1(40). Traffic infractions are not deemed to be criminal in nature. See § 18.2-8; see also 1985-1986 Report of the Attorney General at 208, 210.

Penalties for violations of an ordinance adopted pursuant to § 46.1-252.1 are imposed by the operation of the ordinance. In such circumstances, the administrative official charged with the duty of collecting and accounting for uncontested penalties would have no inherent authority to disregard the provisions of the ordinance imposing the penalty. It is my opinion, therefore, that the administrative official designated to collect payments for uncontested parking citation penalties pursuant to § 46.1-254.1(a)(1) may not waive late payment penalties to effectuate the collection of the fines, absent specific authority for such a waiver in an ordinance.

V. Local Governing Body May Provide by Ordinance for Administrative Waiver of Late Payment Penalty for Violations of Parking Regulations

You next ask whether, if the administrative official charged with collecting uncontested fines is to exercise the discretionary authority to waive the late payment penalties, such authority must be granted by ordinance, resolution or other written directive of the local governing body.

As noted immediately above, it is my opinion that the administrative official designated to collect and account for uncontested penalties would have no inherent authority to waive a late payment penalty provided by ordinance. Any such waiver must be pursuant to a grant of authority to the designated administrative official by action of the local governing body.

VI. Waiver May Be Retroactive

Your final question is whether the local governing body may retroactively provide for the waiver of penalties which have accrued against violators of an ordinance.

In an analogous context, § 58.1-3916 authorizes a local treasurer to waive accrued penalty and interest payments on certain property tax filings. Since I have concluded that a local governing body may by ordinance grant the authority to a designated administrative official to waive a late payment penalty for parking violations, it is my opinion
that this waiver may be retroactive. In the absence of any constitutional or statutory prohibitions, municipal legislation having a retroactive effect is permitted, unless the legislation interferes with a contract or vested right. 6 McQuillin, Municipal Corporations § 20.70 (1980); 62 C.J.S. Municipal Corporations § 445(c) (1949); Pipeline Company v. Commonwealth, 206 Va. 517, 145 S.E.2d 227 (1965); compare Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984) (same rule applicable to State statutes). In this instance, a provision authorizing the retroactive administrative waiver of a late payment penalty would not, in my opinion, interfere with any contract or vested right.

As discussed above, violations of an ordinance adopted pursuant to § 46.1-252.1 are traffic infractions which are not criminal in nature. See § 18.2-8. See also 1985-1986 Report of the Attorney General, supra. Accordingly, the waiver of a late payment penalty in cases of uncontested citations would not constitute the waiver of a criminal fine or the suspension of a judicially imposed fine. Compare 1984-1985 Report of the Attorney General at 221 (procedures under § 46.1-254.1(a) governing contest of parking citations).

It is my opinion, therefore, that the local governing body may provide by ordinance for the administrative waiver of a late payment penalty for violations of an ordinance adopted pursuant to § 46.1-252.1. It is further my opinion that the retroactive application of such an administrative waiver, again by ordinance, to penalties for uncontested violations which have already accrued would violate no constitutional or statutory prohibition. Finally, I would advise that any provision for such waiver should set out reasonably definite standards to guide the administrative exercise of this delegated power. Compare Waynesboro v. Keiser, 213 Va. 229, 234, 191 S.E.2d 196, 199 (1972) ("We have declared several statutes and ordinances which delegated the power of decision to administrative officers unconstitutional because of lack of standards." (Citations omitted.)). See also 1982-1983 Report of the Attorney General at 607, 610 n.4.

October 25, 1986
The Honorable Thomas B. Baird, Jr.
Commonwealth's Attorney for Wythe County

You ask whether the provisions of § 46.1-198.1(B) of the Code of Virginia apply to persons who sell devices used to detect the presence of radar.

I. Applicable Statute

Section 46.1-198.1(A) prohibits the operation of a motor vehicle in this Commonwealth when that vehicle is equipped with a radar detection device, and also prohibits the sale and use of such devices in the Commonwealth. Section 46.1-198.1(B) creates a qualified exception for certain actions which might otherwise be violations under paragraph (A), by providing:

No person shall be guilty of a violation of this section when the [radar detection] device or mechanism in question, at the time of the alleged offense, had no power source and was not readily accessible for use by the driver or any passenger in the vehicle.

II. Exception Inapplicable to Sale of Radar Detection Devices

By its express terms, § 46.1-198.1(B) excepts persons from prosecution if they, as drivers or passengers, do not have ready access to a radar detection device with a power
source in the vehicle.

Because the § 46.1-198.1(B) exception refers to radar detection devices "in the vehicle" and exempts a "driver" or "passenger" from the violation, it is manifest that this exception applies only to the vehicle-related violations enumerated in § 46.1-198.1(A). Thus, an accused may invoke the § 46.1-198.1(B) exception only if he is charged with either "operat[ing]... when such vehicle is equipped with [a radar detection] device or... us[ing] any such device." The § 46.1-198(B) exception is, in my opinion, inapplicable if the accused is charged with selling a radar detection device.

Rules of statutory construction also support this interpretation. "It is a 'well estab-

lished principle of statutory interpretation that the law favors rational and sensible con-

struction.' It is my opinion that the application of the § 46.1-198.1(B) exception to the

sale of radar detection devices would render that prohibition of no effect and would

therefore be an inappropriate construction of the statute. The General Assembly cannot

be presumed to have done a futile act. See McFadden v. McNorton, 193 Va. 455, 69 S.E.2d 445 (1952).

III. Conclusion: Sales of Radar Detection Devices in
Commonwealth Are Prohibited Without Exception

In light of the above, it is my opinion that the exception provided by § 46.1-198.1(B) is not applicable to a charge that the accused sold a radar detection device.

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PARADES. ORDINANCE LIMITING GROUP TO ONE PARADE IN LOCALITY ANNU-
ALLY IMPERMISSIBLE PRIOR RESTRAINT ON CONSTITUTIONALLY PROTECTED
SPEECH.

February 25, 1987

The Honorable Madison E. Marye
Member, Senate of Virginia

You ask whether a municipality may regulate the number of times a group may
parade annually within the limits of a town or city. You refer to instances when more
than one parade by a single group during a year has resulted in significant public expense,
inconvenience to residents, and disruption of local businesses.

I. Regulation or Ordinance Restricting Parades
Requires Balancing of Interests Between Government
Regulation and Constitutionally Protected Free Speech

The question you pose points out a practical problem now being experienced by
many localities across this Commonwealth. Counties, cities and towns alike are faced
with the necessity of regulating parades, which are a constitutionally protected speech-
related activity, due to the public expense, inconvenience and disruption often con-
nected with parades, all of which you have described in your letter. Courts have encoun-
tered great difficulty in developing a unified constitutional theory on which to permit
localities to enact ordinances that restrict such speech-related activities and that, at
the same time, strike an appropriate balance between a locality's legitimate concerns about
burdens on its financial and other resources and a group's freedom to speak. A review of
the decisions by the Supreme Court of the United States dealing with the regulation of
free speech clearly demonstrates Professor Freund's admonition that "what is most cer-
tain [in the free speech area] is the complexity of the strands in the web of freedoms
which the judge must disentangle." The conflict involved in the situation you present is
between the traditional purpose of the public forum and the particular "expressive" ac-
activity seeking access to it. For example, parks traditionally exist to promote aesthetic and recreational purposes; streets and sidewalks provide for the orderly movement of vehicular and pedestrian traffic. Neither was traditionally intended for parades. Reconciling the needs of the speech-related activity with these traditional purposes or uses often creates significant forum-access problems.

II. Access to "Traditional Public Forum" May Be Limited but Not Prohibited

The Supreme Court of the United States has never held that protected speech is entitled to absolute protection against governmental regulation.\(^3\) Even those judges who are the most protective of speech agree that if government remains neutral as to the content of speech, it may reasonably regulate the time, place and manner in which protected speech occurs.\(^4\) The authority of localities in this respect may be express and specific, or it may be predicated on the police power to prevent and suppress nuisances, since meetings or parades on streets or in parks or public places under some conditions create disturbances, become nuisances, menace life, limb and property, disrupt traffic, or occasion other problems. See Walker v. Birmingham, 388 U.S. 307, 316 (1967); Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

There is also no question that a locality's streets and parks are "traditional public forums," since they are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939). Justice Roberts' concurring opinion in Hague was an early, and possibly the best, articulation of the concept of the "traditional public forum." He said that the use of streets and parks for discussing public questions has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16. Sidewalks are also a traditional public forum. See United States v. Grace, 461 U.S. 171, 177 (1983).

In recent decisions, the Court has reaffirmed the authority of government to control access to the traditional public forum through the enactment of reasonable time, place and manner regulations, as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication." Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 45 (1983). The long-established constitutional rule is that "there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks, and parks . . . ."\(^6\) Restrictions falling short of a total ban on such activity must be narrowly drawn to serve a particular governmental interest. If the regulation is content-neutral,\(^6\) the state interest must be "significant," and must "leave open ample alternative channels of communication."

The extent to which a speaker or group possesses a right of guaranteed access to the traditional public forum will be determined within the framework of the above Perry tests. Although there are uncertainties in these tests, the Court, \textit{albeit in dicta}, has clearly indicated that no matter how compelling the state interest, the Constitution does not permit government to ban all expressive activity from the traditional public forum. Greer, 424 U.S. at 835.

III. Proposed Restriction on Parading Would Violate Perry Standards

It could be argued that a proposed restriction on the number of times a group may
parade annually within a locality would further at least two governmental interests: (1) limiting the public expense resulting from the administration of the parade and the provision of police services; and (2) minimizing public inconvenience and disruption resulting from the obstruction of streets. The minimization of public expense, while obviously an important objective of localities, cannot by itself be used to justify restrictions on the exercise of a constitutionally protected right. Access to traditional public forums cannot be denied solely to spare public expense. See N.A.A.C.P., Western Region v. City of Richmond, 743 F.2d 1346, 1355 (9th Cir. 1984), citing Schneider v. State, 308 U.S. 147, 162 (1939) (saving of city expenses relating to cleaning up litter does not justify restrictions on distribution of pamphlets).

The proposed regulation would clearly restrict access to a traditional public forum for groups wishing to conduct parades. The interests to be served by the proposed restriction—limiting public expense and minimizing public inconvenience—are facially content-neutral and unrelated to the suppression of free expression. The controlling factor in this instance is whether the proposed restriction is narrowly tailored to serve the stated government interests. As discussed above, a government's interest in minimizing public expense, without more, is unlikely to be sufficient to support the constitutionality of the proposed restriction. The issue, therefore, is whether the restriction is narrowly tailored to serve the government's additional interest in minimizing public inconvenience and disruption resulting from frequent parading.

A blanket restriction of one parade annually per group would not, in my opinion, satisfy the latter criteria. The freedoms of speech and assembly were not intended, however, to be absolute principles which ignore legitimate concerns of a locality about the potential impact on its fiscal and other resources and the ordinary use of its public streets occasioned by frequent marches or parades. It is my opinion, therefore, that a limit on the number of parades a group may conduct in a given period would not be unconstitutional per se. To satisfy First Amendment standards, however, it is my opinion that such a restriction could not limit groups to a single parade annually. It is further my opinion that an ordinance imposing quantitative restrictions of this nature must provide an alternative channel of effective communication, such as an alternative public forum, to any group denied a parade permit because the group has exhausted its opportunities to parade within a given period.

To summarize, it is my opinion that a restriction on the number of parades a group may conduct each year would be a prior restraint on constitutionally protected expression, but would not be unconstitutional per se. To satisfy the constitutional requirement that such restrictions be narrowly tailored to serve a significant governmental purpose, it is my opinion that an ordinance imposing such a restriction may not merely limit a group to a single parade per year and must provide an alternative public forum to any group denied a parade permit because the group has exhausted its opportunities to parade within the locality during a given period of time.

IV. Other Forms of Regulation Permitted; Certain Governmental Interests Justifiable

Having detailed the principles which control content-neutral restrictions on speech in a traditional public forum, it is instructive to discuss examples of limitations which may be validly imposed and the governmental interests which justify reasonable restrictions on parades and related activities. Courts have held that the preservation of public convenience and the use of city streets, the preservation of public order, and the defraying of administrative expenses will support reasonable content-neutral regulations of speech.

Particular restrictions have also been considered and upheld against First Amendment arguments. As discussed above, such restrictions must be content-neutral and applied uniformly to all groups.
A. Permit Requirements

Groups desiring to parade in a locality may be required to obtain prior authorization in the form of a parade or demonstration permit. See Hague, 307 U.S. at 514. The permit process must be administered fairly and may not vest unbridled discretion in the hands of the licensing authority. This discretion should be guided by standards for obtaining the permit, which are set out in the ordinance. See Kunz v. New York, 340 U.S. 290 (1951); Beckerman, 664 F.2d at 509. The permit process should provide adequate procedural safeguards, such as expeditious judicial review of permit denials. See Shuttlesworth, 394 U.S. 290 (1951). The locality may require that applications be filed sufficiently in advance to afford opportunity for proper policing, to prevent confusion, to secure the convenient use of the street to other travelers, and to minimize the risk of disorder. See Cox v. New Hampshire. Although an ordinance requiring an application to be submitted five days in advance of a planned public gathering has been set aside as impermissibly frustrating the exercise of free speech, approval has been given to a provision requiring that applications be submitted 48 hours in advance, provided that notice of denial be issued within 24 hours of submission of the application. See A Quaker Action Group v. Morton, 516 F.2d 717, 735 (D.C. Cir. 1975). Flexibility should also be provided in a parade ordinance for spontaneous political demonstrations in response to current events. See Walker, 388 U.S. at 349.

B. Time and Duration Restrictions

The governmental interest in assuring the convenient use of the streets by other travelers may justify barring parades or even large sidewalk demonstrations during weekday morning and evening rush hours. See Cox v. New Hampshire; A Quaker Action Group, 516 F.2d at 733. If a locality has a valid reason for denying a demonstration request for a particular date, its denial will be upheld if it selects and grants a reasonable alternative date. See Young v. Morris, 218 N.Y.S.2d 257, 258 (N.Y. App. Div. 1961).

A requirement that prohibited issuance of a permit for a period of more than seven consecutive days or for demonstrations with a duration of more than 24 consecutive hours has been held invalid.

Privacy interests may justify restricting parades or demonstrations in residential areas where an audience hostile to demonstrators may be "captivating." See L. Tribe, American Constitutional Law 619 n.16 (1978); V. Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1482, 1513 (1970). In Collin v. Smith, however, the Court of Appeals for the Seventh Circuit did protect a Sunday afternoon Nazi march on Village Hall in a predominantly Jewish and "hostile" Chicago suburb, the village of Skokie. The court held that there was no captive audience in that case because village residents could simply avoid Village Hall on that Sunday afternoon when, in any event, it was not open for regular business. See id., 578 F.2d at 1206.

C. Manner Restrictions

Restriction of sound amplification devices which are incompatible with the normal activities of certain locations at certain times is permissible. See Grayned, 408 U.S. at 108. Theoretically, therefore, "disruptive noise" may conceivably be prohibited in residential areas in late evenings, near churches on Sunday mornings, and at all times near hospitals. See A Quaker Action Group, 516 F.2d at 734. The standard of "disruptiveness" must be set out with sufficient clarity to give an ordinary person fair notice of the prohibited conduct. See Kovacs v. Cooper, 336 U.S. 77 (1949).

Further, a locality may restrict crowd sizes in furtherance of significant governmental interests. For example, considerations of physical space and protection of public property could justify restricting the scheduling of massive demonstrations in a small park. See A Quaker Action Group, 516 F.2d at 733. If the projected number of demonstrators exceeds the number that the locality feels can be safely accommodated at the
requested site, however, a reasonable alternative site capable of accommodating the major demonstration should be provided.

Security considerations may also justify placing absolute numerical limitations on demonstrations. See Concerned Jewish Youth v. McGuire (12-person limit). In A Quaker Action Group, however, the court stated that such a numerical restriction can only be upheld if there are provisions for a waiver of the limitation upon a showing that the demonstration would be so planned and patrolled as to ensure that any substantial security danger would be unlikely. See id., 516 F.2d at 732.

D. Fees

A locality may impose a nominal fee as a regulatory measure to defray the administrative expense of processing the permit or of policing the activity in question. See Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943); Cox, 312 U.S. at 577; Milwaukee, etc. v. Milwaukee County Park Com'n, 477 F. Supp. 1210, 1219-20 (E.D. Wis. 1979). Thus, a law requiring all demonstrators to defray at least a portion of the costs incurred in providing extra police protection is permissible, provided the fee charged is not "excessive." See Cent. Fla. Nuclear Freeze Campaign, 774 F.2d at 1523; United States Labor Party v. Codd, 527 F.2d 118, 119 (2d Cir. 1975). It is unclear, however, what fee will be held to be impermissibly excessive. See Cox, 312 U.S. at 576 ($300.00 fee valid). Localities should also recognize that some persons are indigent and, therefore, cannot afford any fee. See Cent. Fla. Nuclear Freeze Campaign, 774 F.2d at 1553.

V. Conclusion: Proposed Regulation Invalid; Others Are Proper Exercise of Regulatory Authority Under Stated Circumstances

Based on the above, it is my opinion that an ordinance which limits a group to one parade in a locality annually would be an impermissible prior restraint on constitutionally protected speech. Local governments are not, however, completely restricted from regulating parades and similar speech-related activities. As set forth above, there are certain governmental interests which will justify reasonable restrictions on parades and related activities and certain limitations which, therefore, may be validly imposed.

2 P. Freur, On Understanding the Supreme Court 28 (1949).
4 See Konigsberg, 366 U.S. at 68-9 (Black, J., dissenting). Although your request does not specifically pertain to a content-selective regulation, it is important to realize that there are circumstances where content-selective government regulations are constitutionally permissible, most notably for the protection of youth and privacy. See Young v. American Mini Theatres, 427 U.S. 50, 85-6 (1976). It is significant also that at least one justice has considered arguments about scarce resources and subsidization in a case involving a content-selective regulation of protected speech. See Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 543 (1980) (Powell, J.) (order of New York Public Service Commission that prohibited inclusion in monthly bills of inserts discussing controversial issues of public policy directly infringes freedom of speech).
6 If the regulation is content-selective, the state interest must be "compelling." Perry Ed. Assn., 460 U.S. at 45 (1983).
7 I am mindful of the often great expense that may result from parades or marches which are sponsored by controversial groups and which may require additional police ser-
services. The facially content-neutral interest in minimizing public expense, while seemingly unrelated to the suppression of free expression, could be characterized, however, as having such an effect. See Cent. Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523-25 (11th Cir. 1985), cert. denied, ___ U.S. ___, 106 S. Ct. 1637, 90 L. Ed. 2d 183 (1986). Compare Collin, 578 F.2d at 1209. But cf. supra note 4.

In doing so, it is not my intent to invade the province of city or town councils, or county boards of supervisors, in enacting ordinances they feel proper for their citizens. Indeed, the needs of different localities will result in different provisions concerning parades, or, in some instances, no regulations at all.

See Shuttlesworth, 394 U.S. at 152; N.A.A.C.P., 743 F.2d at 1354.


See Walsh, 774 F.2d at 1522; Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050, 1056 (2d Cir. 1983); United States Labor Party v. Codd, 527 F.2d 118, 119 (2d Cir. 1975). The constitutionality of a requirement that a parade permit applicant acquire liability insurance is doubtful. See Powers, 723 F.2d at 1056; Collin, 578 F.2d at 1209-09. See also § 15.1-14(9) of the Code of Virginia.


PENSIONS AND RETIREMENT - VIRGINIA SUPPLEMENTAL RETIREMENT ACT - GROUP INSURANCE FOR CERTAIN EMPLOYEES AND OFFICERS. TERMINATION BY PUBLIC SCHOOL TEACHERS ONLY UNDER CONDITIONS SPECIFIED IN §51-111.67:4(e).

November 28, 1986

The Honorable Charles L. Waddell
Member, Senate of Virginia

You ask whether §§51-111.67:1 through 51-111.67:7 of the Code of Virginia mandate that all Virginia public school teachers who have not opted out of the State employees' life insurance program by a date certain must continue to carry, and may not cancel, that life insurance.

I. Applicable Statutes

Sections 51-111.67:1 through 51-111.67:7 provide group insurance for certain governmental employees and officers, including public school teachers. Employees accepting employment covered by the State employees' life insurance program are "deemed to consent and agree to any deductions from ... compensation required" by law for such coverage. Section 51-111.15.

The only statute permitting individual teachers to "opt out" of group life insurance coverage is §51-111.67:3(b), which pertains only to those teachers eligible for the State group insurance program prior to June 30, 1964. The statute provides:

Such eligible teachers in service with such a school board as of June 30, 1964, shall be automatically insured effective September 1, 1964, provided that any such teacher desiring not to be so insured shall, prior to October 1, 1964, on an appropriate form to be prescribed by the Board, give written notice to his employing office that he desires not to be insured. The provisions of §51-111.67:6 shall apply to all such eligible teachers entering service with such a school board subsequent to June 30, 1964. [Emphasis added.]
It is clear, therefore, that while Virginia law permitted teachers, prior to October 1, 1964, to decline coverage, there is no provision for a teacher to "opt out" of coverage subsequent to that date. Termination of coverage for such teachers ceases only upon a teacher's separation from service, failure to pay requisite contributions while on unpaid leave, or continuation on unpaid leave status beyond the statutory time limits. See § 51-111.67:4(e).

II. Conclusion: Teachers May Not Opt Out of Coverage After October 1, 1964

It is my opinion, therefore, that §§ 51-111.67:1 through 51-111.67:7 require all Virginia public school teachers who did not opt out of the State employees' group life insurance program under § 51-111.67:3(b) by October 1, 1964, to continue that life insurance. Such teachers may not now cancel their coverage. Coverage ceases only under the conditions specified in § 51-111.67:4(e).

The Honorable Robert E. Russell
Member, Senate of Virginia

You request my opinion on several matters concerning contact visits for inmates on death row.

I. Opinions Limited to Questions of Law

Your first two inquiries are whether there is or was an agreement between the Commonwealth and the American Civil Liberties Union regarding contact visits for inmates on death row, and, if so, what the agreement provides. You cite certain newspaper accounts describing a factual dispute over the existence of such an agreement and ask that this Office resolve that factual dispute by determining whether an agreement in fact exists.

The Attorney General is charged by § 2.1-118 of the Code of Virginia with the responsibility of rendering official opinions to certain public officials, including members of the General Assembly. However, "official opinions of the Attorney General must be confined to matters of law." 1977-1978 Report of the Attorney General at 31, 33, citing II A. Howard, Commentaries on the Constitution of Virginia 668 (1974) (emphasis in original). This Office, therefore, is required to decline to render an Opinion when the Opinion request does not involve an interpretation of constitutional or statutory provisions. See also 1976-1977 Report of the Attorney General at 17. Because the first two questions you pose require the resolution of a factual dispute and do not involve questions of law, this Office must decline to render an official Opinion as to those questions.

II. Agreement Is Binding Absent Modification

Your third inquiry is whether, assuming that there was an agreement on contact visitation, any such agreement would be legally enforceable against Virginia. Absent modification of the order as discussed below, any such agreement would be enforceable.

III. General Assembly May Adopt Legislation Prohibiting Contact Visits

You state in your Opinion request that you intend to introduce legislation prohibiting, or severely restricting, contact visits for death row inmates. You then inquire
whether a prior federal court order authorizing contact visits would be invalidated by any such subsequent legislation prohibiting contact visits.

A provision of a federal court order incorporating a settlement agreement (commonly called a "consent decree") enforcing federal constitutional law would be binding on state prison officials. See Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983). A state cannot force its officials to violate federal law. See Ex parte Young, 209 U.S. 123 (1908). There is, however, no federal constitutional right to contact visits. See White v. Keller, 438 F. Supp. 110 (D. Md. 1977), aff'd, 588 F.2d 913 (4th Cir. 1978). Such visits are a matter of public policy to be determined by the state. See id.

Where the issue is one involving state public policy, changed circumstances may require modification of a federal consent decree pursuant to Fed. R. Civ. P. 60(b). See System Federation v. Wright, 364 U.S. 642 (1961); Haldeman v. Pennhurst State School & Hospital, 673 F.2d 628 (3d Cir. 1982) (en banc), cert. denied, 465 U.S. 1038 (1984). Those changed circumstances can be either factual or legal in nature:

There is ... no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen ....

***

Just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives ....

System Federation, 364 U.S. at 647, 651 (the Railway Labor Act was amended in 1951 to permit, under certain circumstances, a contract requiring a union shop; that amendment served as a basis for modifying a 1945 federal consent decree prohibiting such a contract) (emphasis added). Indeed, the Supreme Court held that, on the facts of System Federation, refusal to modify a court decree would constitute an abuse of discretion by the trial court, "whether the decree has been entered after litigation or by consent." Id. at 650, quoting United States v. Swift & Co., 286 U.S. 106, 114 (1932).

Based on the above, it is my opinion that (1) the General Assembly would not be precluded by a federal consent decree from acting within its authority; (2) a change in state law inconsistent with such a decree would not, of itself, deprive the decree of its force and effect; and (3) to obtain relief from the terms of the consent decree, state officials must seek modification of the decree pursuant to Fed. R. Civ. P. 60(b) and, if unsuccessful, must pursue their appellate remedies.

IV. Board Adopts Regulations; Director Implements

Your final question is whether § 53.1-5 grants the State Board of Corrections the authority to make, adopt and promulgate rules and regulations governing visitation privileges.

The General Assembly has directed that the Board promulgate regulations and that the Director implement them. Section 53.1-5(6) authorizes the State Board of Corrections:

To make, adopt and promulgate such rules and regulations as may be necessary to carry out the provisions of this title and other laws of the Commonwealth administered by the Director or the Department .... [Emphasis added.]
Section 53.1-10(2) requires the Director of the Department of Corrections:

To implement the standards and goals of the Board as formulated for local and community correctional programs and facilities and lock-ups.... [Emphasis added.]

The Department of Corrections' Guideline No. 854, which establishes policy and standardized procedures for visitation in adult institutions, was adopted by the Board, and this guideline delegates to the wardens/superintendents the responsibility for implementing that visitation policy.

It is my opinion that Guideline 854 is within the authority of the Board as set forth in § 53.1-5(6).

PRISONS AND OTHER METHODS OF CORRECTION - COMMUNITY CORRECTIONAL FACILITIES AND PROGRAMS - COMMUNITY DIVERSION INCENTIVE ACT. DEPARTMENT OF CORRECTIONS MAY INSTRUCT LOCALITIES ON HIRING OR UPGRADING OF CDI PERSONNEL.

May 30, 1987

The Honorable Charles R. Hawkins
Member, House of Delegates

You ask whether the Department of Corrections (the "Department") may instruct localities on the hiring or upgrading of community diversion incentive ("CDI") program personnel.

I. Facts

Pittsylvania County has entered into a contract with the Department under which the Department grants funds to the county to establish a CDI program. The purpose of the CDI program is to divert from incarceration those nonviolent offenders who do not require confinement in a correctional facility, but who do require more than probation.

Item V of the contract provides, in part:

The contractor [Pittsylvania County] acknowledges that the Department ... shall not be responsible for any actions of employees or designated representatives of the program. Similarly the Department ... acknowledges that the contractor shall not be responsible for any actions of employees or designated representatives of the Department.

Item X, para. K of the contract provides:

The contractor agrees to get prior written approval from the Department prior to the hiring or upgrading of personnel.

The contract is signed by the Director of the Department.

II. Relevant Contract Terms Are Legally Binding on Both County and Department

The Community Diversion Incentive Act, Art. 2, Ch. 5 of Title 53.1 (§ 53.1-180 et seq.) of the Code of Virginia (the "Act"), authorizes the establishment of community diversion programs to provide circuit courts with sentencing alternatives for certain non-violent offenders. Section 53.1-181 further authorizes the Director of the Department to enter into a contract for, and to provide funds to operate, these CDI programs.
Neither the Act nor any other provision of the Code prohibits the Director from requiring, as a term of the contract, that the locality or other contracting party agree "to get prior written approval from the Department prior to the hiring or upgrading of personnel." These terms are clear, unambiguous and enforceable under general contract law.

III. Conclusion: Department May Instruct Localities on Hiring and Upgrading of CDI Personnel

Based on the above, it is my opinion that the Department may instruct localities on the hiring or upgrading of CDI personnel.

1986-1987 REPORT OF THE ATTORNEY GENERAL

PRISONS AND OTHER METHODS OF CORRECTION - LOCAL CORRECTIONAL FACILITIES - DUTIES OF SHERIFFS. RESPONSIBILITY FOR EXPENSES INCURRED IN MEDICAL TREATMENT OF PRISONERS; RELIANCE ON PROFESSIONAL ADVICE OF JAIL PHYSICIAN IN DETERMINATION OF DEGREE AND CIRCUMSTANCE UPON WHICH OUTSIDE MEDICAL CARE REASONABLY REQUIRED.

November 28, 1986

The Honorable B. R. Overman
Sheriff for the City of Virginia Beach

You ask whether a sheriff must pay the medical expenses of a person entering the local jail with a preexisting medical condition or whether such expense must be borne by the prisoner. You indicate that six women prisoners recently have entered your jail with preexisting pregnancies and have either delivered or otherwise required medical care while in your custody.

I. Applicable Statute and Case Authority

Section 53.1-126 (formerly § 53-175) of the Code of Virginia provides that a sheriff "shall purchase . . . such clothing and medicine as may be necessary" for jail prisoners. This language in former § 53-175 has been interpreted as imposing upon a sheriff the immediate responsibility for his prisoners' medical needs. See Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977). Accord 1967-1968 Report of the Attorney General at 252. In fact, the Supreme Court of the United States has made it clear that the United States Constitution requires that prison officials must not deliberately deny care to inmates with serious medical needs. See Estelle v. Gamble, 429 U.S. 97 (1976).

II. Conclusion

Based on these interpretations of the language in § 53.1-126, it is my opinion that a sheriff is responsible for the expenses incurred in the medical treatment of prisoners confined in the local jail. Even though you are responsible for the medical needs of your prisoners, however, you should rely on the professional advice of your jail physician in determining the degree and circumstance upon which outside medical care is reasonably required.1

1Although the situation you pose does not involve a medical emergency, § 53.1-83.1 does provide for a fund that could prove helpful in meeting extraordinary costs to local jails from unanticipated medical emergencies. See also § 53.1-85.

PRISONS AND OTHER METHODS OF CORRECTION - LOCAL CORRECTIONAL FACILITIES - PRISONER PROGRAMS AND TREATMENT. COURT'S AUTHORITY TO
DETERMINE SUITABILITY OF CANDIDATE FOR COURT-ORDERED WORK RELEASE; RESPONSIBILITY OF SHERIFF TO ACCEPT PRISONERS, INCLUDING THOSE ASSIGNED TO OTHER WORK RELEASE PROGRAMS. SHERIFF MAY NOT TERMINATE EXISTING WORK RELEASE PROGRAM WITHOUT COURT'S APPROVAL; COURT MAY NOT ORDER SHERIFF TO ESTABLISH PROGRAM.

February 28, 1987

The Honorable Donald L. Boswell
Sheriff for Henrico County

You ask five questions concerning a sheriff's local work release program. Specifically, you ask:

[1] When a sheriff has established written policies and procedures which comply with the Board of Corrections' prescribed rules and regulations governing work release programs, may the sentencing court order the sheriff to accept an offender into that work release program in violation of the sheriff's established policies and procedures?

[2] May a sheriff establish a maximum number of offenders which his work release program will accept at any one time based upon adequate available work release facility beds and/or authorized and funded work release staff positions which precludes the sentencing court from ordering further work release assignments?

[3] May a sheriff suspend and/or eliminate his work release program if he determines he cannot provide adequate supervision?

[4] May the sentencing court order a sheriff to assign an offender to work release if that sheriff does not have a work release program?

[5] May a court order the sheriff in [its] jurisdiction to maintain and/or establish a work release program?

I. Court Has Sole Authority to Determine Suitability of Candidate for Court-Ordered Work Release

Work release from local jails is governed generally by §§ 53.1-131 and 53.1-132 of the Code of Virginia. Specifically, § 53.1-131(A) provides, in part:

Any court having jurisdiction for the trial of a person charged with a criminal offense or charged with an offense under Chapter 5 (§ 20-61 et seq.) of Title 20 may, if the defendant is convicted and (i) sentenced to confinement in jail or (ii) being held in jail pending completion of a presentence report pursuant to § 19.2-299 . . . and if it appears to the court that such offender is a proper and suitable candidate for work release, assign the offender to a work release program under the supervision of a probation officer, the office of the sheriff or a program designated by the court.

When deciding whether to assign an inmate to a work release program, the court has the sole discretion to determine who is a proper and suitable candidate for such a program. Section 53.1-131 authorizes the State Board of Corrections (the "Board") to "prescribe rules and regulations to govern the work release . . . programs." The Minimum Standards for Local Jails & Lockups § 3.08 (1980) (as amended May 13, 1980) ("Minimum Standards"), adopted by the Board, authorizes local jails to develop written policies and procedures to administer these programs. I do not believe, however, that these rules and regulations can do more than prescribe minimum standards to govern the administration of a work release program. Determining the suitability of the candidate for work release is, by statute, the court's prerogative. A sheriff is bound by that determination.
II. Sheriff's Responsibility is to Accept All Prisoners, Including Those Assigned to Other Work Release Programs

This Office has previously concluded in an analogous context that a sheriff may not refuse to accept prisoners from within his jurisdiction due to an overcrowded jail. See 1982-1983 Report of the Attorney General at 160. It was noted in that Opinion that § 53.1-119 requires a sheriff to accept "all persons committed by the order of such courts" and consequently, the sheriff could not "discriminately pick and choose his inmates who come from within his jurisdiction." Id. at 161. The provisions of § 53.1-131, giving the court discretion to determine appropriate assignments to a work release program, mandate the same result.

An inmate assigned pursuant to § 53.1-131 may be placed by the court in a work release program under the supervision of any of three individuals or agencies, including the sheriff. Regardless of the identity of the supervising work release authority, the inmate is still confined to the jail and is only allowed to leave for work purposes. See 1984-1985 Report of the Attorney General at 211. Even if the court does not place the inmate in a program supervised by the sheriff, there are still many duties incumbent upon the sheriff for the inmate's care and upkeep during his incarceration in the jail. The inmate on work release is merely serving part of his sentence outside the jail. The sheriff, therefore, must accept all prisoners sentenced to his jail by the court, including inmates assigned to other work release programs authorized by § 53.1-131.

III. Sheriff May Not Terminate Existing Program Without Court Approval; Court May Not Order Sheriff to Establish Program

There is no statutory or regulatory requirement that a sheriff establish a work release program where one has not previously existed, but once a program has been established, it becomes an integral part of a court's sentencing prerogatives. The sheriff may not discontinue an existing program without the court's approval. If a program director could suspend or eliminate a work release program because of a disagreement with the court's decision to place a particular inmate on work release, then a serious and unacceptable intrusion into a court's authority to determine an appropriate sentence in a given case would occur. Once a work release program is established, a court must be able to rely on its continued existence. I am of the opinion, therefore, that a sheriff may not unilaterally suspend or discontinue his work release program because he feels he is unable to supervise it adequately.

Obviously, appropriate supervision of inmates and the utilization of proper security measures is an important concern for any sheriff. Many of the methods a sheriff has to deal with jail overcrowding are also available to control sudden staff shortages in the supervision of work release programs. For example, the sheriff may request the State Compensation Board to amend his budget to provide funds for additional staff as circumstances change. See § 14.1-66. The aid and guidance of the court is also available. In fact, a cooperative relationship between a sheriff and the court is vital to the success of any work release program. Before any work release program is suspended or eliminated, however, all substantive reasons should be presented to the court for its decision whether ultimately to terminate the program.

IV. Conclusion

Based on the above, it is my opinion that a sheriff may not establish a policy or procedure that interferes with a court's discretion to determine who is a proper and suitable candidate for court-ordered work release authorized by § 53.1-131. Although the nature of the "violation" of the established policies and procedures referenced in your first inquiry is unclear, I presume you question whether the court may order reinstatement of an inmate who has violated the established rules of the work release program. Since a court has the sole authority to determine qualification for these programs, any violation of the conditions of an inmate's work release should be presented to the court for consideration, but the final decision whether an inmate enters or remains in the program...
gram rests with the court. It is also my opinion that a sheriff must accept offenders assigned to a work release program by a court, whether the offenders are assigned to other work release programs or to a program under the sheriff's supervision, if the sheriff has chosen to operate such a program. As a result, no regulation should be adopted setting a maximum number of inmates who will be accepted into a work release program and precluding a court from ordering further work release assignments. Further, § 53.1-131 does not authorize a court to require a sheriff to establish a work release program, but an existing program should not be suspended or eliminated without the court's approval.

1The Board's Jail Work/Study Release Program Standards, adopted Sept. 13, 1984, contain no standard which limits the court's authority to determine proper and suitable candidates for court-ordered assignments. In fact, those standards deal primarily with matters arising after an initial assignment to work release.

2Section E(1) of the Board's Jail Work/Study Release Program Standards (1984) authorizes jails to implement policies governing removal of a participant from work release. That authority does not impede a court from exercising its authority subsequently to modify a jail sentence under § 19.2-303 and reinstate a defendant to work release, even after such removal.

3For example, § 53.1-126 makes the sheriff responsible for providing food, clothing and medicine for jail inmates.

4Section 3.04 of the Minimum Standards merely states that "work release programs should be encouraged."

Also, the Jail Work/Study Release Program Standards Introduction at 1 (1984) states that "[t]he Board . . . recognizes that there are differences among the various local facilities and programs throughout the Commonwealth. It is considered, however, that these standards are both few enough in number and flexible enough . . . to be attainable for any and all worthwhile work release programs."

5Section C(4) of the Jail Work/Study Release Program Standards requires policies and procedures to account for all participants in work release, including field visits by staff, employers or volunteers.

PRISONS AND OTHER METHODS OF CORRECTION - LOCAL CORRECTIONAL FACILITIES - REGIONAL JAILS AND JAIL FARMS. CONSTITUTION OF VIRGINIA - LOCAL GOVERNMENT - COUNTY AND CITY OFFICERS. COSTS, FEES, SALARIES AND ALLOWANCES - FEES. COUNTIES, CITIES AND TOWNS - COUNTY, CITY AND TOWN OFFICERS GENERALLY. ADMINISTRATION OF THE GOVERNMENT GENERALLY - COMPREHENSIVE CONFLICT OF INTERESTS ACT - STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT. CLERK OF CIRCUIT COURT NOT PROHIBITED FROM SERVING ON REGIONAL JAIL BOARD; MAY RECEIVE EXPENSES AND PER DIEM PAYMENTS FROM APPOINTING LOCAL GOVERNING BODY.

April 24, 1987

Mr. V. R. Shackelford, III
County Attorney for Madison County

You ask whether a circuit court clerk who has been appointed by a board of supervisors as a member of a regional jail board may receive necessary expenses and the per diem allowance authorized for service on the regional jail board.

I. Facts

Madison County is a member of the Central Virginia Regional Jail Board (the "Jail Board"), established pursuant to § 53.1-105 et seq. of the Code of Virginia. The Madison County Board of Supervisors has appointed the Clerk of the Circuit Court of Madison County as one of the county's members on the Jail Board. The resolution creating the
Jail Board provides that a member shall receive necessary expenses and an allowance of $50 for each day the member is in attendance at Jail Board meetings.

II. Applicable Statutes

The creation of regional jails is provided for in Art. 5, Ch. 3 of Title 53.1, §§ 53.1-105 through 53.1-115.1. Section 53.1-106(A) provides:

Each regional jail or jail farm shall be supervised and managed by a board to consist of at least one representative from each political subdivision participating therein who shall be appointed by the local governing body thereof. The sheriff of each participating political subdivision shall be eligible for appointment to the jail or jail farm board.

Section 53.1-108 provides:

Members of the regional jail or jail farm board shall be entitled to necessary expenses incurred in attending meetings of the board. They shall each receive an allowance for each day they are in attendance on the board. Such expenses and allowances shall not exceed in any 1 year the sum of $1,200 per member and shall be paid by the respective governing bodies.

The eligibility of constitutional officers to hold multiple offices is restricted by § 15.1-50(A), which provides, in part:

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 or councilman shall hold any other office mentioned in Article VII of the Constitution at the same time.

The facts you present raise the issue of the clerk's eligibility to serve on the Jail Board, as well as the propriety of the clerk receiving necessary expenses and the per diem allowance for service on the Jail Board.

III. Contemplated Payments Do Not Constitute Supplement to Clerk's Salary for Services Performed within Office of Clerk

The office of clerk of a circuit court is a constitutional office created pursuant to Art. VII, § 4 of the Constitution of Virginia (1971). The compensation a clerk receives for performing the duties of that office is set out in § 14.1-143.2. A local governing body is generally without authority to supplement the salary a circuit court clerk receives. See Reports of the Attorney General: 1985-1986 at 27; 1982-1983 at 78. Because the contemplated expense and per diem payments are for the clerk's services as a Jail Board member, and do not constitute a supplement for services within the office of the clerk, it is my opinion that § 14.1-143.2 does not prohibit the contemplated Jail Board payments to the clerk.

IV. Section 15.1-50(A) Does Not Prohibit Clerk from Serving on Jail Board

Section 15.1-50(A) prohibits the clerk from holding any other office mentioned in Va. Const. Art. VII. Membership on the Jail Board is clearly not an office mentioned in Art. VII. See 1984-1985 Report of the Attorney General at 21, 22 n.1. Accordingly, it is my opinion that § 15.1-50 does not prohibit the clerk from serving on the Jail Board.

V. Comprehensive Conflict of Interests Act Does Not Prohibit Clerk from Receiving Contemplated Payments

The final question presented by your inquiry is whether the Comprehensive Conflict
A clerk of a circuit court is an "officer" of local government and is, therefore, subject to the Act's prohibitions and restrictions. See § 2.1-600. The contemplated payments to the clerk, in my opinion, would also constitute a "contract" within the meaning of § 2.1-600. Section 2.1-607 restricts the contractual relationships such officer may have with an agency of the local government which the officer serves. For purposes of the Act, a clerk is considered to be a separate agency of local government from the local governing body itself. See Reports of the Attorney General: 1982-1983 at 657, 659; 1980-1981 at 87, 88; 1978-1979 at 302, 303; 1973-1974 at 431(2). Contracts between a local officer and another local governmental agency are restricted by § 2.1-607(B), which provides:

No officer or employee of any governmental agency of local government shall have a personal interest in a contract with any other governmental agency which is a component of the government of his county, city or town unless such contract is (i) awarded as a result of competitive sealed bidding or competitive negotiations as defined in § 11-37 . . . or is awarded as a result of a procedure embodying competitive principles as authorized by paragraph D of § 11-35 . . . or (ii) is awarded after a finding, in writing, by the administrative head of the governmental agency that competitive bidding or negotiations is contrary to the best interest of the public.

The contemplated payments by the board of supervisors to the clerk would, in my opinion, establish the clerk's personal interest in a contract with the board of supervisors. See § 2.1-600 ("personal interest" and "personal interest in a contract"). Section 2.1-607(B), therefore, would apparently require that the appointment be made after an administrative finding that competitive procurement of the contract is contrary to the best interests of the public. Compare 1973-1974 Report of the Attorney General at 431(1) (administrative finding by judge necessary prior to appointment of Commonwealth's attorney as commissioner in chancery).

I note, however, that § 53.1-106(A) provides that members of a regional jail board are to be appointed by the local governing bodies of the participating jurisdictions. Section 53.1-108 expressly provides for the compensation of members of regional jail boards. Competitive procurement of such contracts, therefore, is precluded by the provisions of §§ 53.1-106(A) and 53.1-108. In such circumstances, in my opinion, an administrative finding pursuant to § 2.1-607(B) would be a superfluous act. It is my opinion, therefore, that an administrative finding pursuant to § 2.1-607(B) is not necessary in this circumstance because the legislature has precluded the competitive award of such contract by statute. The Act, therefore, does not prohibit or restrict the clerk's personal interest in the contemplated contract with the board of supervisors.

I have also reviewed this question under the State and Local Government Conflict of Interests Act, §§ 2.1-639.1 through 2.1-639.24 (the "1987 Act"), which will become effective August 1, 1987. Section 2.1-639.8(B) imposes restrictions that parallel the provisions of present § 2.1-607(B). My conclusion above, therefore, will be unaffected by the provisions of the 1987 Act.

VI. Conclusion

To summarize, it is my opinion that (1) the contemplated payments do not constitute a supplement to the clerk's salary for the performance of his duties as clerk; (2) § 15.1-50(A) does not prohibit the clerk from serving on the Jail Board; (3) the Comprehensive Conflict of Interests Act does not prohibit the clerk from receiving the contemplated payments. It is further my opinion, therefore, that the clerk may receive the contemplated expenses and per diem payments from the board of supervisors for his service on the Jail Board.
Due to the limited nature of the prohibition imposed by § 15.1-50(A), it is not necessary that I opine on whether membership on a regional jail board constitutes a public office.

PROFESSIONS AND OCCUPATIONS - AUCTIONEERS - AUCTIONEERS' REGISTRATION AND CERTIFICATION ACT. CHARITABLE CORPORATIONS EXEMPT FROM ACT PROVIDED VOLUNTEER AUCTIONEER RECEIVES NO COMPENSATION.

October 30, 1986

The Honorable S. Vance Wilkins, Jr.
Member, House of Delegates

You ask whether Sam Houston Ruritan Club, Inc. (the "corporation") and its corporate members are exempt from the Auctioneers' Registration and Certification Act (the "Act") pursuant to § 54-824.3(9) of the Code of Virginia.

I. Facts

The corporation is a legal entity separate and distinct from both Ruritan National and its local member club. You have furnished the corporation's articles of incorporation, local business license, and income tax return which claims an exemption under I.R.C. § 501(c)(4) (1954).

Article II of the corporation's articles states, in part, that the purpose of the corporation is

[to render ... constructive community service, to render service to underprivileged children, to render services to boys and girls and youth through vocational guidance ... to promote the adoption and application of higher agricultural, social, business, and professional standards ... and ... to raise money for the promotion of the above services.]

These articulated purposes clearly connote a corporation organized for charitable and fraternal purposes.

The tax information which you provided establishes that the funds raised are used for charitable purposes and operating expenses only. No compensation is paid to the volunteer auctioneers.

II. Applicable Statute

Section 54-824.3(9) exempts from regulation under the Act "[s]ales conducted by and on behalf of any charitable, religious, fraternal, or political organization if the person conducting the sale receives no compensation therefor."

III. Charitable and Fraternal Corporation Exempt from Regulations

The corporation fulfills the first requirement under § 54-824.3(9) for exemption from regulation because it is a charitable or fraternal organization. The corporation also meets the second requirement for exemption under § 54-824.3(9) in that the volunteer auctioneers are not compensated. I conclude, therefore, that the corporation's auctions are exempt from regulation by § 54-824.3(9).

IV. Volunteer Auctioneers for Charitable Corporation Need Not Be Registered

You also ask whether the nonpaid volunteer auctioneer must register with the the Virginia Auctioneers Board. In my opinion, the plain language of § 54-824.3(9) exempts
the volunteer auctioneer as well as the corporation from regulation under the Act.

V. Requirement of Local Business License Is Question of Fact to Be Determined by Local Commissioner of Revenue

Finally, you ask whether the corporation is required to obtain a business license in the county in which the auctions are held. This Office has consistently held that the requirement of a local business license is a determination of fact which is the responsibility of the local commissioner of the revenue. See, e.g., 1983-1984 Report of the Attorney General at 374. In carrying out this responsibility, the commissioner of the revenue must be guided by applicable statutes and the guidelines of the Virginia Department of Taxation.

Section 58.1-3703 authorizes local governing bodies to impose license taxes on businesses, trades, professions, occupations and callings. The corporation is not automatically exempt from the license tax because of its charitable nature. Section 2-7 of the Guidelines for Local Business, Professional and Occupational License Taxes, issued by the Virginia Department of Taxation on January 1, 1984, at 13, states that "[a] charitable institution or other not-for-profit organization that engages in the business of buying and selling merchandise may be subject to a local license tax as a retail or wholesale merchant, even though the proceeds are subsequently used for charitable purposes." Thus, if an organization is operating a licensable business, a locality may, in my opinion, require it to procure a local business license pursuant to an ordinance adopted under § 58.1-3703, regardless of how earnings are expended. See Commonwealth v. Employees Assoc., 195 Va. 663, 79 S.E.2d 621 (1954); 1983-1984 Report of the Attorney General at 371.

1Ruritan National and its local member club comprise the civic organization commonly associated with the "Ruritan" name. The local member club is exempt from registration under the Act under § 54-824.3(10), which exempts "[s]ales, not exceeding one sale per year, conducted by or on behalf of a civic club or organization . . . ." (Emphasis added.) The corporation, on the other hand, uses "Ruritan Club" within its name but is an entirely separate organization.

PROFESSIONS AND OCCUPATIONS - AUCTIONEERS - AUCTIONEERS' REGISTRATION AND CERTIFICATION ACT. INDIVIDUAL LICENSEES NOT REQUIRED TO BE SEPARATELY BONDED WHERE FIRM BOND INCLUDES EACH EMPLOYEE.

July 17, 1986

Mr. David R. Hathcock
Director, Department of Commerce

You ask whether § 54-824.9:1 of the Code of Virginia requires that a surety bond be issued for each registered auctioneer, as well as for the registered firm with which an auctioneer may be affiliated.

I. Applicable Statutes

Section 54-824.9:1 provides, in pertinent part, as follows:

Effective six months after the adoption of initial rules by the Board, no person or firm shall sell at auction, unless exempt by § 54-824.3 of this article, without first being registered with the Board.

In order to be registered any person or firm shall pay a fee and provide such information as may be required by regulation of the Board. No person applying for registration shall be required to pass a test or show evidence of training or experience.
Before such registration shall be operative there shall be filed with the Board evidence that such person is covered by a surety bond, executed by a surety company authorized to do business in this Commonwealth, in a reasonable amount to be fixed by the Board, conditioned upon the faithful and honest conduct of his business or employment.

Section 54-824.2 provides that "[p]erson' means any natural person, association, partnership, or corporation, and shall also include officers, directors, and employees of a corporation."

II. Blanket Bonds Covering All Registered Members of Firm Are Legally Sufficient

It is clear that the intent of the General Assembly is to require a surety bond to protect the public against dishonest or unfaithful conduct of a registrant in the auctioneering business. As long as the bond of a firm is a blanket bond which includes in its coverage all registered auctioneers working with the firm, it is my opinion that a single bond would satisfy the requirements of § 54-824.91.

PROFESSIONS AND OCCUPATIONS - BEHAVIORAL SCIENCE PROFESSIONS - EXEMPTIONS, ETC. STATE EMPLOYEES PROVIDING PSYCHOLOGICAL SERVICES EXEMPT FROM LICENSURE WHERE SPECIFIC REQUIREMENTS MET.

January 21, 1987

Mr. Paul W. Timmreck
Director, Department of Planning and Budget

You ask whether salaried employees of the Commonwealth who provide psychological services without charge or fee to the recipients or beneficiaries thereof may rely upon the exemption from licensure contained in § 54-944(a) of the Code of Virginia or whether such persons must rely exclusively upon the exemption contained in § 54-944(d).

I. Applicable Statute

Section 54-944 sets forth five separate exemptions from the requirements for licensure or certification within the behavioral science professions. Subsection (a) provides an exemption for all persons who render services where the recipients or beneficiaries are not subject to any charge or fee, or any financial requirement, provided that the person rendering these services is not held out as a licensed or certified practitioner.

Subsection (d) exempts all salaried employees of the Commonwealth, and others not relevant here, from licensure or certification, but further provides that any such person who renders psychological services shall be "supervised by a licensed psychologist or clinical psychologist."

II. Section 54-944(d) Not Exclusive Exemption from Licensure for State Employees

The primary objective of statutory interpretation is to give effect to the legislative intent behind its enactment. See Vollin v. Arlington Co. Electoral Bd., 216 Va. 874, 679, 222 S.E.2d 793, 797 (1976); Bott v. Hampton Roads San. Comm., 190 Va. 775, 783, 58 S.E.2d 306, 309 (1950). In this instance, however, the legislative intent is not apparent from a plain reading of the statute. Therefore, it is necessary to resort to rules of statutory construction to resolve any ambiguity or perceived conflict between § 54-944(a) and (d).

While subsection (d) provides a specific exemption for all State employees, this alone is not controlling. It is an accepted rule of statutory construction that a provision
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. Com., 124 Va. 36, 56, 97 S.E. 343, 349 (1918). See also 1983-1984 Report of the Attorney General at 212, 213. In the instant case, however, not all State employees exempt from licensure under subsection (d) would be eligible for exemption under subsection (a), because not all psychological services provided by employees of the Commonwealth are without fee or charge to the recipient. Likewise, not all persons exempt under subsection (a) are State employees subject to subsection (d). Therefore, although overlapping in scope, neither subsection covers all cases within the purview of the other. To the extent that the two subsections do conflict, they should be construed, if reasonably possible, to allow both to stand and to give force and effect to each. See Scott v. Lichford, 164 Va. 419, 422, 180 S.E. 393, 394 (1935). See also 1983-1984 Report of the Attorney General, supra, at 213 n.2.

Based upon this analysis, I am unable to conclude that the legislature intended that § 54-944(d) be the exclusive exemption for State employees from licensure or certification within the behavioral science profession.

III. Conclusion: State Employees May Be Exempt from Licensure Under Either § 54-944(a) or § 54-944(d)

For the foregoing reasons, it is my opinion that, absent a clear legislative intent to the contrary, State employees providing psychological services may be exempt from licensure under the provisions of either § 54-944(a) or § 54-944(d) where the specific requirements of either subsection are met.

PROFESSIONS AND OCCUPATIONS - DENTISTS - CERTIFICATES AND LICENSES GENERALLY. EXISTING STATUTES WHICH AUTHORIZE BOARD OF DENTISTRY TO GRANT LICENSE TO PRACTICE DENTISTRY MAY NOT SERVE AS BASIS FOR PROMULGATION OF REGULATION PROVIDING FOR ISSUANCE OF LIMITED LICENSE TO PRACTICE DENTISTRY TO BOARD CERTIFIED SPECIALISTS SERVING FULL TIME ON FACULTY OF DENTAL SCHOOL.

May 30, 1987

Sanford L. Lefcoe, D.D.S.
President, Virginia Board of Dentistry

You ask whether the Virginia Board of Dentistry (the "Board") has the statutory authority to promulgate its current Regulation 4(B)(3), which authorizes the issuance of a limited license to practice dentistry to a Board-certified specialist serving as a full-time faculty member of a dental school. You also ask whether the Board may issue a limited license pursuant to this regulation.

I. Applicable Statutes

Chapter 8 of Title 54 of the Code of Virginia (§ 54-146 et seq.) governs the practice of dentistry in Virginia. Section 54-175 authorizes licensure of all applicants who undergo a satisfactory examination. Section 54-175.1(A) authorizes the Board to issue, without examination, a license to teach dentistry to an otherwise qualified individual who is not licensed to practice dentistry in the Commonwealth, provided the individual has not failed an examination for such a license in the Commonwealth and is licensed to practice dentistry in at least one other state. Section 54-175.1(A) specifically precludes the holder of such a teaching license from engaging in a private or intramural dental practice or from receiving fees for services. Section 54-175.2 authorizes the issuance of a restricted license to teach dentistry to dentists licensed in a foreign country who hold faculty appointments at a dental school in the Commonwealth. The statutes constitute the Board's exclusive authority to issue licenses to practice dentistry.
II. Regulation 4(B)(3) Exceeds Statutory Authority of Board

Regulation 4(B)(3) of the Rules and Regulations Governing the Practice of Dentistry and Dental Hygiene (1984), adopted by the Board on December 8, 1979, following a public hearing of the same date, provides, in pertinent part, as follows:

Any person who is certified by the Dean of a dental school to be serving on the faculty of a dental school in this State and has successfully passed a specialty board examination recognized by the ... Board [specialty boards recognized by the American Dental Association] may be granted a limited license to practice dentistry upon successful completion of the Oral Pathology and Oral Diagnosis Treatment Planning examinations of the Southern Regional Testing Agency.

A. Regulation 4(B)(3) Is Inconsistent with § 54-175

It is my opinion that Regulation 4(B)(3) exceeds the authority granted to the Board because it authorizes the issuance of a license upon completion of only a portion of the licensure examination required by § 54-175. Regulations promulgated by agencies may not exceed the statutory authority granted them by the legislature. 2 Am. Jur. 2d Administrative Law § 300 (1962). When the language of a statute, such as § 54-175 or § 54-175.1(A), is clear and unambiguous, its plain meaning and intent will govern without resort to rules of statutory construction. Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982); 1985-1986 Report of the Attorney General at 120; 2A N. Singer, Sutherland Statutory Construction §§ 45.02, 46.01 and 46.02 (4th ed. 1984).

To the extent Regulation 4(B)(3) authorizes the issuance of a limited license to certain individuals who complete only a portion of the Board's licensure examination, it is inconsistent with the express provisions of § 54-175, which authorize licensure only of applicants who undergo a satisfactory examination. This section of the Code has been consistently interpreted by the Board since 1976 as prescribing a single examination for all applicants. The construction of a statute by public officials charged with its administration is entitled to great weight. Peyton v. Williams, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965); Bed Company v. Corporation Commission, 205 Va. 272, 275, 136 S.E.2d 900, 902 (1964); Commonwealth v. Appalachi. El. Power Co., 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951). Where, however, an agency's interpretation of a statute is erroneous, it cannot be permitted to override the clear mandate of that statute. Hurt v. Caldwell, 222 Va. 91, 97, 279 S.E.2d 138, 142 (1981). Since Regulation 4(B)(3) provides for exceptions or "special" tests for differing categories of persons, it is my opinion that it is clearly inconsistent with § 54-175, and as such, is beyond the Board's express statutory authority.

B. Regulation 4(B)(3) Also Is Inconsistent with § 54-175.1(A)

To the extent that Regulation 4(B)(3) permits the holders of a limited license to practice either intramurally or privately or to receive fees for service, it is also inconsistent with the express language of § 54-175.1(A), which prohibits such intramural or private practice by dental school faculty members.

Since Regulation 4(B)(3) exceeds, and is inconsistent with, the Board's statutory authority, the Board may not issue licenses pursuant to that regulation. 3

1 Regulation 4(B)(1) provides that pursuant to § 54-175, the Board adopts the Southern Regional Testing Agency examinations as the Board examination for licensure and that satisfactory completion of the Southern Regional Testing Agency's examination in dentistry is a precondition for licensure.

2 See Regulation 4(B)(1).

PROFESSIONS AND OCCUPATIONS -- FUNERAL SERVICE. INSURANCE -- INSURANCE AGENTS -- LIFE INSURANCE POLICIES -- GROUP LIFE INSURANCE POLICIES. CONTRACTS -- BURIAL, ETC., CONTRACT. COMMISSIONS, BOARDS AND INSTITUTIONS -- ADMINISTRATIVE PROCESS ACT. SOLICITATION OF PRE-NEED FUNERAL SERVICE CONTRACTS BY AGENTS OF BURIAL ASSOCIATIONS AND BY LICENSED FUNERAL PROVIDERS.

December 30, 1986

Mr. Harvey L. Gray
President, Board of Funeral Directors & Embalmers

You ask numerous questions regarding the solicitation of pre-need funeral service contracts by agents of burial associations and by licensed funeral providers.

I. Contract Applications Must Be Accepted by Licensed Funeral Director; Certain Solicitation and Solicitation-Related Activities Prohibited

You first ask whether a licensed funeral provider or a burial association may employ licensed insurance agents who are not licensed funeral providers to call on the general public for the purpose of showing photographs of caskets, discussing service fees, explaining pre-planned funeral services, and accepting applications for pre-need funeral contracts where the contracts themselves must be accepted by a licensed funeral director.

A. Applicable Statutes

Section 54-260.73:1 provides:

It shall be unlawful for any person to engage in the funeral service profession or to operate a funeral service establishment, to act as a funeral director or embalmer or hold himself out as such unless he is duly licensed by the [Virginia] Board [of Funeral Directors and Embalmers].

Section 54-260.67(2) defines the "practice of funeral services" to include "making arrangements for funeral service . . . or making financial arrangements for the rendering of such services or the sale of [funeral] supplies."

B. Acceptance of Application by Licensed Funeral Provider Not Sufficient; Activity Would Constitute Unlicensed Funeral Practice

The question presented, therefore, is whether the activity you describe constitutes the "practice of funeral services" by unlicensed persons. A prior Opinion of this Office, found in the 1985-1986 Report of the Attorney General at 231, considered a similar question and concluded that a licensed funeral director in charge of a funeral home could not employ a nonlicensed person to prearrange services which the funeral home would later provide.

The activity detailed in your inquiry, when performed by an unlicensed person, clearly constitutes the "practice of funeral services," in that it involves the sale of funeral supplies, the making of arrangements for funeral services, and the financing of those services. To require that such applications later be accepted by a licensed funeral director does not, in my opinion, remove the activity from the prohibition of § 54-260.73:1. It is my opinion, therefore, that a licensed funeral provider or a burial association may not employ a licensed insurance agent who is not a licensed funeral provider to call on the general public for the purpose of engaging in the activity you describe.

In dealing with this question, it is also instructive to note the prohibitions against
unprofessional conduct applicable to licensed funeral providers. See § 54-260.74(2). Among the activities prohibited are certain types of solicitation of business, the payment of commissions for the securing of business, and the employment of agents to obtain business. See subsections (d), (e), (f), (h) and (k) of § 54-260.74(2).

The employment of agents to make unsolicited calls on the general public could, in many instances, violate the prohibitions of § 54-260.74(2) and result in the loss of the employing funeral provider's license. See § 54-260.74. See also 1985-1986 Report of the Attorney General, supra.

II. Employment of Insurance Agent to Seek Initial Designation of Funeral Home as Beneficiary of Policy May Violate Prohibition Against Solicitation-Related Activities

You next ask whether a licensed funeral provider or a burial association may employ a licensed insurance agent who is not a licensed funeral provider to call on the general public for the purpose of writing insurance contracts to fund a prearranged funeral plan where the funeral establishment is the designated beneficiary of the policy, but where the insured or next of kin may change beneficiaries at any time.4

A. Employment by Licensed Funeral Provider
   Would Violate Solicitation Prohibition

A prior Opinion of this Office held that licensure as a funeral service professional was not necessary to sell life insurance policies, the proceeds of which could be revocably assigned to a Virginia funeral home for burial and funeral expenses. See 1983-1984 Report of the Attorney General at 338. That Opinion, however, did not address the question of whether an agreement of a licensed funeral provider with an insurance agent to seek the initial designation of the funeral home as the beneficiary of the policy would violate the solicitation prohibitions of § 54-260.74(2). In my opinion, the employment by a licensed funeral provider of an insurance agent to sell such policies with the employer's funeral home as the initial beneficiary would violate the prohibitions of § 54-260.74(2).

B. Employment by Burial Association Would Not Violate Solicitation Prohibition

The prohibitions of § 54-260.74(2), however, do not apply to burial associations. A burial association, therefore, could, in my opinion, employ a licensed insurance agent to sell such policies, provided the agent's activities do not constitute the "practice of funeral services."5 See Reports of the Attorney General: 1985-1986, supra; 1983-1984, supra.

III. "Multi-Line" Agency Agreement Does Not Remove Prohibition Against Unlicensed Funeral Practice or Applicability of Solicitation Prohibition

You next ask whether a "multi-line" or "three-hat" agent representing several different funeral providers could engage in the activities described in your first two inquiries--the acceptance of an application for pre-need funeral contracts and the writing of funeral plan insurance contracts. You do not specify the nature of a "multi-line" agent but I assume, for purposes of this Opinion, that you refer to an agency agreement providing for the agent to work for several discrete principals--a burial association, a life insurance company, and several funeral service providers. Such an agent would wear three separate "hats" on behalf of the association, the insurance company, and the funeral service providers.

A. Accepting Pre-Need Funeral Contracts Would Constitute Unlicensed Funeral Practice

As is noted in Part I above, the activity involved in accepting or completing appli-
B. Agent Seeking Designation of Funeral Provider Would Violate Prohibition Against Solicitation-Related Activity

As is noted in Part II above, a compensation agreement between a funeral provider and an insurance agent for the agent to seek the provider's designation as the initial beneficiary of policies sold would, in my opinion, violate the prohibitions of subsections (d) and (f) of § 54-260.74(2). Any such compensatory agency agreement entered into by several funeral providers with a "multi-line" agent would, in my opinion, similarly violate the prohibitions of subsections (d) and (f) of § 54-260.74(2).

IV. Exclusive Territory Agreement Does Not Affect Application of Prohibitions

Your fourth inquiry is whether an insurance agent and a funeral provider could enter into an agency contract granting the agent an exclusive geographic or demographic territory to engage in the activity set out in Parts I and II above.

My conclusions concerning your first two inquiries turn on the application of the prohibition against the unlicensed practice of funeral services (§ 54-260.73:1) and the prohibition against certain solicitation-related activity by licensed funeral providers (§ 54-260.74(2)). The application of these statutes is not in any way affected by geographical or demographic restrictions imposed upon an agent. Accordingly, my conclusions in Parts I and II would be unaffected by any agency agreement granting the agent an exclusive geographic or demographic territory.

V. Sales of Burial Insurance and Bank Trusts by Licensed Funeral Staff Permitted; Certain Solicitation Prohibited

You next ask whether a licensed funeral provider may employ licensed funeral staff to call on the general public for the purpose of selling prearranged funerals funded by a bank trust or by insurance. In responding to this question, I will assume that the licensed funeral staff members are responding to requests from the prospective clients and are not engaged in direct in-person solicitation of the public, in violation of the prohibitions of § 54-260.74(2). The sale of prearranged funerals funded by a bank trust or by insurance would, depending upon the nature of the sales agreements, constitute the "practice of funeral services" and must be conducted by licensed staff. It is my opinion, therefore, that this type of activity by licensed funeral staff is permitted, provided the requirements of §§ 11-24 through 11-26 are satisfied with regard to funerals funded by bank trusts. In the case of funerals funded by insurance, any licensed funeral staff engaged in such sales must also be licensed to sell such insurance policies. See § 38.2-1815. Again, the prohibition against solicitation and solicitation-related activities set out in § 54-260.74(2) should be noted with regard to the sale of prearranged funerals funded by a bank trust or by insurance.

VI. Complete Funeral May Be Advertised; General Price List Must Be Provided upon Inquiry

Your sixth inquiry is whether a licensed funeral establishment or a partnership of licensed funeral directors may advertise a "complete" funeral for a fixed price, including merchandise, service, facilities and transportation, but not itemize the various specific charges.
A. Applicable Statute

Section 54-260.71:1 provides, in part, as follows:

Every person licensed pursuant to the provisions of [Ch. 10.2] shall furnish a written general price list and a written itemized statement of charges in connection with the care and disposition of the body of a deceased person.

Individuals inquiring in person about funeral arrangements or the prices of funeral goods shall be given the general price list. Upon beginning discussion of funeral arrangements or the selection of any funeral goods or services, the general price list must be offered by the funeral licensee.

***

Further, there shall be included a statement of all anticipated cash advances and expenditures requested by such person contracting for the funeral arrangements and such other items as may be required by regulation of the ... Board. ... Such statement shall be furnished to the party contracting for such funeral arrangements at the time such arrangements are made if such party is present and, if not present, no later than the time of the final disposition of the body.

B. No Prohibition Against Advertisement; Price List Must Be Furnished

Section 54-260.71:1 requires that a general price list and an itemized statement of charges must be furnished in connection with the disposition of the body of a deceased person. The general price list must be offered by the licensee to individuals inquiring about funeral arrangements. Section 54-260.71:1 does not, in my opinion, prohibit the advertisement of a "complete" funeral for a fixed price, without itemizing the specific charges. Section 54-260.71:1 does, however, require that the general price list be offered to those persons who inquire about funeral arrangements in response to such advertisements. Accordingly, a funeral establishment or a partnership of licensed funeral directors may, in my opinion, advertise a complete funeral for a fixed price, without itemizing the specific charges, provided those persons who inquire about funeral arrangements in response to such advertisements are offered the general price list as required by § 54-260.71:1.

VII. Itemized Statement of Charges Must Be Furnished at Time Services Provided

You next ask whether a licensed funeral establishment may itemize charges to the customer at the time the funeral is arranged, but not itemize charges to the family when the services are provided. Section 54-260.71:1, quoted above, requires that a written, itemized statement of charges be furnished in connection with the disposition of the body of a deceased person. When funeral service, supply and transportation charges are to be paid by burial insurance and the family is to receive any excess over actual charges for supplies or services provided, disclosure is also necessary at the time the supplies and services are provided to prevent fraud and overreaching in violation of § 54-260.74(2)(a). Accordingly, it is my opinion that § 54-260.71:1 requires a licensed funeral establishment to provide a written, itemized statement of charges to the family when the services are provided.

VIII. Sales of Funeral Supplies to Public by Unlicensed Person Prohibited

Your eighth inquiry is whether an unlicensed person may sell caskets to the general public if he does not arrange funerals or prepare remains. Under § 54-260.67(2), the "practice of funeral services" includes "selling funeral supplies to the public." The appli-
cation of this definition does not require that the person selling funeral supplies arrange funerals or prepare remains. It is my opinion, therefore, that the sale of caskets to the general public constitutes the "practice of funeral services," and unlicensed persons are prohibited from engaging in such activity by § 54-260.73:1.

IX. Board May Prohibit Certain Activities
Relating to Assignment of Insurance Benefits

You next ask whether the Board has the power to prohibit funeral homes from using or permitting the use of their names in connection with the sale of insurance where the beneficiary of that insurance is the funeral establishment or a banking institution.

Section 54-260.69 authorizes the Board to adopt rules and regulations for the enforcement of the provisions of Ch. 10.2 of Title 54 ("Funeral Service"). I am unaware of any statute that expressly prohibits a funeral home from permitting the use of its name in connection with insurance sales where the beneficiary of the insurance is the funeral home or a banking institution. Any such designation of a funeral home as the irrevocable beneficiary in an insurance policy required of a burial association's member is prohibited by § 38.2-3321. Similarly, nonburial association insurance policies may not designate a funeral home as the irrevocable beneficiary of an insurance policy or bank trust. See § 54-260.74(2). Accordingly, it is my opinion that the Board may prohibit funeral homes from permitting the use of their names in connection with the sale of insurance where the irrevocable beneficiary of the insurance is a particular funeral home or group of funeral homes.

Similarly, § 54-260.74(2) prohibits certain solicitation and solicitation-related activities by funeral providers. Accordingly, the Board, in my opinion, may prohibit funeral homes from permitting the use of their names in connection with the sale of insurance where the beneficiary of the insurance is a particular funeral home, if the funeral provider compensates the insurance agent for soliciting the designation as beneficiary on behalf of the funeral home. Any such regulation should, however, be carefully tailored so as not to preclude permitted solicitations.

X. Maintenance of Insurance Office May Be Subject of Board Regulation

Your final question is whether the Board has the power to prohibit funeral homes from maintaining an insurance office on the premises or maintaining an insurance company as a subsidiary corporation.

Section 54-260.74 provides, in part, as follows:

No company ... engaged in the business of providing any insurance ... under which contract of insurance any obligation might or could arise to care for the remains of the insured, shall contract to pay or shall pay any such insurance ... to any funeral establishment ... in any manner which might or could deprive the [heirs] or in any way control them...in procuring such funeral establishment .... [Emphasis added.]

In the proper circumstances, the maintenance of an on-premises insurance sales office could implicate this prohibition against contracting in a manner which may control the heirs in procuring funeral services. In my opinion, maintaining an on-premises insurance sales office or maintaining an insurance company as a subsidiary may suggest an overbearing influence on insurance consumers. Any Board prohibition on such activities, however, could only be imposed after the public participation requirements of Ch. 1.1:1 of Title 9, § 9-6.14:1 et seq. have been met. After receiving public comment on a proposed regulation, if the Board determines that such activities would violate the prohibition of § 54-260.74(2), then a regulation prohibiting these activities would be authorized by § 54-260.69.
For purposes of this Opinion, a "pre-need funeral service contract" is an agreement for burial services as defined in § 11-24 of the Code of Virginia.

A burial association is provided for in § 38.2-3318 of the Code of Virginia. Although similar in some respects to a burial society, organized under Ch. 40 of Title 38.2, § 38.2-4000 et seq., a burial association is not subject to the general provisions of Ch. 40. See also Ch. 160, 1983 Va. Acts 174 (predecessor statute to § 38.2-3318).

A funeral director's license is not necessary to sell insurance policies when the sale of such policies does not involve arrangements for providing funeral supplies and services but is limited to the sale of insurance policies, the benefits of which may be used to pay for funeral services. See 1983-1984 Report of the Attorney General at 338. See also § 38.2-3318 (defining the purpose of burial associations).

Section 38.2-3321 prohibits the issuance of burial association group life insurance to a burial association in which membership is conditioned on the member designating a specific funeral director as beneficiary under circumstances which would control the representatives or family of the deceased or deprive them of the opportunity to obtain funeral services competitively. See also § 54-260.74(2).

A funeral provider who enters into an agreement with a burial association to have the association's employee/agent seek to have policy purchasers designate the funeral service provider's funeral home as the initial beneficiary of the policy would, however, in my opinion, violate the prohibitions of subsections (d) and (f) of § 54-260.74(2), if the agreement provided for the funeral service provider to compensate the burial association or its employee/agent. Also, even an agreement that did not provide for compensation could, in certain circumstances, violate the general solicitation prohibition of § 54-260.74(2)(c).

In the event the sales agreement for prearranged funerals funded by a bank trust are structured so as not to constitute the "practice of funeral services," then persons other than licensed funeral providers could engage in such sales. See supra note 3.


PROFESSIONS AND OCCUPATIONS - GENERAL PROVISIONS. CIVIL IMMUNITY EXTENDS TO HEALTH CARE PROFESSIONALS ONLY WHEN PROVIDING SERVICES AT FREE CLINIC; DOES NOT EXTEND WHEN PROVIDING SERVICES VOLUNTARILY AND WITHOUT COMPENSATION AT OTHER LOCATIONS UPON REFERRAL FROM FREE CLINICS.

December 16, 1986

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

You ask whether the immunity granted under § 54-1.2:2 of the Code of Virginia to certain health care professionals rendering services at free clinics also applies to those professionals who render health care services voluntarily and without compensation at their own offices upon referral from such clinics.

I. Applicable Statute

Section 54-1.2:2 provides:

No person[1] ... who renders any health care services within the limits of his license voluntarily and without compensation to any person at any clinic where no charges are made for any health care services furnished at such clinic, shall be liable for any civil damages for any act or omission resulting from the rendering of such services unless such act or omission was the result of such licensee's gross negligence or willful misconduct. [Emphasis added.]
II. Conclusion: Immunity Applies Only to Health Care Professionals Providing Services at Free Clinics

The above statute limits the common law right of recovery in tort for certain health care providers to instances involving gross negligence or willful misconduct, where the services are received at a free clinic. Statutes in derogation of the common law are to be strictly construed and not to be enlarged in operation by construction beyond their express terms. See C. & O. Railway v. Kinzer, 206 Va. 175, 181, 142 S.E.2d 514 (1965); Pump and Well Company v. Taylor, 201 Va. 311, 316, 110 S.E.2d 525 (1959).

The present statute is clear and unambiguous. It is my opinion, therefore, that the civil immunity provided by § 54-1.2:2 extends only to those health care professionals providing services at a free clinic and does not extend to services provided voluntarily and without compensation at other locations upon referral from free clinics.

The persons covered by this section are any licensee of the State Boards of Examiners for Audiology and Speech Pathology, Dentistry, Medicine, Nursing, Optometry, Opticians, Pharmacy, Hearing Aid Dealers and Fitters, Psychology, Social Work, and Professional Counselors.

PROFESSIONS AND OCCUPATIONS - MEDICINE AND OTHER HEALING ARTS - BEHAVIORAL SCIENCE PROFESSIONS. CRIMINAL PROCEDURE - PROCEEDINGS ON QUESTION OF INSANITY. MENTAL HEALTH GENERALLY - ADMISSIONS AND DISPOSITIONS IN GENERAL. CLINICAL PSYCHOLOGISTS PERFORMING EVALUATIONS UNDER § 19.2-169.5 REQUIRED TO BE LICENSED BY VIRGINIA STATE BOARD OF MEDICINE.

December 29, 1986

The Honorable Jay W. DeBoer
Member, House of Delegates

You ask whether the "clinical psychologist with a doctorate degree" who may perform evaluations of sanity in accordance with § 19.2-169.5 of the Code of Virginia must be licensed as a clinical psychologist by the Virginia State Board of Medicine.

I. Applicable Statute

Any time an indigent criminal defendant's sanity at the time of an offense will be a significant factor in his defense and the defendant is financially unable to pay for expert assistance, § 19.2-169.5 requires the appointment of one or more mental health experts to evaluate the defendant. "Such mental health expert shall be a psychiatrist or a clinical psychologist with a doctorate degree and shall be qualified by training and experience to perform such evaluations." Section 19.2-169.5 (emphasis added).

II. Clinical Psychologist Required to Be Licensed by Board of Medicine

A person may be licensed to practice "clinical psychology" by the Virginia State Board of Medicine under Ch. 12 of Title 54, § 54-273 et seq., or to practice "psychology" by the Virginia Board of Psychology under Ch. 28 of Title 54, § 54-923 et seq. Sections 54-273 and 54-936(c) both define "clinical psychologist" to mean "a psychologist who is competent to apply the principles and techniques of psychological evaluation and psychotherapy to individual clients for the purpose of ameliorating or attenuating problems of behavioral and/or emotional maladjustment." Sections 54-273(19) and 54-936(f) define the "practice of clinical psychology" to mean "the offering by an individual of his services to the public as a clinical psychologist." Despite this parallel nomenclature in the statutory definitions for both the State Board of Medicine and the Board of Psychology, the latter board has no authority to license a "clinical psychologist."
Section 54-281.3 provides: "It shall be unlawful for any person not licensed as such under this chapter to designate himself as a clinical psychologist, or use the words 'clinical psychologist' in connection with his name or otherwise hold himself out as qualified to practice clinical psychology." "[This chapter]" refers to Ch. 12 of Title 54 and pertains to licensure by the Virginia State Board of Medicine.

Section 54-275 defines the practice of the healing arts, including clinical psychology, to include actually engaging in such practice as defined in § 54-273, opening an office for such purpose, or advertising or announcing to the public a readiness or ability to so practice. A person must therefore be licensed by the Virginia State Board of Medicine to practice clinical psychology.

III. Legislative Amendment Presumes Change in Law Intended


Prior to July 1, 1986, § 19.2-169.5 provided that the "evaluation of the defendant's sanity at the time of the offense be performed by at least one psychiatrist or psychologist with a doctorate degree in clinical psychology who is qualified by training and experience to perform such evaluations." (Emphasis added.) A person could be licensed by the Board of Psychology as a psychologist and such a person may have been awarded an academic degree as a doctor of clinical psychology, but the Board of Psychology could not then or now license such a person as a clinical psychologist. The General Assembly amended § 19.2-169.5, effective July 1, 1986, to require that the mental health expert performing the evaluation "shall be a psychiatrist or a clinical psychologist with a doctorate degree and shall be qualified by training and experience to perform such evaluations." (Emphasis added.) As noted earlier, a clinical psychologist may be licensed only by the State Board of Medicine.

A presumption normally arises that a change in law was intended when new provisions are added to prior legislation by an amendatory act. See Wsiewiaski v. Johnson, 223 Va. 141, 286 S.E.2d 223 (1982); Boyd v. Commonwealth, 216 Va. 16, 215 S.E.2d 915 (1975); Richmond v. Sutherland, 114 Va. 688, 77 S.E. 470 (1913). Thus, the amendment of § 19.2-169.5 to include the term of art "clinical psychologist" properly should be read as effecting a substantive change in the law providing for evaluations of criminal defendants. Based on this change in language, it is my opinion that, by its amendment to § 19.2-169.5, the legislature vested such authority only in psychiatrists and clinical psychologists licensed by the Virginia State Board of Medicine.

IV. Conclusion: Clinical Psychologist Performing Evaluation Requires Board of Medicine License

For the foregoing reasons, it is my opinion that the clinical psychologist with a doctorate degree referenced in § 19.2-169.5 must be licensed as a clinical psychologist by the Virginia State Board of Medicine. ¹

¹I am aware that it may not have been the actual intent of the General Assembly to effect a substantive change in this portion of § 19.2-169.5 by the enactment of Ch. 535, 1986 Va. Acts 1032, 1033. Along with this Opinion, I am enclosing several drafts of amendments to the appropriate statutes in Title 19.2, to deal with potential conflicting district and circuit court rulings which have already arisen from existing § 19.2-169.5 and which may also arise from my interpretation of this statute. I hope these will be helpful in your consideration of this issue.
Mr. Bernard L. Henderson, Jr.
Director, Department of Health Regulatory Boards

You pose thirteen hypothetical situations which could be brought to the attention of the Board of Medicine (the "Board") as violations of §§ 54-317(12) and 54-524.53 of the Code of Virginia. These hypothetical situations all relate to whether sales of certain articles such as hearing aids, eyeglasses or drugs are made for a prohibited purpose, i.e., either for a physician's own convenience or for the purpose of supplementing his income. In subsequent correspondence with this Office you have indicated that the purpose of your inquiry is to determine whether, if one of the situations you have described is found to exist, the Board should proceed to take action.

I. Applicable Statutes

Section 54-317 provides, in pertinent part:

Any practitioner of medicine, osteopathy, chiropractic, podiatry, physical therapy or clinical psychology or any physical therapist 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 . . . . [Emphasis added.]

Such language is also found in § 54-524.53 (part of The Drug Control Act) with respect to the sale of drugs by licensed practitioners of medicine. The Board may suspend or revoke the licenses of its licensees who are found in violation of these statutes.

II. Prior Opinions Hold Test Is One of Purpose of Sale

Prior Opinions of this Office have dealt with this same subject. One Opinion established that violation of the foregoing statutes is grounds for disciplinary action. See 1982-1983 Report of the Attorney General at 269. Another Opinion held that selling articles described in § 54-317(12) "at a profit" does not necessarily violate the prohibition against such sales "for the purpose of supplementing [the practitioner's] income." See 1983-1984 Report of the Attorney General at 285, 286. The latter Opinion held that it is necessary to look at the purpose behind the sale to see if it falls within the prohibition. Last year, this Office reaffirmed the 1983-1984 Opinion that whether certain transactions constitute a violation of § 54-317(12) or of § 54-524.53 will depend upon the purpose of the transaction and the particular facts of the case. See 1984-1985 Report of the Attorney General at 230.

Accordingly, in each case involving the sale of medicine, drugs, eyeglasses or medical appliances or services, the Board must look at the facts on a case-by-case basis:

[T]he Board is entitled to infer purpose from objective evidence such as cost of goods sold, percentage of income generated by sales of medical devices.
and profit margin, but it must also consider other relevant information bearing upon the physician's purpose. If based on all of these factors, the Board reasonably concludes that the purpose behind the sale is supplementation of income, then such sale is prohibited.


III. Most of the Hypothetical Situations Cannot be Evaluated as Presented

The General Assembly has not provided statutory guidance by defining what is required to establish supplementation of income. As a result, my predecessors have concluded that each case must be considered on its own merits. See Reports of the Attorney General: 1984-1985, supra; 1983-1984, supra. I reach the same conclusion. With the exception of two items (numbered 8 and 10 in your letter) discussed in Part IV of this Opinion, therefore, I must conclude that it is not possible to draw definitive conclusions on the facts you present.

The reason for this conclusion, as noted, is that purpose, which is the key to determining whether a statutory violation has occurred, is a highly subjective question. The same facts which may contribute toward establishing a prohibited purpose in one case may not in another. In no case will there be only one of the hypothetical facts you state. As noted in the prior Opinions, there will always be, for example, other relevant information, including an explanation or defense by the practitioner involved. It is impossible to guess accurately or generalize usefully about what other evidence the practitioner will present. Moreover, as in any administrative proceeding of this type, the credibility and demeanor of witnesses will be key factors. The burden is, of course, on the Board to prove a violation by clear and convincing evidence. See 1979-1980 Report of the Attorney General at 168.

For these reasons, even a detailed review of a particular physician's records often will not establish whether the statute has been violated. Sales to nonpatients clearly constitute a violation. Sales to patients, which upon audit show no profit to the practitioner, however, provide little probability that a violation may be established on the basis of supplementation of income, although the same may not be true with respect to "convenience to the practitioner." Where profits are made, the probability of such violation based on supplementation of income obviously increases. It seems reasonable that high-volume, high-profit sales would attract the attention of the Board or the Department of Health Regulatory Boards (the "Department") as likely candidates for consideration of disciplinary action. "Supplementation of income" and "convenience of the practitioner" in this context may not be assumed as you suggest. Each is always a question of fact. It constitutes a violation only if proven by clear and convincing evidence.

The ultimate decision is for the Board, which will need to proceed on a case-by-case basis. Most of your hypothetical situations, therefore, do not lend themselves to generalization.

I would assume that through the investigatory process the Department, and the Board will develop their own criteria for selecting which cases to prosecute. In the final analysis, however, since clear statutory guidance is lacking, it will be necessary to proceed carefully through the administrative and, if necessary, the judicial process in order to develop a body of precedents on these issues.

IV. Practitioner's Financial or Personal Relationship with Seller Does Not, in Itself, Constitute Violation

From the hypothetical situations you present in Nos. 8 and 10 of your letter, it is clear that the actual sales of articles are not made by the practitioner himself. In No. 8, the spouse of the practitioner, or a person with whom the practitioner has a financial relationship, sells articles to persons who may or may not be the patients of the practi-
tioner. In No. 10, the articles are sold to third persons by a corporation in which the practitioner has a financial interest. Since there is nothing in the applicable statutes which prohibits or even addresses such sales, it is my opinion that proof of a practitioner's financial or personal relationship with another person or entity which sells covered articles to third persons, whether or not such persons are the practitioner's patients, does not in itself constitute a violation.³

¹In correspondence with this Office subsequent to your original inquiry, you have assured us that these hypothetical situations are not proxies for cases currently pending before the Board of Medicine. The long-standing policy of this Office, of course, is not to issue Opinions on matters which are pending before administrative or judicial tribunals. See 1977-1978 Report of the Attorney General at 31, 34.

²This Office stands ready to assist the Department and the Board, both through its role as their counsel and through its prosecutorial function, in this difficult task.

³This Opinion does not express any view as to potential violations of statutes not herein discussed, e.g., § 32.1-315, which prohibits kickbacks or such other payments to or by Medicaid providers.

PROFESSIONS AND OCCUPATIONS - PILOTS - DUTIES AND LIABILITIES OF MASTER, ETC. SECTION 54-544 REQUIRES STATE LICENSED PILOTS FOR TIME CHARTERED VESSELS UNLESS ENGAGED EXCLUSIVELY IN COASTWISE TRADE.

October 27, 1986

The Honorable Clarence A. Holland
Member, Senate of Virginia

You ask my opinion concerning the requirement of § 54-544 of the Code of Virginia, that "every vessel, other than vessels exclusively engaged in the coastwise trade and those made exempt by United States statutes," take a pilot licensed by the Commonwealth of Virginia while transiting the pilotage waters identified in that section. You ask whether this requirement applies to privately owned vessels under time charter to the United States Military Sealift Command or the United States Navy.

I. Federal Law Governing Pilotage

A. General Provisions

The authority of states to regulate and control pilotage is set forth in 46 U.S.C. § 8501, entitled "State regulation of pilots," as follows:

(a) Except as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States.

(b) The master of a vessel entering or leaving a port on waters that are a boundary between 2 States, and that is required to have a pilot under this section, may employ a pilot licensed or authorized by the laws of either of the 2 States.

(c) A State may not adopt a regulation or provision that discriminates in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or against vessels because of their means of propulsion, or against public vessels of the United States.
(d) A State may not adopt a regulation or provision that requires a coastwise vessel to take a pilot licensed or authorized by the laws of a State if the vessel--

(1) is propelled by machinery and subject to inspection under part B of this subtitle; or

(2) is subject to inspection under chapter 37 of this title.

(e) Any regulation or provision violating this section is void.\textsuperscript{2}

B. Exemptions

Two particular types of ships have been specifically exempted by Congress from state pilotage. As provided in 46 U.S.C. § 8502(a), U.S.-flag coastwise vessels are exempt from state pilotage. This exemption is reiterated in § 54-544 and is not at issue in the question you pose. "Public vessels" are also expressly exempted from state pilotage by federal law. See 46 U.S.C. § 2109. A "public vessel" is defined as a vessel that:

(A) is owned, or demise chartered,\textsuperscript{3} and operated by the United States Government or a government of a foreign country; and

(B) is not engaged in commercial service.


II. State Law Governing Pilotage

Section 54-544 states:

The master of every vessel, other than vessels exclusively engaged in the coastwise trade and those made exempt by United States statutes, inward bound from sea to any port in Virginia or any intermediate or other point in Hampton Roads, the Virginia waters of Chesapeake Bay, or in any navigable river in Virginia which flows into Chesapeake Bay or Hampton Roads, shall take the first Virginia pilot that offers his services, and any such vessel outward bound, or bound from one port or point in Virginia to another port or point, shall take the first Virginia pilot that offers his services at the port, point, or place of departure or sailing, and any master refusing to do so shall immediately pay to such pilot full pilotage from the point where such services are offered to the point of destination of such vessel. Any master or other person violating the provisions of this section shall be subject to the penalties prescribed in this chapter. [Emphasis added.]

Under § 54-544, therefore, the only exemptions to mandatory State pilotage are for coastwise ships and "public vessels."

III. "Time Chartered" Vessels Are Not "Public Vessels"

The ships referenced in your inquiry are described as "time chartered." Ownership and usage characteristics of "time chartered" ships, according to Gilmore and Black, are as follows:

In this form ... the owner's people continue to navigate and manage the vessel, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world. ... She is therefore under the charterer's orders as to ports touched, cargo loaded, and other business mat-
ters. The time charter is used where the charterer's affairs make it desirable for him to have tonnage under his control for a period of time, without undertaking the responsibilities of ship navigation and management or the long-term financial commitments of vessel ownership.

The Law of Admiralty, supra, at 194. Only "owned" or "demise chartered" vessels are included within the definition of a "public vessel" under 46 U.S.C. § 2101(24). "Demise chartered" is a term of art that has the narrow meaning described above, which does not include "time chartered" vessels. "Time chartered" ships, therefore, are not "public vessels" exempt from state pilotage laws under 46 U.S.C. § 2109.

I am advised that the Board of Examiners to Examine Pilots (the "Board"), which is the State regulatory body responsible for licensing pilots and otherwise regulating State pilotage, recently addressed the question you pose by a Resolution dated September 10, 1986:

The ... Board ... has been informed that vessels under time-charter to the U.S. Military Sealift Command or the Navy may have entered or departed Virginia pilotage waters without a pilot licensed by the Commonwealth of Virginia. After review of the available facts and the applicable federal and state law, it is the considered view of the Board that the Virginia compulsory pilotage required by Chapter 16, Title 54, Code of Virginia, applies to vessels time-chartered to the Military Sealift Command, the Navy, or any other arm or instrumentality of the United States Government. Accordingly, it is the Board's view that any such vessel must take a state licensed pilot unless the vessel is engaged exclusively in the coastwise trade, and the failure to do so constitutes a violation of state law.

It is an elementary rule of statutory interpretation that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to great weight. See Commonwealth v. Wellmore Coal, 228 Va. 149, 320 S.E.2d 509 (1984).

If the vessels to which you refer were government owned or demise chartered, they would be "public vessels" as defined under 46 U.S.C. § 2101(24) and, therefore, exempt from State pilotage. You state, however, that the vessels are not demise chartered but, rather, are time chartered. A time charter is inconsistent with ownership of the vessel. It therefore is my opinion that the vessels to which you refer are not "public vessels." If they are not public vessels and are not engaged in the coastwise trade, they are not exempt from State pilotage under federal law or § 54-544, which clearly provides that all other vessels are subject to State pilotage.

IV. Conclusion

According proper weight to the recent resolution of the Board and in view of the federal and State law on this matter, it is my opinion that time chartered vessels used by the United States Military Sealift Command or the United States Navy must take pilots licensed by the Commonwealth of Virginia while sailing in the waters described by § 54-544, unless those time chartered vessels are engaged exclusively in the coastwise trade.

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1See definition of "time charter" under Part III.
2This statute was held constitutional by the Supreme Court of the United States in Cogley v. Board of Wardens of Port of Philadelphia, et al., 53 U.S. (12 How.) 299 (1851).
3Gilmore and Black, authors of a standard treatise on admiralty law, state that a demise or bareboat charterer "becomes, in effect, the owner pro hac vice, just as does the lessee of a house and lot, to whom the demise charterer is analogous. Obviously, such an arrangement is suitable to the needs of anyone who wants, for a time, to be in the position of the owner of a vessel, but who does not want to go to the expense and
February 25, 1987

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

You ask whether a certain document presented to you for recordation is a writing authorized by law to be recorded in a deed book. The document, entitled "Notice of Planned Fraudulent Lien," is a 9-page affidavit indicating on its face that it is drafted for recordation pursuant to § 55-142.1 of the Code of Virginia. In fact, the writing is merely the affiant's statement under oath as to why he feels he is not liable for federal taxation.

I. Applicable Statutes

Section 55-106 provides that

"[e]xcept when it is otherwise provided, the circuit court of any county ... in which any writing is to be or may be recorded ... 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 ... when it shall have been acknowledged by him ... ."

Sections 17-60 and 17-61 enumerate certain documents which may be recorded in a deed book.

II. Clerk Not Required to Record All Writings Presented for Recordation

This Office has previously concluded that a circuit court clerk is neither required nor permitted to record every writing presented for recordation. See 1968-1969 Report of the Attorney General at 40(1). For example, there is no statute authorizing the recordation of an affidavit describing historical events, a "Notice of Lease Pending" expressing the intent of the parties to enter into a lease in the future, or a petition in bankruptcy, and the clerk is not required to record these documents.

III. Conclusion: "Notice of Planned Fraudulent Lien" Not Recordable Writing

The document presented to you for recordation is of no legal effect and is merely a lengthy assertion of the affiant's belief that he is not liable for taxation by the Internal Revenue Service. This is not the type of recorded writing contemplated by § 55-142.1, and I can find no other statute specifically authorizing its recordation. It is my opinion, therefore, that the "Notice of Planned Fraudulent Lien" presented to you for recordation is not a recordable writing.

1Section 55-142.1 provides that "[a] notice of liens upon real property for taxes payable to the United States, and certificates and notices affecting the liens, including certificates of redemption, shall be filed in the appropriate deed book in the office of the clerk of the circuit court of the county or city in which the real property subject to a federal tax lien is situated."
(b) Notices of liens upon personal property, whether tangible or intangible, for taxes payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(1) If the person against whose interest the tax lien applies is a corporation or a partnership whose principal executive office is in this Commonwealth, as these entities are defined in the internal revenue laws of the United States, in the office of the clerk of the State Corporation Commission.

(2) In all other cases in the office of the clerk of the circuit court of the county or city where the taxpayer resides at the time of filing of the notice of lien.


PROPERTY AND CONVEYANCES - RECORDATION OF DOCUMENTS - UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT. COURTS OF RECORD - CLERKS, CLERKS' OFFICES AND RECORDS - RECORDS, RECORDATION AND INDEXING GENERALLY. ACKNOWLEDGMENT OF SIGNATURES ON DEED PRIOR TO ITS DATE DOES NOT INVALIDATE ACKNOWLEDGMENT.

March 10, 1987

The Honorable Samuel H. Cooper, Jr.
Clerk, Circuit Court of Accomack County

You ask whether a deed which is acknowledged prior to the date of the deed is improperly acknowledged and, therefore, should not be recorded. The deed presented was dated January 15, 1987, and the signatures on the deed were acknowledged by a notary public on January 10, 1987. You indicate that the acknowledgment by the notary public states that the grantors appeared before her and acknowledged "the foregoing instrument."

I. Applicable Statutes

Section 17-60 of the Code of Virginia provides that "[a]ll deeds . . . which have been acknowledged as required by law . . . shall, unless otherwise provided, be recorded in a book to be known as the deed book." (Emphasis added.)

Section 55-118.3, a portion of the Uniform Recognition of Acknowledgments Act, §§ 55-118.1 through 55-118.9, details the requirements for acknowledgments:

The person taking an acknowledgment shall certify that:

(1) The person acknowledging appeared before him and acknowledged he executed the instrument; and

(2) The person acknowledging was known to the person taking the acknowledgment or that the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument.

II. Acknowledgment Valid; Incorrectly Dated Deed Immaterial

No objection has been made to the acknowledgment in question except that it was made prior to the date shown on the deed. Although acknowledgment of signatures on a deed subsequent to the date of the deed is usual, it is not required. "An acknowledgment merely verifies that the person named executed the document in question. Code § 55-118.3." Wisniewski v. Johnson, 223 Va. 141, 143, 286 S.E.2d 223, 224 (1982).
The fact that the acknowledgment is dated prior to the date of the deed itself affects neither the validity of the deed nor the acknowledgment. In fact, no date is essential on the face of a deed. *Hunt v. Brent*, 1 Va. Dec. 258, 260 (1877), citing *Skipwith's ex'or v. Cunningham &c.*, 35 Va. (8 Leigh) 271 (1837).

III. Conclusion: Acknowledgment Valid; Deed Should Be Recorded

Based on the above, it is my opinion that an acknowledgment of signatures on a deed prior to the date shown on the deed does not invalidate the acknowledgment. Assuming the deed qualifies in all other respects as a recordable writing, it should be admitted to record.

1 The true "date" of a deed is the time when the deed is proved to have been delivered. 2 Minor, *The Law of Real Property* § 1059 (2d ed. Ribble 1928).

SCHOOLS. BASIC AID FORMULA. INDIVIDUAL INCOME LEVEL DEFINITION.

July 18, 1986

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

You ask three questions relating to the calculation of the basic school aid formula in the 1986-1988 Appropriations Act, Ch. 643, 1986 Va. Acts 1594. Your specific questions are:

1. Has the term "individual income level" been defined by the General Assembly?

2. If the term has not been defined, does the Tayloe Murphy Institute have the authority to determine the proper definition or to substitute adjusted gross income figures from the Virginia Department of Taxation for personal income figures from the Bureau of Economic Analysis of the United States Department of Commerce (the "BEA"), which are now used by the Institute?

3. May the Department of Education require that the Tayloe Murphy Institute use adjusted gross income figures or may it substitute such figures to correct a substantial error in this element of the composite index?

I. Basic School Aid Formula in Appropriations Act

Includes Element Based upon "Individual Income Level"


The "composite index of local ability-to-pay" is a component in the formula which reflects local indices of wealth. The current Appropriations Act, Ch. 643, § 1-48, Item 155(A)(4), provides, in part, as follows:

The indices of wealth are determined by combining the following constituent index elements . . . (1) true values of real estate . . . (2) individual income level for the calendar year . . . as determined by the Tayloe Murphy Institute of the University of Virginia . . . (3) the sales for the calendar year . . . which are subject to the state general sales and use tax, as reported by the State Department of Taxation . . . . [Emphasis added.]
All three of your questions relate to the means by which a locality's "individual income level" is calculated.

II. "Individual Income Level" Not Defined by General Assembly

In answer to your first question, the General Assembly has not defined the term "individual income level" in the Code of Virginia or in the Appropriations Act.

III. Tayloe Murphy Institute's Current Definition of "Individual Income Level" Based on Personal Income Figures Must Be Retained Absent Legislative Direction

In addressing your second question, I note that extensive study preceded the adoption of the basic school aid formula. See S.J. Res. 29, 1972 Va. Acts 1614; S.J. Res. 105, 1973 Va. Acts 1321; Task Force on Financing the Standards of Quality for Virginia Public Schools (December 1972), at 8; Second Report of the Task Force on Financing the Standards of Quality for Virginia Public Schools (July 1973), at 9. It is evident from these documents that "personal income" was the constituent factor to be used to determine "individual income level." You state that the Tayloe Murphy Institute traditionally has interpreted "individual income level" as personal income, a figure which it obtains from the BEA. Presumably, the General Assembly concurs in the use of the BEA personal income figures, because it has not amended that portion of the formula, prohibited the use of those figures, or mandated the use of a substitute.

Furthermore, there is no evidence in the Code, or in the Appropriations Act, that the General Assembly intends the Tayloe Murphy Institute to use "adjusted gross income" as the measure of "individual income level." All evidence is to the contrary. The term "adjusted gross income" is well established and has been used by the General Assembly as a benchmark in other statutory provisions relating to income. See, e.g., §§ 58.1-321, 58.1-322, 58.1-330, 58.1-490. The fact that the General Assembly has not used the term "adjusted gross income" in the formula for "composite index of local ability-to-pay" (Ch. 643, § 1-48, Item 155(A)(4), supra) is strong evidence that the legislature does not intend adjusted gross income figures to be used in that index.

Accordingly, in answer to your second question, it is my opinion that the Tayloe Murphy Institute does have the authority to define "individual income level" in terms of the BEA personal income figures, a definition consistent with the studies which constructed the formula and a definition which the General Assembly has accepted without modification. It is also my opinion, however, that the Tayloe Murphy Institute does not possess the authority, absent legislative direction, to redefine "individual income level" in terms of "adjusted gross income" figures from the Virginia Department of Taxation.

IV. Department of Education May Not Substitute "Adjusted Gross Income" Figures, Absent Some "Substantial Error"

In response to your third question, I know of no present statutory authority for the Virginia Department of Education to redefine the components of the composite index. The Appropriations Act requires that the Department collect the data under the formula from the responsible source agencies by a designated date. The Act further provides:

When it is determined that a substantial error exists in a constituent index element, the Department of Education will make adjustments in funding for the current school year. No adjustment during the biennium will be made as a result of updating of data used in a constituent index element.

Chapter 643, § 1-48, Item 155(A)(4), supra. This provision does not give authority to the Department of Education to alter constituent elements of the index. Furthermore, on the facts you present, I have no basis to conclude that a "substantial error" exists in a constituent index element.
Accordingly, in answer to your third question, it is my opinion that the Department may not require unilaterally that the Tayloe Murphy Institute use "adjusted gross income" figures to redefine the "individual income level" of the composite index. Similarly, it is my opinion that the Department of Education may not unilaterally substitute "adjusted gross income" for personal income figures in the current computation of the composite index.

1The Second Report of the Task Force, supra, notes as follows: "Personal income is used as a proxy for a variety of miscellaneous local revenue sources."

2I note also that figures from the Department of Taxation are required to be used for element (3) of the index, i.e., "sales for the calendar year." Had the General Assembly intended that Department of Taxation "adjusted gross income" figures be used for element (2), i.e., "individual income level," it could have clearly stated that intention, as it did in the language for element (3).


August 13, 1986

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

You ask whether deed receipts books maintained in offices of clerks of circuit courts and real property appraisal cards maintained by commissioners of the revenue or other comparable tax assessing officials are public records open to inspection. If these documents are open to public examination, you ask under what terms and conditions such examination may be made.

I. Applicable Statutes

The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), and in particular § 2.1-342(a), provides, in pertinent part, as follows:

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).

Section 2.1-342(b)(21) excludes from the operation of the Act "[d]ocuments as specified . . . in § 58.1-3," which relates to the handling of confidential tax information. Section 58.1-3 reads, in pertinent part:

A. Except in accordance with proper judicial order or as otherwise provided by law, the . . . clerk . . . shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property . . . income or business of any person, firm or corporation. . . . 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 characteris-
tics of real property ....

Four other statutory provisions are applicable to the question you have posed. Sec-
tion 14.1-139 provides, in part:

[The clerks] shall keep a true and accurate record of all fees ... to which
[they are] entitled under the law, the amount of the same actually collected
by him and the date of collection and sources from which the collections
were made. Such record shall at all times be open to public inspection.
[Emphasis added.]

Section 17-43 also relates to records of the clerk and provides, in part:

The records and papers of every court shall be open to inspection by any per-
son and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided. ... No person shall be per-
mitted to use the clerk's office for the purpose of making copies of records
in such manner, or to such extent, as will interfere with the business of the office
or with its reasonable use by the general public. [Emphasis added.]

Section 58.1-3303 requires the clerk of every circuit court to prepare a recordation
receipt for all deeds for the partition or conveyance of land, other than deeds of trust
and mortgages, made to secure payment of debts, which have been admitted to record in
that clerk's office. The receipt is required to contain the date of the deed, the date
admitted to record, the name of the grantor and grantee, the address of the grantee and
the description, quantity and the value of the land conveyed.

Lastly, § 58.1-3331 specifically addresses real property appraisal cards and pro-
vides, in part:

A. All property appraisal cards or sheets within the custody of a county,
city or town assessing officer, except those cards or sheets containing
information made confidential by § 58.1-3, shall be open for inspection during
the normal office hours of such official by any taxpayer, or his duly
authorized representative, desiring to review such cards or sheets.

C. The assessing officer of the governing body may fix and promulgate a
limited period within normal office hours when such records shall be avail-
able for inspection and copying, but such period of time may not be less than
four hours per day on Monday through Friday, except on such days when the
office is otherwise closed. [Emphasis added.]

II. Clerk's Deed Receipts Books
Are Subject to Public Examination

To the extent that any of the data contained on a recordation receipt prepared pur-
suant to § 58.1-3303 may be regarded as tax-related information, it is a matter of public
record by virtue of §§ 14.1-139 and 17-43, pertains to the sales price or characteristics
or physical dimensions of the real property, and is specifically exempt from nondisclosure
under subparagraphs (1) and (4) of § 58.1-3(A). Thus, it is my opinion that the deed
receipts books are public documents subject to public inspection under §§ 2.1-342(a),
14.1-139 and 17-43, notwithstanding the nondisclosure provisions of § 58.1-3. This con-
clusion is supported by several prior Opinions of this Office with which I concur. See
III. Terms and Conditions May Be Prescribed for Public Examination of Deed Receipts Books

Section 17-43 authorizes the clerk to limit the use of the clerk's office for the purpose of making copies of records in such manner as will not interfere with the business of the office or with its reasonable use by the general public. The custodian of public records is also authorized by §2.1-342(a) to take necessary precautions to preserve and safeguard the records, to limit inspection and copying to normal office hours, and to make reasonable charges for copying and search time expended in supplying the records requested, not to exceed the actual cost of such services. At the request of the citizen, such cost shall be estimated in advance. See Reports of the Attorney General: 1983-1984 at 436; 1982-1983 at 727; 1975-1976 at 409; and 1972-1973 at 490.

IV. Real Property Appraisal Cards Are Subject to Public Examination

Relying upon §58-792.02(B), the predecessor to §58.1-3331, an earlier Opinion of this Office held that the information generally contained on the property appraisal cards is otherwise a matter of public record, and may, therefore, be disclosed without violating §58-46, the predecessor to §58.1-3. See 1981-1982 Report of the Attorney General at 372. That Opinion listed the following information as that which generally is contained on these cards and which may be disclosed: the appraised value of the property and improvements, if any; the calculations used in determining the assessed value of such property and improvements; and the name, residence and description of the estate of the person chargeable with taxes. The Opinion also held that in the event such cards contain additional information protected under §58.1-3, such information must be expunged before disclosure. I concur with this Opinion. It is my opinion, therefore, that property appraisal cards are open to public inspection subject to the further requirement of §58.1-3331(A) that the person requesting disclosure must be a taxpayer or a duly authorized representative of a taxpayer.

V. Examination of Property Appraisal Cards May Be Subject to Terms and Conditions

In addition to the requirement of §58.1-3331(A) that the opportunity for public inspection of real estate appraisal cards or sheets must be granted during the normal office hours of such official, §58.1-3331(C) authorizes the assessing officer to further limit the "period within normal office hours when such records shall be available for inspection and copying, but such period of time may not be less than four hours per day on Monday through Friday, except on such days when the office is otherwise closed."

The other conditions and terms for examination of deed receipts books set forth in Pt. III above would also apply to examination of the appraisal cards or sheets.

TAXATION - LICENSE. FUNDS HANDLED AS DISBURSING AGENT NOT GROSS RECEIPTS SUBJECT TO LOCAL BUSINESS LICENSE TAX.

November 28, 1986

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

You ask whether the local business, professional and occupational gross receipts license tax authorized by §58.1-3700 et seq. of the Code of Virginia would apply to certain funds received by a corporation from its clients.

I. Facts

You state that the funds are monies received by the corporation from its clients as advance payments or reimbursement for payments by the corporation of clients' ex-
penses. The funds are distinguished from monthly management fee receipts of the corporation which the corporation concedes are subject to the local license tax.

You state further that:

1. The corporation was established to transact and facilitate business of foreign companies in the United States.

2. A major activity of the corporation is to act as an escrow service, disbursing funds on behalf of foreign clients to pay for goods and services selected by, and furnished to, the clients by United States vendors.

3. The corporation separately bills the client a flat monthly fee for services rendered in processing orders and paying vendor bills.

4. All expenditures made by the corporation on behalf of clients are authorized by the client in advance and in writing.

5. By contract, the company is recognized as an agent of the clients for the purchase of goods and services.

6. The obligation to make payment to a vendor initially may be the obligation of either the client or the company; where the company initially assumes responsibility, the client guarantees payment to the corporation.

7. Vendors are generally aware of the identity of the principal and recognize that the corporation is not ultimately responsible for payment.

8. Reimbursements by the client to the corporation are dollar for dollar; no markup on the vendor charges occurs.

II. Receipts from Client Escrowed for Disbursement on Behalf of Client Are Not Gross Receipts For Business License Tax Purposes

Your inquiry is governed by an Opinion of this Office, found in the 1985-1986 Report of the Attorney General at 281, to the Honorable Bernard S. Cohen, Member, House of Delegates, dated December 5, 1985. The Cohen Opinion held that the term "gross receipts," for purposes of the local business, professional and occupational license tax, does not include (i) purchase moneys received by an attorney from a client and deposited into an attorney's escrow account, or (ii) moneys received by an attorney from a client to reimburse the attorney for costs advanced by the attorney on behalf of the client, e.g., clerk's and filing fees. The underlying principle in this Opinion is that gross receipts are not subject to local license taxes where a taxpayer acts as an agent for another, receiving and disbursing moneys on behalf of a person or entity other than the taxpayer. The answer to your inquiry then turns on whether the corporate taxpayer is the legal disbursing agent of its clients.

III. Conclusion: Inquiry Necessitates Factual Determination by Local Commissioner of the Revenue

From the limited facts presented, the corporation appears to be acting as an agent of its foreign clients. Nevertheless, whether the corporation acts as a disbursing agent is a determination of fact for which the local commissioner of the revenue, based upon all the facts available, is responsible.

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1This principle is illustrated in a recent opinion of the Supreme Court of Virginia, Alexandria v. Morrison-Williams, 223 Va. 349, 288 S.E.2d 482 (1982). The Court concluded that money handled by one as an agent of a principal is not characterized as gross
TAXATION - LICENSE. MOTOR VEHICLE COMMON CARRIERS IN INTERSTATE COMMERCE SUBJECT TO FAIRLY APPORTIONED LOCAL BUSINESS LICENSE TAX.

July 31, 1986

The Honorable E. Louise Beemer Cheatham
Commissioner of the Revenue for the City of Lynchburg

You ask two questions concerning the city's authority to tax motor vehicle common carriers which are regulated exclusively by the Interstate Commerce Commission ("I.C.C.").

I. Motor Vehicle Common Carriers in Interstate Commerce Are Subject to Local Business License Tax

Your first question is whether motor vehicle common carriers which operate in interstate commerce must pay the local business license tax imposed under § 58.1-3703 of the Code of Virginia. In my Opinion to you dated May 30, 1986, noted in footnote 1, I stated that a common carrier which has not obtained a certificate of public convenience and necessity from the State Corporation Commission ("S.C.C.") is not a public service corporation within the meaning of the exemption from local license taxes found in § 58.1-3703(B)(1) and is, therefore, not exempt from a local business license tax. Although that Opinion is limited to common carriers regulated by the S.C.C., the analysis of the statutory exemption also applies to motor vehicle carriers regulated by the I.C.C. Such carriers are not required to obtain a certificate of public convenience and necessity from the S.C.C. Therefore, they are not public service corporations and are not exempt from the local business license tax under § 58.1-3703(B)(1).

I am not aware of any other statutory authority which would operate to exempt interstate carriers from the local business license tax. Because your question deals with interstate carriers, however, further examination is required in light of the interstate commerce clause, U.S. Const. Art. I, §8, cl. 3, which may limit a locality's taxing authority.

II. Federal Commerce Clause Limits Scope of City's Authority to Impose License Tax; Test Met Here

In the case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), the Supreme Court of the United States established four standards that a state tax statute must meet to withstand an attack on Commerce Clause grounds: (1) there must be a substantial nexus between the taxpayer and the taxing state; (2) the tax must be fairly apportioned; (3) there must be no discrimination against interstate commerce; and (4) the tax must be fairly related to the services provided by the state imposing the tax. See also Commonwealth v. McAdams, 227 Va. 548, 317 S.E.2d 788 (1984). In each situation where an interstate carrier is sought to be taxed, all four standards must be met.

From the facts you provide in your letter, I assume that the carrier has an office or terminal in your jurisdiction; therefore, the test of substantial nexus has been met.

With respect to the requirement of fair apportionment, no particular apportionment scheme has been established by the courts. It appears, however, that apportionment based on a ratio of miles traveled in the taxing jurisdiction to total miles traveled will meet the fair apportionment test. See id.
A finding of discrimination against interstate commerce does not appear to be warranted in this case. The question may arise whether interstate carriers subject to the tax are discriminated against because most intrastate carriers are exempt under § 58.1-3703(B)(1). Generally, the basis for a finding of discrimination is disparate treatment of equally situated parties. In the context of commerce, equally situated parties are businesses which compete against each other to attract the same customers or clients. In the situation you have presented, interstate carriers do not compete with intrastate carriers for the same customer services. Thus, the two groups are not similarly situated.

The fourth standard requires the tax to be fairly related to the services provided by the state. On the assumption that there is an office or terminal in your jurisdiction which requires police, fire and other governmental services, it is my opinion that this fourth standard is met.

II. Motor Vehicles of Common Carriers in Interstate Commerce Are Subject to Personal Property Tax on Apportioned Basis Under § 58.1-3511(B)

Your second question is whether the city may impose the personal property tax under § 58.1-3500 et seq. upon motor vehicles of a common carrier operating in interstate commerce. For purposes of this Opinion, I will assume that the vehicles are normally garaged in your jurisdiction and that they are subject to property taxation in one or more other states on the basis of an apportioned assessment. Section 58.1-3511(B) addresses your question as follows:

The assessment of motor vehicles ... operating over interstate routes, in the rendition of a common, contract or other private carrier service which are subject to property taxation in any other state on the basis of an apportioned assessment, shall be apportioned in the same percentage as the total number of miles traveled in the Commonwealth by such vehicle bears to the total number of miles traveled by such vehicle.

Based on the foregoing, it is my opinion that, under the two assumptions stated above, a locality may impose the personal property tax upon motor vehicles of a common carrier operating in interstate commerce on the basis of a mileage apportionment as set forth in § 58.1-3511(B).

1In the 1985-1986 Report of the Attorney General at 285, I addressed similar questions concerning the city's authority to tax common carriers as defined in § 56-273(d) and (e) of the Code of Virginia. Such carriers operate in intrastate commerce and are regulated by the State Corporation Commission rather than the I.C.C.

2Where there is more than one jurisdiction in the Commonwealth which has nexus under § 58.1-3511(B) to tax the motor vehicles of an interstate common carrier not certificated by the S.C.C., the rules provided by § 58.1-3511(A) must be applied. This statute assigns jurisdiction to tax to "the county, district, town or city where the vehicle is normally garaged, docked or parked." If situs cannot be determined from the operation of this rule, "the situs shall be the domicile of the owner of such personal property."

TAXATION - LICENSE. WHOLESALER OF RAW NITRATE NOT "MANUFACTURER." SALES OFFICE TAX SITUS.

July 31, 1986

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

You ask several questions concerning the application of the local business license tax to the Chilean Nitrate Sales Corporation (the "corporation"), which has a sales office
in Norfolk and a warehouse in Chesapeake.

I. Manufacturing Implies Transformation into Different Product; Corporation Is "Wholesaler," Not "Manufacturer"

Your first question concerns the classification of the corporation as a wholesaler or a manufacturer. You state that the corporation "imports raw nitrate from Chile, which is then sold to fertilizer manufacturers who mix it with the other ingredients necessary to fertilizer."

The Department of Taxation has promulgated *Guidelines for Local Business, Professional and Occupational License Taxes* (January 1, 1984) ("Guidelines") which, on page 3, state:

The term 'wholesaler' is defined as any person who sells to others for resale or who sells at wholesale to institutional, commercial or industrial users. [Emphasis added.]

The term "manufacturer," for purposes of local license taxation, is not defined in either the Guidelines or the Code of Virginia. Previous Opinions of this Office, however, have utilized the interpretation of the term set forth by the Supreme Court of Virginia that "manufacture" implies a transformation of raw material into a product or article of substantially different character. See *Solite Corp., v. King George Co.*, 220 Va. 661, 261 S.E.2d 535 (1980); 1984-1985 Report of the Attorney General at 356, 399.

According to the facts presented, the corporation does not substantially change the character of the raw nitrate anytime prior to sale to fertilizer manufacturers. Thus, based on the previous Opinions noted above, the corporation would not be a manufacturer. It would, instead, be a wholesaler.

II. "Definite Place of Business" Is Determination of Fact to Ascertain Tax Situs

Your second question is whether the situs for taxation of the corporation is Norfolk or Chesapeake. You state the following:

A parent corporation owns the mines in Chile, and through paper transactions, sell[s] it to the Chesapeake warehouse. The Norfolk office ... makes all contacts and sales which are then sent to their Chesapeake warehouse for shipment.

Section 58.1-3703 of the Code of Virginia, which authorizes and limits the imposition of the local license tax, provides, in pertinent part, as follows:

B. No county, city, or town shall levy any license tax:

    * * *

6. Upon a wholesaler for the privilege of selling goods, wares and merchandise to other persons for resale unless such wholesaler has a definite place of business in such city, town or county. [Emphasis added.]

Under the language of § 58.1-3703(B)(6), the determination of tax situs in this case depends on whether the corporation maintains "a definite place of business" in Norfolk. Previous Opinions of this Office have interpreted this phrase. See Reports of the Attorney General: 1982-1983 at 553 (home or store is a definite place of business), 611 (trash dumpster not a definite place of business).

Based on the information provided in your letter and the analyses in these Opinions, it appears that the corporation has a situs for local license taxation in Norfolk. Whether the warehouse in Chesapeake also constitutes "a definite place of business" is a deter-
mination of fact to be made in the first instance by the assessing officer of the City of Chesapeake. If there is taxable situs in both jurisdictions, the business activity on which the tax may be imposed must be apportioned between the jurisdictions. See §58.1-3708(A), (B), (D) and (F).

TAXATION - LOCAL OFFICERS - TREASURERS. DELINQUENT TAXES MAY NOT BE SET OFF AGAINST PAYCHECKS OF REGIONAL JAIL EMPLOYEES.

April 2, 1987

The Honorable Anita S. Wilson
Treasurer for Middlesex County

You advise that you have a dual responsibility as treasurer for Middlesex County. In addition to serving as treasurer, you are also the fiscal agent for the Middle Peninsula Regional Security Center ("Regional Jail"), a regional jail established under §§53.1-105 through 53.1-115.1 of the Code of Virginia. You ask whether you may deduct funds from the regular paycheck of a Regional Jail employee who is a Middlesex County resident to pay Middlesex County taxes owed by the employee.

I. Relevant Statutes

Section 58.1-3132 provides, in part:

[The treasurer] shall receive, in payment of the county or city levy, any county or city warrant drawn in favor of any taxpayer, whether such warrant has been entered in the treasurer's book or not. However, if the warrant has been transferred it shall be subject to any county or city levy owing by the taxpayer in whose favor the warrant was issued. [Emphasis added.]

Section 58.1-3133 provides:

In the payment of any warrants lawfully drawn, the treasurer paying such warrants may first deduct all taxes due from the party in whose favor the warrant is drawn. If such warrant is insufficient to pay the entire amount due, then such treasurer shall credit the tax bill by the amount of the warrant. [Emphasis added.]

As to the operating funds for regional jails, §53.1-112 provides:

Except as provided in §53.1-114, the expenses of operating and maintaining a jail ... shall be borne by the participating political subdivisions. Such participation shall be based on the percentage of the total cost for such operation that the number of prisoner days bears to the total number of prisoner days confined therein, plus their proportionate part of the fixed cost for such maintenance and operation. [Emphasis added.]

Section 53.1-114 provides that "[c]ounties and cities or any combination thereof operating a regional jail or jail farm shall be paid the reasonable cost of maintaining the facility as provided for in §53.1-85."

II. Warrants Drawn on Funds of Regional Jail Are Not Warrants of Middlesex County

According to §§53.1-85, 53.1-112 and 53.1-114, the political subdivisions participating in the operation of a regional jail bear proportionate parts of the operating costs, and the State reimburses the reasonable costs to the fiscal agent of the facility.
Pursuant to the written Agreement dated November 1, 1975 ("Agreement"), between the five counties establishing the Regional Jail, the treasurer of Middlesex County is appointed the fiscal agent "to serve at the joint will of the parties, and all records of accounts and all revenues and disbursements shall be maintained in a separate account known as the Jail Fund." (Emphasis added.) The Agreement also provides that the fiscal agent "shall be responsible for depositing all funds received for the regional jail and shall issue all checks for disbursements on vouchers of the administrative officer." (Emphasis added.)

I do not find either in the Agreement or in §§ 53.1-105 through 53.1-115.1, the statutes concerning establishment of regional jails, that the operating funds of the Regional Jail belong to the participating political subdivisions individually. According to the Agreement, they are specifically deposited in a separate account known as the "Jail Fund." There is no authorization for Middlesex County to draw checks against the Jail Fund. The Agreement specifically provides that the fiscal agent "shall issue all checks for disbursements on vouchers of the administrative officer." The checks drawn, therefore, are Regional Jail checks, and not Middlesex County checks.

III. Both §§ 58.1-3132 and 58.1-3133 Apply Only to County or City Warrants

Section 58.1-3132 permits treasurers to use setoff principles to collect the "county or city levy," i.e., to credit a delinquent tax bill by the amount of a "county or city warrant" drawn in the taxpayer's favor. This authority includes the ability to deduct delinquent county or city taxes from the paychecks of county or city employees. See Reports of the Attorney General: 1978-1979 at 289; 1964-1965 at 320.

Section 58.1-3133, however, ostensibly permits treasurers to credit a taxpayer's delinquent tax bill by the amount of "any warrants lawfully drawn" in the taxpayer's favor. (Emphasis added.) In the situation you pose, the Regional Jail's checks are drawn against the Jail Fund. Section 58.1-3133, if read literally, would seem to permit a treasurer to deduct the city or county's delinquent taxes from any check he may pay to a delinquent taxpayer, including checks he pays as fiscal agent for a regional government enterprise. Such a result, however, is violative of the common law principle of setoff, which requires that demands be mutual, that is, the claims or debts must be owing between the same parties. 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 74 (1965).

It is a rule of statutory construction that if the sense of a statute is doubtful, such construction should be given, if possible, as will not conflict with general principles of law. 17 M.J. Statutes § 52 (1979). Where there has been a general revision of the laws, the presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new. Id. § 47. In the recodification of Title 58.1, § 58.1-3133 (formerly § 58-922) was amended. The former section provided, in part:

In the payment of any warrants lawfully drawn on account of allowances made against the Commonwealth the treasurer of any county or corporation paying such warrants shall first deduct all taxes due by the party in whose favor the warrant is drawn .... [Emphasis added.]

The underlined words are the pertinent changes in the amendments to former § 58-922. The phrase "on account of allowances made against the Commonwealth" was deleted and "shall" was changed to "may." The comment following the section in the recodification report states: "Specific language dealing with allowances made against the Commonwealth has been deleted. Requirement is now discretionary." The comment does not, however, make it clear whether the intent of the change was to avoid a conflict with the general principle of setoff that the demands be mutual.

Based upon the above-quoted rules of statutory construction, therefore, it is my opinion that § 58.1-3133 should not be construed to enlarge the authority for treasurers
to set off delinquent taxes, but should be construed to permit only the setoff of delinquent county or city taxes against county or city warrants drawn in favor of the taxpayer, as is presently allowed by § 58.1-3132. Section 58.1-3133 is permissive concerning the duty of the treasurer to exercise the right of setoff and, therefore, is harmonious with § 58.1-3132 in this regard.

IV. Conclusion: Setoff Not Available for County Treasurer Who Is Fiscal Agent for Regional Jail to Recover Delinquent Taxes from Employees of Regional Jail

In summary, the warrant from which you wish to deduct Middlesex County delinquent taxes is a warrant drawn by the Regional Jail, not Middlesex County. Without a clear indication of legislative intent to the contrary in the amendment to § 58.1-3133, it is my opinion that the scope of this statute is no more extensive than § 58.1-3132; that is, setoff of county or city delinquent taxes may only be exercised against county or city warrants drawn in favor of the taxpayer. It is further my opinion, therefore, that you may not deduct funds from the paychecks of the Regional Jail’s employees to pay Middlesex County taxes due from the employees.

1Section 53.1-85 provides for payment of such costs by the Compensation Board in quarterly installments to the fiscal agent of the facility.

2Pursuant to the Agreement, the superintendent who is appointed by and directly responsible to the Regional Jail Board is the administrative officer for the Regional Jail.

3I am aware of no authority which permits a treasurer to collect taxes not owed to the jurisdiction of which he is treasurer. See § 58.1-3127(A); 1983-1984 Report of the Attorney General at 342; cf. § 15.1-40.2 (treasurers may serve two jurisdictions).


5Section 58.1-3132 is permissive and not mandatory, according to previous Opinions of this Office. See Reports of the Attorney General: 1978-1979, supra; 1984-1985, supra; 1958-1959 at 280.

TAXATION - MISCELLANEOUS - CONSUMER UTILITY. LOCALITY MAY EXEMPT PERSONS 65 YEARS OF AGE OR OLDER FROM TAX.

October 16, 1986

Mr. Douglas W. Napier
County Attorney for Warren County

You ask whether a county may exempt persons 65 years of age or older from the local consumer utility tax imposed by ordinance under the authority of § 58.1-3812 of the Code of Virginia.

I. Applicable Statute

Section 58.1-3812(A) authorizes local governing bodies to "impose a tax on the consumers of the utility service or services provided by telegraph and telephone companies." Section 58.1-3812(D) authorizes local governing bodies to exempt from such tax certain public safety agencies which provide fire-fighting, police, medical, or other emergency services. No other exemption is expressly authorized.

II. Creation of Separate Class Requires Reasonable Basis

Classifications of taxpayers may be created and taxed at different rates or exempted entirely from the consumer utility tax; however, the equal protection clauses of the U.S. Const. Amend. XIV, and Art. I, §§ 1 and 11 of the Constitution of Virginia (1971) require that there be a reasonable basis for the classification. See 1972-1973 Report of the Attorney General at 391; see also Whyy v. Glassboro, 393 U.S. 117 (1968).
Prior Opinions of this Office have held that a county may classify residential and commercial consumers separately for purposes of the consumer utility tax. See Reports of the Attorney General: 1971-1972 at 419; 1970-1971 at 400. Another prior Opinion of this Office holds that a county may exempt from the consumer utility tax all or some of the religious, charitable and educational organizations enumerated in § 58.1-12 (currently enumerated at §§ 58.1-3606 and 58.1-3707) because there is a reasonable basis for such classifications. See 1972-1973 Report of the Attorney General, supra.

III. Class Consisting of Taxpayers 65 or Older Has Reasonable Basis

A classification which consists of taxpayers 65 years of age or older appears to have a reasonable basis. The General Assembly has recognized age 65 as a separate classification for purposes of the real property tax exemption or deferral in § 58.1-3210. This separate classification for persons "not less than sixty-five years of age" is expressly authorized by Va. Const. Art. X, § 6(b).

IV. Conclusion: Persons 65 Years of Age or Older May Be Exempted from Consumer Utility Tax

Based on the foregoing, it is my opinion that a county may exempt persons 65 years of age or older from the local consumer utility tax imposed by ordinance under the authority of § 58.1-3812.


Furthermore, I am not persuaded that the addition by the Regular Session of the 1986 General Assembly of the express exemption for public safety agencies in § 58.1-3812(D) necessarily precludes local governing bodies from enacting other exemptions. Such preclusion arguably could be based on the familiar maxim of statutory construction, expressio unius est exclusio alterius. The prior Opinions of this Office cited herein, however, furnish a long-standing historical perspective allowing classifications for and exemptions from the consumer utility tax. The General Assembly has not chosen to overrule these interpretations, which were rendered as early as 15 years ago. "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view." Deal v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983). I conclude, therefore, that the addition of § 58.1-3812(D) was for the purpose of authorizing specific exemptions for public safety agencies which might not otherwise be permissible under the traditional analysis of the prior Opinions of this Office.

TAXATION - MISCELLANEOUS - MOTOR VEHICLE FUEL SALES TAX IN CERTAIN TRANSPORTATION DISTRICTS. CONSTITUTION OF VIRGINIA - TAXATION AND FINANCE - LIMIT OF TAX OR REVENUE. CONSTITUTIONAL LIMIT ON AMOUNT OF TAX OR REVENUES FOR NECESSARY EXPENSES OF GOVERNMENT DOES NOT PREVENT ACCUMULATION FOR FUTURE CAPITAL IMPROVEMENTS.

March 30, 1987

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

You ask whether it is lawful to collect the two percent sales tax imposed by § 58.1-1720 of the Code of Virginia (for the use of the Potomac and Rappahannock Transportation District to be applied to and expended for any mass transit purpose of such district) when, until there is a purpose for the revenues, the revenues collected will remain indefinitely in the special account. Your further concern is whether these
arrangements violate Art. X, § 8 of the Constitution of Virginia (1971) when the tax is being collected in a district "where a mass transit [system] is contemplated but does not exist, and may never exist."

I. Relevant Constitutional and Statutory Provisions

Article X, § 8 provides that "[n]o other or greater amount of tax or revenues shall, at any time, be levied than may be required for the necessary expenses of the government, or to pay the indebtedness of the Commonwealth."

Section 58.1-1720(A) provides, in pertinent part:

There is hereby levied, in addition to all other taxes imposed on fuels subject to tax under Chapter 21 (§ 58.1-2100 et seq.) of this title, in every county or city which is a member of any transportation district in which a rapid heavy rail commuter mass transportation system operating on an exclusive right-of-way and a bus commuter mass transportation system are owned, operated or controlled, by an agency or a commission as defined in § 15.1-1344, or in any transportation district which is subject to § 15.1-1357 (b) (6) and which is contiguous to the Northern Virginia Transportation District, a sales tax of two percent of the retail price of such fuels sold within such county or city.

Section 58.1-1724 provides, in pertinent part:

All taxes paid to the Commissioner pursuant to this article, after subtraction of the direct costs of administration by the Department of Taxation, shall be deposited in a special fund entitled the 'Special Fund Account of the Transportation District of......'. The amounts deposited in the special fund shall be distributed monthly to the applicable transportation district commission of which the county or city is a member to be applied to the operating deficit and debt service of the mass transit system of such district or, in the case of a transportation district subject to the provisions of § 15.1-1357 (b) (6), to be applied to and expended for any mass transit purpose of such district.

II. Revenues May Be Raised by Taxes in Excess of Immediate Needs for Necessary Purpose

It has been observed in II A. Howard, Commentaries on the Constitution of Virginia 1094-95 (1974) that

[Article X, §8 might well be called the taxpayer's Barmecide feast.]\(^1\)

The words whet the appetite, but the substance puts little meat on the taxpayer's table. The courts have treated section 8's language as having but one purpose: to assure that public funds are used only for public purposes. The section has never been seriously thought, for example, to prevent a budgetary surplus....

The 'public purpose' test is not, indeed could not realistically be, a severe one. Any 'governmental function' is thought to serve a public purpose....

As Chief Justice John Marshall so ably demonstrated in M'Culloch v. Maryland, the word 'necessary' has many senses other than 'indispensable,' and when the word is found in a constitution, to construe 'necessary' in a narrow spirit would be 'to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.' Courts are simply not equipped, nor today are they disposed, to attempt to substitute their judgment for that of a legislature as to the necessity of an appropriation, and section 8 ought to be understood in this light. [Footnotes omitted.]
Necessity, therefore, is less a question of the immediate need for revenues and more a question of whether the funds are to be used for a public purpose. As Professor Howard notes, a "governmental function" is generally regarded as serving a public purpose. There can be no doubt that the tax levy and the governmental function authorized by §§ 58.1-1720 and 58.1-1724 serve a public purpose.

This Office has previously rendered Opinions on two questions which are relevant to your inquiry. Governmental entities may levy a tax that will yield a budgetary surplus without violating the Constitution. See 1974-1975 Report of the Attorney General at 461, 462. Moreover, a political subdivision of the Commonwealth may levy taxes for the creation of a reserve for capital improvements not intended to be expended during the current tax year in order to build up a surplus of funds for later capital improvements. See 1970-1971 Report of the Attorney General at 359(2). The latter Opinion does impose a test of reasonableness upon the amount accumulated with respect to the foreseeable needs of the political subdivision.

III. Whether and to What Extent Accumulated Revenues May Be Used Is Matter of Conjecture

Your letter speculates that a mass transit system may never exist in the Potomac and Rappahannock Transportation District. The tax authorized by § 58.1-1720 for the Potomac and Rappahannock Transportation District Commission only became effective with the 1986 amendments to that statute. Whether the Commission will be in a position to implement the expenditure of funds for mass transit purposes in the district and, if so, when it would be in that position is a matter of conjecture. It would be inappropriate for me to offer an Opinion on such hypothetical facts. See 1986-1987 Report of the Attorney General at 274. If the implementation of expenditures for mass transit purposes is not forthcoming in such period of time as would render the continued accumulation of the sales tax reasonable, the continued imposition of the tax beyond that time would certainly be open to question. Such a determination, however, lies beyond the facts you present.

IV. Conclusion: Potomac and Rappahannock Transportation District Commission Levy of Sales Tax on Motor Vehicle Fuel Not Unconstitutional Merely Because There Are No Current Expenditures for Mass Transit Purposes

Based on the above, it is my opinion that the levy of the two percent sales tax on the retail price of motor vehicle fuel sold in Stafford County, to be applied to and expended for any mass transit purpose by the Potomac and Rappahannock Transportation District, is not unconstitutional under Art. X, § 8, even though there are currently no expenditures for such purposes and the tax revenues are accumulating in anticipation of future expenditures. Unless and until such accumulated revenues amount to a sum beyond the reasonably foreseeable needs of the Potomac and Rappahannock Transportation District Commission, the tax may continue to be levied and the tax revenues may continue to accumulate.

1According to Professor Howard, "[t]he expression 'Barmecide feast' for an imaginary banquet derives from a tale in the Arabian Knights in which a Barmecide (a member of a noble Persian family) has a series of empty dishes served to a hungry man to test his sense of humor." II A. Howard, supra, at 1094 n.4.
The Honorable C. Richard Cranwell  
Member, House of Delegates

You ask for an opinion on the availability of grants from the Alcohol Fuel Production Incentive Program Fund ("AFPIPF") to a proposed Virginia ethanol plant. The plant was not installed or substantially completed on January 1, 1986. A terminal facility to be used as a site for the storing and production of anhydrous ethyl alcohol, however, had been purchased on or before March 1, 1986.

I. Applicable Statutes and Regulations

The statutes establishing the AFPIPF, § 58.1-2127.1 et seq. of the Code of Virginia, provide that grants shall be paid to Virginia producers of anhydrous ethyl alcohol intended to be used in motor fuel (such as gasohol). Section 58.1-2127.2(B) provides with regard to such grants that

[the total number of gallons of denatured anhydrous ethyl alcohol subject to grants shall not exceed sixty-five million gallons per fiscal year. Each producer of anhydrous ethyl alcohol from a plant that was installed or substantially completed as of January 1, 1986, shall be entitled to a grant for each gallon of denatured anhydrous ethyl alcohol produced from such plant up to the lesser of 3.5 million gallons per year or the installed annual production capacity using feedstock of 194 proof or less ethyl alcohol of such plant as of January 1, 1986. The total number of gallons of denatured anhydrous ethyl alcohol produced from plants installed or substantially completed before January 1, 1986, for which grants may be received shall not exceed forty-five million gallons per fiscal year. Grants will not be available for gallons produced from plants installed or substantially completed on or after January 1, 1986, unless the anhydrous ethyl alcohol is fermented and distilled in Virginia from agricultural, forestry or waste products in a plant which does not use natural gas or a petroleum-based product as a primary fuel except that any producer of anhydrous ethyl alcohol who, on or before March 1, 1986, has a binding contractual agreement purchasing a terminal facility in the Commonwealth to be used as a site for the storing and production of anhydrous ethyl alcohol shall be entitled to a grant for each gallon of anhydrous ethyl alcohol produced from a plant, not to exceed 3.5 million gallons per year if the installed annual production capacity, using feedstock of 194 proof or less ethyl alcohol, exceeds such amount. For purposes of this article, a producer shall mean any person producing anhydrous ethyl alcohol. [Emphasis added.]

The Commissioner of the Department of Motor Vehicles, pursuant to authority granted by § 58.1-2127.7, has promulgated regulations relating to the AFPIPF. Pursuant to these regulations, a plant fitting the description of the emphasized portion of the above-quoted statute has been denominated a "Class III" plant. Producers of anhydrous ethyl alcohol from Class III plants are entitled to grants under the program, even though they may use as "feedstock" 194 proof or less ethyl alcohol fermented outside Virginia. In this particular regard, Class III plants are treated the same way as those plants installed or substantially completed on or before January 1, 1986, denominated "Class I" plants in the regulations. A plant which does not qualify as either a Class I or Class III plant is eligible for an AFPIPF grant only if the anhydrous ethyl alcohol it produces is both fermented and distilled in Virginia from agricultural, forestry or waste products. Such a plant has been denominated a Class II plant.¹

II. Plant Described May Qualify as Class II or Class III Plant

A plant such as the one described in your inquiry cannot qualify as a Class I plant because it was not installed or substantially completed as of January 1, 1986. Such a plant may qualify, however, as a Class II plant, where the date of completion is irrelevant.
It is further my opinion that this plant may qualify as a Class III plant, since the terminal facility to be used as the storage and production site of ethanol had been purchased by the producer prior to March 1, 1986. The actual purchase of such terminal facility on or before March 1, 1986, clearly satisfies the statutory requirement that the producer, on or before March 1, 1986, have a binding contractual agreement purchasing such a terminal. That the agreement is no longer merely executory is irrelevant.

III. Conclusion

Accordingly, it is my opinion that a plant such as you describe may qualify for AFPIPF grants as either a Class II or Class III plant, provided that all other eligibility requirements are met. Grants are available for such a plant once it is properly registered with the Department of Motor Vehicles, subject to the production limitations set out in the statute and regulations governing the AFPIPF.

1 Class I and Class III plants are eligible for grants even if the fermentation process, which reduces raw agricultural products to hydrous alcohol (194 proof or less), is performed outside Virginia, so long as the distillation process, which reduces hydrous alcohol to anhydrous alcohol (199 proof or more), occurs in Virginia.

TAXATION - MOTOR FUEL AND SPECIAL FUEL TAX - ALCOHOL FUEL PRODUCTION INCENTIVE PROGRAM FUND. PROVISIONS DO NOT VIOLATE COMMERCE OR EQUAL PROTECTION CLAUSES OF U.S. CONSTITUTION.

August 11, 1986

The Honorable Joseph B. Benedetti
Member, House of Delegates

You ask whether the Alcohol Fuel Production Incentive Program Fund provisions enacted by the 1986 General Assembly, Art. 3.1, Ch. 21 of Title 58.1 of the Code of Virginia, are constitutional in light of my Opinion of January 29, 1986, to the Honorable Hunter B. Andrews, Member, Senate of Virginia, found in the 1985-1986 Report of the Attorney General at 294. That Opinion held that the tax exemption provisions which had previously served as an incentive for Virginia gasohol production violated the Commerce and Equal Protection Clauses of the Constitution of the United States.

I. Basis for the January 29, 1986 Opinion

The basis for the January 29, 1986 Opinion was a series of Supreme Court cases which state the principle summarized in the Andrews Opinion that "while states may enact laws pursuant to their police powers that have the purpose and effect of encouraging domestic industry, the states may not constitutionally impose a discriminatory burden upon the business of other states merely to protect and promote local businesses." The tax exemption previously granted to Virginia gasohol producers under §§ 58.1-2105(C) and 58.1-2115(D) violated that principle by taxing out-of-state businesses at a higher rate than in-state gasohol producers.

II. The Present Legislation is Constitutional

By contrast, the new legislation, which repealed the tax exemption provisions, imposes an identical tax on in-state and out-of-state businesses, but encourages in-state production of anhydrous ethanol used in gasohol by providing subsidies to Virginia anhydrous ethanol producers in the form of direct grants. Because such subsidies merely encourage domestic industry while avoiding a discriminatory burden on out-of-state businesses, it is my opinion that the Alcohol Fuel Production Incentive Program Fund provisions do not violate the constitutional provisions which were violated by the tax exemption statutes.
TAXATION - PUBLIC SERVICE CORPORATIONS - LOCAL TAXES - REAL PROPERTY. COUNTIES, CITIES AND TOWNS. REAL PROPERTY SUBJECT TO LOCAL LEVY UNDER § 15.1-18.2(b)(5) IF WITHIN DOWNTOWN SERVICE DISTRICT.

July 10, 1986

The Honorable Jerome S. Howard, Jr.
Commissioner of the Revenue for the City of Roanoke

You ask whether the real property of a public service corporation which is located within the boundaries of a city's downtown service district is subject to a property tax levied by the locality under the authority of §§ 15.1-18.2(b)(5) and 15.1-18.3 of the Code of Virginia.

I. Applicable Statutes

Under the authority of § 15.1-18.3, a city may designate downtown service districts as follows:

The governing body of any city ... may designate primary and secondary downtown service districts for the purposes set forth in subsection (a) of § 15.1-18.2[1] 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.

Subsection (b)(5) of § 15.1-18.2 sets forth the city's power "[t]o levy and collect an annual tax upon any property in such service district subject to local taxation." (Emphasis added.)

II. Conclusion: Property of Public Service Corporation in Downtown Service District Subject to Levy

Although the assessed value of real property of public service corporations is determined by a State agency,[2] such property is subject to local taxation. See §§ 58.1-2803, 58.1-2606, 58.1-3000, 58.1-3200, 58.1-3201. It is my opinion that the real property of a public service corporation which is located within the boundaries of a downtown service district is subject to a property tax levied by a locality under the authority of §§ 15.1-18.3 and 15.1-18.2(b)(5). See 1975-1976 Report of the Attorney General at 293.

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1 The authorized purposes are "to provide additional or more complete services of government than are desired in the city as a whole," Section 15.1-18.2(a).

2 Property of railroad and pipeline transmission companies is assessed by the Department of Taxation. Other public service corporation property is assessed by the State Corporation Commission. See § 58.1-2600.

TAXATION - REAL PROPERTY - BOARDS OF EQUALIZATION. NO AUTHORITY TO SET DEADLINE FOR APPLICATIONS FOR RELIEF OR FOR DISPOSITION BY BOARD OF SUCH APPLICATIONS.

August 30, 1986

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

You ask whether a board of equalization appointed under § 58.1-3370 of the Code of Virginia may set (1) the date by which property owners or lessees must apply to the board for relief on real estate assessments, and (2) the deadline by which such applications
must be disposed of by the board, where a locality elects not to adopt an ordinance pursuant to § 58.1-3378 setting such a date and deadline.

I. Relevant Statutes

Article 14, Ch. 32, Title 58.1, § 58.1-3370 et seq., provides for the appointment of boards of equalization for real estate assessments and sets forth their powers and duties.

Section 58.1-3370(B) provides:

The term of any board of equalization appointed under the authority of this section shall expire six months after the effective date of the assessment for which they were appointed.

Section 58.1-3378 reads, in pertinent part:

Each board of equalization shall sit at and for such time or times as may be necessary to discharge the duties imposed and to exercise the powers conferred by this chapter. Of each sitting public notice shall be given at least ten days beforehand by publication in a newspaper having general circulation in the county or city and, in a county, also by posting the notice at the courthouse and at each voting precinct. Such posting shall be done by the sheriff or his deputy. Such notice shall inform the public that the board shall sit at the place or places and on the days named therein for the purpose of equalizing real estate assessments in such county or city and for the purpose of hearing all complaints of inequalities including errors in acreage in such real estate assessments.

The governing body of any county or city may provide by ordinance the date by which applications must be made by property owners or lessees for relief. ... Such governing body may also provide by ordinance the deadline by which all applications must be finally disposed of by the board of equalization. All such deadlines shall be clearly stated on the notice of assessment.

II. Board of Equalization May Not Set Deadlines for Receipt or Disposition of Applications for Relief

The clear language of § 58.1-3378 authorizes only the local governing body of a city or county to set deadlines for applications for relief from real estate assessments by property owners or lessees and final disposition thereof. I find no other section which permits a board of equalization to set such deadlines.

In the absence of such deadlines, taxpayers may bring their complaints to the board of equalization at any time the board is sitting in accordance with § 58.1-3378. Section 58.1-3378 requires that the board "shall sit ... for such time or times as may be necessary to discharge the duties imposed and to exercise the powers conferred by this chapter." Thus, the practice is for the board to sit for as many days as necessary following the ten-day public notice to taxpayers required by § 58.1-3378. See 1954-1955 Report of the Attorney General at 228.

III. Conclusion: In Absence of Deadlines Ordained by Governing Body, Applications for Relief May Be Received at Any Time, but Board of Equalization's Work Must Be Completed Within Its Term

Accordingly, it is my opinion that a board of equalization appointed under § 58.1-3370 may not set the date by which taxpayers must apply to it for relief from real estate assessments or a deadline for final disposition of such applications. Section 58.1-3370(B) provides, however, that the term of a board appointed under § 58.1-3370...
"shall expire six months after the effective date of the assessment for which they were appointed." All applications for relief, therefore, must be received and disposed of prior to the expiration of this six-month period.

1See, e.g., §§ 58.1-3379 (dealing with a board's power to hear complaints and equalize assessments, as well as to increase and decrease assessments); 58.1-3381 (permitting the board by order to increase, decrease or affirm an assessment upon complaint made, or upon its own motion); and 58.1-3386 (authorizing the board to summon taxpayers to obtain information relating to the real estate of any and all taxpayers).

TAXATION - REAL PROPERTY - EXEMPTIONS FOR ELDERLY AND HANDICAPPED. APPLICATION MUST BE TIMELY FILED, ABSENT ADOPTION OF LATE FILING PROCEDURES AND COMPLIANCE WITH THOSE PROCEDURES.

April 29, 1987

The Honorable W. O. Conley, Jr.
Commissioner of the Revenue for the City of Bristol

You ask whether a city council may authorize the tax exemption for the elderly and handicapped to a person who did not file a timely application for such exemption. You also inquire what steps must be followed to determine the amount of the tax credit if city council has such authority.

I. Applicable Statutes

Section 58.1-3210 et seq. of the Code of Virginia authorizes localities to provide, by ordinance, subject to specified restrictions and conditions, for the exemption or deferral of taxation of real estate owned and occupied by certain elderly and handicapped persons. Pursuant to § 58.1-3213, such persons may apply for the exemption by filing annually an affidavit or certification setting forth the names of related persons occupying the real estate and the net worth of those persons specified in § 58.1-3211. Section 58.1-3213(D) further provides that "[t]he affidavit or certification shall be filed after January 1 of each year, but before April 1, or such later date as may be fixed by ordinance. Such ordinance may include a procedure for late filing by first-time applicants or for hardship cases." You note that May 1, 1985, was the filing deadline date fixed by your local ordinance for the applicant in question.1

II. Word "Shall" Generally Indicates Procedures Intended to be Mandatory

Use of the word "shall" in a statute generally indicates that its procedures are intended to be mandatory, rather than permissive or directive. See Reports of the Attorney General: 1985-1986 at 119, 120; 1977-1978 at 64. Since the exemptions provided pursuant to § 58.1-3210 et seq. must be construed strictly,2 the deadlines in § 58.1-3213(D), likewise, must be applied strictly.3

III. City Council Has No Independent Authority to Grant Tax Exemption

Virginia follows the Dillon Rule of strict construction concerning the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication from such conferred powers. County Board v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); 1984-1985 Report of the Attorney General at 99. Section 58.1-3213(D) makes a timely application a prerequisite for the exemption provided to the elderly and handicapped. Cf. 1982-1983 Report of the Attorney General at 503, 510, and 525, 526. I am unaware of any provision of law which would permit the city council to authorize a tax exemption based upon an application filed outside the statutorily prescribed periods. See id. at 525, 526. A city council, therefore, lacks the au-
authority to grant the tax exemption in question once the deadline set forth in the statute or ordinance has passed.

IV. Conclusion: Property Remains Taxable
   When Application for Exemption Filed Late

   Based on the above, it is my opinion that the city council may not grant a tax exemption for the elderly and handicapped to an applicant who did not file a timely application, absent the adoption of late-filing procedures in an ordinance pursuant to § 58.1-3213(D) and compliance with those procedures in an appropriate case. Since I have reached this conclusion regarding your first question, a response to your second question is unnecessary.

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1I assume that late filing procedures have not been incorporated in your local ordinance or that they are not applicable to the facts of this Opinion.


3But see 1984-1985 Report of the Attorney General at 259, 260 (the word "shall," although generally understood as imperative or mandatory, may be read as directory where an overly rigid application of a deadline may produce a strained nonsensical result).

TAXATION - REAL PROPERTY. PROPERTY IN ANNEXED AREA REQUIRED TO BE TAXED FROM DATE OF ANNEXATION.

May 13, 1987

The Honorable J. Robert Dobyns
Member, House of Delegates

You ask two questions concerning property taxation in a newly annexed area. You first ask whether the Town of Pulaski (the "town") may impose real and tangible personal property taxes within the area annexed by the town for any portion of the year following the effective date of annexation. You next ask whether the town may enact a land use assessment and taxation ordinance for the annexed area to be effective on the expected effective date of the annexation, July 1, 1987. Both the town and the County of Pulaski operate on a July 1 through June 30 fiscal year basis and have designated the prior January 1 as the date of assessment in accordance in § 58.1-3010 of the Code of Virginia.

I. Constitution Requires Property in Annexed Area to Be Taxed from Date of Annexation

Your first question has been answered by a prior Opinion of this Office. See 1985-1986 Report of the Attorney General at 257. The constitutional requirement of uniformity, Art. X, § 1 of the Constitution of Virginia (1971), requires the town to tax the annexed area from the date of annexation in the same manner that it taxes all other real and tangible personal property in the town. Since the effective date of annexation and the beginning of the fiscal year coincide, the town will not need to adopt a short year for the annexed area, as was necessary in the prior Opinion. The assessment dates will not need to be changed because both jurisdictions use the same date, January 1.

II. Town May Not Adopt Land Use Taxation Ordinance Applicable Only to Annexed Area

In response to your second question, the town may only adopt a land use taxation ordinance under the rules of § 58.1-3231, which is the general statute granting counties, cities and towns the authority to provide for use value assessment and taxation. Under § 58.1-3231, January 1, 1988 is the earliest date at which the town can have an effective
ordinance. The deadline for adopting an ordinance effective on that date is June 30, 1987. Based on the foregoing, it is my opinion that the town cannot adopt a land use taxation ordinance which will be effective on July 1, 1987, and which will apply only to the annexed area. Any land use taxation ordinance adopted by the town must apply to the entire town and cannot be effective until January 1, 1988.

Section 58.1-3232, which specifically authorizes land use taxation ordinances covering newly annexed areas, applies only to cities, not to towns. The limited scope of § 58.1-3232 is a choice of the General Assembly, exercised in apparent recognition of the fact that the taxing jurisdiction of cities and counties is mutually exclusive, and that former county residents living in the annexed area who were enrolled in the county's land use taxation program stand to lose the benefit of that program unless the city is able to enact a land use taxation ordinance for the annexed area. Conversely, the taxing jurisdiction of towns and counties is, for the most part, concurrent. Cf. § 58.1-3711. A county taxpayer who is enrolled in the county's land use taxation program will not lose his participation in such program by virtue of the fact that he resides in territory annexed by the town.

Although § 15.1-1167.1 allows broad latitude for counties and towns to settle voluntarily a broad range of annexation issues, I find no language in that statute which would embrace as a proper subject for such a settlement, either directly or indirectly, the issue of land use taxation in the annexed area. Section 58.1-3232 is the exclusive statutory authority for land use taxation in annexed areas. Cf. § 15.1-1047.1.

TAXATION - REAL PROPERTY - REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE - REASSESSMENT RECORD/LANDBOOK, COMMUNICATION OF DOCUMENTS TO COMMISSIONER OF REVENUE. COMMISSIONER OF REVENUE MAY CHANGE NAME OF PERSON ASSESSED ON LAND BOOK WHERE CONVEYANCE SHOWN.

July 31, 1986

The Honorable Dorothy A. Sadler
Commissioner of the Revenue for Greensville County

You ask whether you may change the name on the land book of the person to be assessed with real estate taxes on a certain parcel based upon the recent recordation of a deed of gift that is dated 28 years prior to recordation and that was not signed by one person named as a grantor to the deed. Because the land records give no indication of the existence of this deed prior to its recordation, you have been assessing the parcel in the names of the two persons listed as daughters and heirs of the grantor-owner at the time of his death in 1968.

I. Statement of Facts

The parties to the deed of gift are the father and mother, the grantors, and one daughter, the grante. The deed of gift, dated November 12, 1957, conveys the parcel to the daughter, subject to a life estate in the father. Only the father's signature appears on the deed of gift. The subject parcel, which had been purchased on December 23, 1924, during coverture, was titled in the father's name only. He died on January 4, 1968, and his wife predeceased him (no date given).

II. Deed Not Invalid Where Nonsigning Party Has No Interest and Claims None

Based on the facts given, although the wife was possessed of an inchoate dower interest in the parcel during her lifetime, a right of dower in the parcel never matured because she predeceased her husband, extinguishing her inchoate dower interest. Thus, the absence of her signature on the deed of gift would not invalidate the deed or prevent
the deed from conveying the fee simple interest. A deed is not invalid because it was not signed by one named as a party where it is not shown that the nonsigner owned any interest in the land, or claims any interest in the land. The deed is sufficient to convey the interest of the party who signed. See Mission School v. Realty Corporation, 207 Va. 518, 151 S.E.2d 403 (1966). Under the facts you present, the father-grantor owned the fee simple interest in the parcel.

III. Delivery of Deed, Even if Unrecorded, Conveys Title

Conveyance, however, is dependent upon whether delivery of the deed was made, a fact not indicated in your letter. If the deed of gift was delivered to the grantee by the grantor, or with his consent, title passed, and is not affected by the fact that the deed was not recorded. See Brewer v. Brewer, 199 Va. 753, 102 S.E.2d 303 (1958).

IV. Commissioner of the Revenue May Make Changes on Land Book Based upon Later Recorded Deed

Section 58.1-3281 of the Code of Virginia provides that the commissioner of the revenue is to ascertain "the person to whom [real estate] is chargeable with taxes" and provides further that "the owner . . . shall be assessed for the taxes." Section 58.1-3312 provides that changes which occur in a city or county are to be entered when the commissioner of the revenue makes out his land book.

Based on these statutes, if the deed of gift conveys the parcel in question to only one of the two daughters rather than to both daughters, as you have listed on your land book based upon probate records, a change may be entered. I am aware of no law that requires a deed to be recorded in order for the commissioner of the revenue to change the real estate records, so long as the deed is otherwise valid.¹

¹See 1985-1986 Report of the Attorney General at 298, which is in accord.

TAXATION - REAL PROPERTY - REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE. RESOLUTION OF COUNTY BOARD OF SUPERVISORS, PURSUANT TO FORMER § 58-811.1, SUFFICIENT TO SATISFY CURRENT "ORDINANCE" LANGUAGE OF § 58.1-3292.

February 9, 1987

The Honorable George F. Allen
Member, House of Delegates

You ask whether the use of the term "ordinance" in the first sentence of § 58.1-3292 of the Code of Virginia should be construed as precluding the Commissioner of the Revenue for Albemarle County from assessing newly constructed buildings if he is acting pursuant to a 1964 resolution passed by the Albemarle County Board of Supervisors under the corresponding former § 58-811.1 and not pursuant to a duly adopted ordinance. In other words, you ask if the resolution passed under former § 58-811.1 satisfies the current "ordinance" language of § 58.1-3292.

I. Former Statute

Effective January 1, 1985, Title 58 was repealed and replaced with Title 58.1. See Ch. 875, 1984 Va. Acts 1178, 1180-1300. Former § 58-811.1 provided for the assessment of substantially completed new buildings and stated, in pertinent part, as follows:

In any county, incorporated town or city in which a resolution so directing shall have been adopted by an affirmative vote of a majority of the members
of the governing body thereof, all new buildings substantially completed ... shall be assessed when so completed ... [Emphasis added.]

II. Legislative History of Current Statute Indicates No Substantive Change Intended

When Title 58 was repealed, § 58.1-3292 replaced § 58-811.1, and provided, in part, that "[i]n any county, city or town, upon the adoption of an ordinance so providing, all new buildings substantially completed ... shall be assessed when so completed ..." (Emphasis added.) In the Report of the Virginia Code Commission on the Revision of Title 58 of the Code of Virginia, H. Doc. No. 16, 1984 Sess. 358, the Commission noted that there was no substantive change in the new section.

III. Statute Should Be Interpreted to Avoid Constitutional Conflict

In a prior Opinion of this Office, the terms "resolution" and "ordinance" were construed to be interchangeable where a strict reading of the term "resolution" would have rendered a State statute unconstitutional. See 1976-1977 Report of the Attorney General at 289. The Opinion notes that the Supreme Court of Virginia has applied the principle many times that statutes should be construed so as to avoid conflict with the Constitution. See id. at 290; see, e.g., Kohlberg v. Va. Real Estate Comm., 212 Va. 237, 183 S.E.2d 170 (1971); Fairfax County v. C & P Tel. Co., 212 Va. 57, 182 S.E.2d 30 (1971).

IV. Conclusion: Assessments Made Pursuant to 1964 Resolution Are Legally Sufficient

If the board of supervisors were to sit in judgment on a case-by-case basis to act by resolution in determining which new construction should be assessed and which should not, the same constitutional infirmity would arise as was detailed in the prior Opinion. Accordingly, the resolution adopted in 1964 should be construed to have the same force and effect as an ordinance furnishing continuing authority for such assessments by the commissioner of the revenue.

Based on the above, it is my opinion that the 1964 resolution passed by the Albemarle County Board of Supervisors is sufficient to satisfy the "ordinance" language of § 58.1-3292.

TAXATION - REAL PROPERTY - REASSESSMENT RECORD/LAND BOOK, COMMUNICATION OF DOCUMENTS TO COMMISSIONER OF REVENUE. COMMISSIONER MAY CHANGE NAME ON LAND BOOK OF PERSON ASSESSED WITH REAL ESTATE TAXES BASED ON LATER RECORDED DEED.

February 25, 1987

The Honorable Danny C. Ball
Commissioner of the Revenue for Wise County

You ask me to reconsider my Opinion to the Honorable Dorothy A. Sadler, Commissioner of the Revenue for Greensville County, dated July 31, 1986 (1986-1987 Report of the Attorney General at 302), in light of § 58.1-3313 of the Code of Virginia. That Opinion concludes that the commissioner of the revenue may change real estate assessment records based upon a deed of gift recorded 28 years after its date. The Sadler Opinion also cites an earlier Opinion, found in the 1985-1986 Report of the Attorney General at 298 ("Minter Opinion"), for the proposition that the Attorney General is "aware of no law that requires a deed to be recorded in order for the commissioner of the revenue to change the real estate records, so long as the deed is otherwise valid." You indicate that it is your practice not to change the land book without the benefit of a recorded deed.
I. Applicable Statute

Section 58.1-3313 provides:

Every commissioner, in making out his land book, shall correct any mistake made in any entry therein. But land which has been correctly charged to one person shall not afterwards be charged to another without evidence of record that such charge is proper.

II. Sadler Opinion Involves Recorded Deed

The question in the Sadler Opinion was whether the commissioner of the revenue could change the name on the land book of the person to be assessed with real estate taxes on a certain parcel based upon a recent recordation of a deed of gift dated 28 years prior to recordation. Since the circuit court clerk's land records gave no indication of the existence of this deed prior to its recordation, the parcel was assessed in the names of the two persons listed with the clerk as daughters and heirs of the grantor-owner at the time of his death in 1968. The commissioner of the revenue had questioned whether such an old deed, not previously recorded, was a valid conveyance which, once recorded, could be the basis for the commissioner to change the land book.

III. Evidence of Recorded Documents Required to Change Land Book When Land Was Correctly Charged

The rule of the Sadler Opinion is that there is no law requiring a deed of gift to be recorded at the time of execution and delivery in order for the commissioner of the revenue to change the real estate records. This clarification is in accord with § 58.1-3313, which requires evidence of recorded documents before the commissioner of the revenue may change the real estate records when land has been correctly charged. For the reasons discussed above, it is my opinion that the Sadler Opinion is correct, and I decline to overrule it.

IV. Law Does Not Address Town's Listing of Office and Telephone Number of County Commissioner of the Revenue on Town's Personal Property Tax Bills

You also ask whether a town is prohibited from listing the office and the telephone number of the county commissioner of the revenue on its personal property tax bills. This question arises because the town adopts the county's personal property tax assessed values for property owned by town residents as the town's assessed values for the same property, and the town apparently wishes all questions concerning assessed values to be referred to the office of the county's commissioner of the revenue, where the assessed value was originally determined. I am aware of no statute which addresses this situation. In the absence of any such prohibition, I am of the opinion that such a practice is not prohibited. This is not to say, of course, that you may not seek a more informal resolution of this problem with the towns involved.

1I note also that there is a substantial question whether the land in the Sadler Opinion was correctly charged. The facts in the Opinion did not resolve whether the old deed had been delivered by the grantor to the grantee. The Opinion stated, however, that if the delivery had taken place, title passed prior to the grantor's death regardless of the fact that the deed was not recorded. In that case, the assessment on the land books based upon the land passing to the decedent's heirs at law would not have been correctly charged.

TAXATION - REAL PROPERTY - SPECIAL ASSESSMENT FOR LAND PRESERVATION - REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE. SUBDIVISION LOTS MAY NOT BE COMBINED FOR PURPOSE OF QUALIFYING FOR LAND USE TAXATION; EACH LOT MUST MEET MINIMUM ACREAGE REQUIREMENT. LANDOWNER SUBJECT TO ROLL-BACK TAXES FOR EACH PARCEL WHICH DOES NOT CONFORM TO ACREAGE REQUIREMENTS.

March 16, 1987

The Honorable Mayo K. Gravatt
Commonwealth's Attorney for Nottoway County

You ask two questions concerning the availability of land use taxation for parcels located in a subdivision. Specifically, you ask whether: (1) a landowner may combine a number of lots in a subdivision to qualify for land use taxation; and (2) each individual lot in the subdivision must meet acreage and other requirements for determination of eligibility for this taxation.

I. Facts

A large parcel of land was subdivided into lots ranging in size from one-third of an acre to 20 acres. The subdivision plat was recorded in 1950. Approximately one-third of the lots have been sold, and 10 homes built. The remainder of the lots consist primarily of standing timber. A previous commissioner of the revenue allowed the subdivision lots to be assessed together and be placed in land use taxation.

II. Applicable Statutes

Section 58.1-3233 states that local assessing officers are to make certain determinations before real estate is assessed. The section further provides that real estate devoted to an open-space use must consist of a minimum of 5 acres.

Section 58.1-3285 is also relevant to your inquiry and provides, in part:

Whenever a tract of land is subdivided into lots under the provisions of law and plats thereof are recorded ... each lot in such subdivision shall be assessed and shown separately upon the land books, as required by law.

Section 58.1-3241 governs the taxation of a lot which has been separated from a parcel previously assessed under land use taxation and provides, in part, as follows:

A. Separation or split-off of lots, pieces or parcels of land from the real estate which is being valued, assessed and taxed under an ordinance adopted pursuant to this article, either by conveyance or other action of the owner of such real estate, shall subject the real estate so separated to liability for the roll-back taxes applicable thereto, but shall not impair the right of each subdivided parcel of such real estate to qualify for such valuation, assessment and taxation in any and all future years, provided it meets the minimum acreage requirements and such other conditions of this article as may be applicable. Such separation or split-off of lots shall not impair the right of the remaining real estate to continuance of such valuation, assessment and taxation without liability for roll-back taxes, provided it meets the minimum acreage requirements and other applicable conditions of this article. [Emphasis added.]

The roll-back tax provisions of § 58.1-3237 also apply when a change in the use of the real estate occurs. That statute states, in part:

A. When real estate qualifies for assessment and taxation on the basis of use under an ordinance adopted pursuant to this article, and the use by which it
qualified changes to a nonqualifying use, it shall be subject to additional taxes, hereinafter referred to as roll-back taxes. . . . Such additional taxes shall only be assessed against that portion of such real estate which no longer qualifies for assessment and taxation on the basis of use. If in the tax year in which the change of use occurs, the real estate was not valued, assessed and taxed under such ordinance, the real estate or portion thereof shall be subject to roll-back taxes for such of the five years immediately preceding in which the real estate was valued, assessed and taxed under such ordinance.

III. Conclusion: Individual Lots May Not Be Combined to Qualify for Land Use Taxation

Based on the above statutes, it is my opinion that a landowner may not combine subdivision lots for the purpose of qualifying for land use taxation. The commissioner of the revenue, or some other local assessing officer, must determine whether each parcel meets the minimum 5-acre requirement to qualify for such taxation. If a particular parcel consists of 5 acres or more, it may qualify. Any parcel which does not meet either the use requirement or the minimum acreage requirement is subject to roll-back taxes under §§ 58.1-3237 and 58.1-3241.

February 25, 1987

The Honorable Ernest H. Mason
Treasurer for Hanover County

You ask several questions concerning the 1986 amendments to § 58.1-3916 of the Code of Virginia allowing local treasurers to invalidate a tax bill and reissue that bill to a new owner where a transfer of real property ownership occurs after January 1 of a tax year. Specifically you ask whether: (1) all types of transfers, including transfers from joint ownership to single ownership in a divorce proceeding or transfers when the address of the new owner is the same as the former owner, give a treasurer the authority to reissue a tax bill; (2) the treasurer is permitted or required to reissue a bill for a given tax year at any time during the following 20-year tax lien period when property is transferred after January 1 in a given tax year; and (3) the reissuance of the tax bill eliminates the personal liability of the assessed former owner and creates personal liability for the newly billed owner.

I. Applicable Statutes

Section 58.1-3916 provides, in pertinent part:

In the event a transfer of real property ownership occurs after January 1 of a tax year and a real estate tax bill has been mailed pursuant to §§ 58.1-3281 and 58.1-3912, the treasurer . . . upon ascertaining that a property transfer has occurred, may invalidate a bill sent to the prior owner and reissue the bill to the new owner as permitted by § 58.1-3912, and no penalty for failure to pay any tax for any such assessment shall be imposed if the tax is paid within two weeks after the notice thereof is mailed.

I note that § 58.1-3916 authorizes, but does not mandate, a treasurer to invalidate the tax bill and reissue a bill to the new owner.

Section 58.1-3912(A) sets forth procedures for the mailing of tax bills by local treasurers and provides, in pertinent part:
The treasurer of every city and county shall, as soon as reasonably possible in each year, but not later than fourteen days prior to the due date of the taxes, send by United States mail to each taxpayer assessed with taxes and levies for that year amounting to five dollars or more as shown by an assessment book in such treasurer's office, a bill or bills . . . .

The quoted portion of §58.1-3912(A) mandates that treasurers of cities and counties send tax bills to each taxpayer assessed with taxes.

Section 58.1-3340 reads, in pertinent part:

There shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance . . . . The purchaser at a sale shall see that the proceeds are applied to the payment of all taxes and levies assessed on real estate . . . . The seller's liability for taxes and levies shall be effectively prorated contractually.


II. All Transfers Give Treasurer Authority to Reissue Tax Bill Under §58.1-3916

Section 58.1-3916 permits local treasurers to invalidate a tax bill sent to an assessed taxpayer without restrictions as to the types of transfers which trigger this authority. It is my opinion, therefore, that the authority to invalidate and reissue a tax bill where a transfer occurs after January 1 would apply to any transfer recorded in the local clerk's office. Such authority would, therefore, extend to transfers from joint ownership to single ownership in a divorce proceeding or for other purposes, although the address of the prior owner(s) and new owner may remain the same.

III. Treasurer Must Invalidate Prior Bill and Reissue Bill to New Owner Within Tax Year in Which Real Property Transfer Takes Place

When real property is transferred after January 1 of a tax year, §58.1-3916 permits a local treasurer to invalidate a bill sent to the owner as of January 1 and reissue the bill to the new owner, but the reissuance must be performed "as permitted by §58.1-3912." Your second inquiry, whether a reissued bill is required or may be sent at any time during the 20-year period of the tax lien, requires an examination of the meaning of reissuing the tax bill "as permitted by §58.1-3912."

Section 58.1-3912 requires that city and county treasurers, as soon as possible in each year, but not later than fourteen days prior to the due date of taxes, send a tax bill by United States mail to each taxpayer assessed with taxes for that year.

If the requirement in §58.1-3916 that the tax bill must be mailed not later than the beginning of the fourteen-day period prior to the tax due date were followed, the no-penalty provision of §58.1-3916, when taxes are paid within two weeks of the mailing date of the reissued bill, would coincide with the normal due date of the taxes. Such a reading would make the no-penalty provision of §58.1-3916 mere surplusage.

Absurd results in construing statutes are to be avoided. McFadden v. McNorton, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952). A reasonable construction of the "as permitted" language in §58.1-3916 is that the requirement of §58.1-3912 is to be applied to the extent that it harmonizes with the purpose of the reissuance provision of §58.1-3916. Thus, the requirement in §58.1-3912 that the tax bill be mailed to the assessed taxpayer not later than fourteen days prior to the tax due date would not be applicable to reissuance of tax bills authorized under §58.1-3916 because that requirement defeats the purposes of §58.1-3916.
The requirement of § 58.1-3912 that a tax bill be sent by the United States mail as soon as reasonably possible in the tax year would, however, apply to the reissued bill. Applying this interpretation to your inquiry, I am of the opinion that the reissuance must take place in the tax year in which the transfer of property occurs. A treasurer acting pursuant to § 58.1-3916 would, therefore, have a limited period of time in which he may invalidate the bill already sent to the January 1 owner of the real estate and reissue the bill to the post-January 1 new owner. As stated above, however, the invalidation and reissuance actions are not mandatory because the language of § 58.1-3916 is clearly permissive.

IV. Personal Liability for Taxes Is Statutorily Shifted to Purchaser Under § 58.1-3340

Your last question is whether the reissuance of tax bills pursuant to § 58.1-3916 affects the personal liability for taxes of the assessed party or a new owner who purchases the property after January 1 of a tax year. Section 58.1-3916 is not determinative with respect to this question; rather, § 58.1-3340 governs. Under the latter section, a purchaser is required to see that the proceeds of sale of real property are applied to the payment of all taxes. Furthermore, the seller's liability for taxes is to be prorated contractually. The legislative history of § 58.1-3340 makes it clear that this section is intended to shift the personal liability for taxes to the purchaser of real estate when the property is sold. The reviser's comment states that this section "statutorily places the burden of taxes on the purchaser of property." House Doc. No. 16, supra. It is my opinion, therefore, that, in accordance with § 58.1-3340, with or without the reissuance of a tax bill to a new owner, when real property is transferred after January 1 of a tax year, the real estate tax liability to the locality for that year is the personal liability of the new owner and not of the January 1 assessed owner.²

²The real estate taxes remain a lien on the property until satisfied or until the expiration of twenty years after the taxes become delinquent. See §§ 58.1-3340, 58.1-3341 and 58.1-3344.

TAXATION - REVIEW OF LOCAL TAXES - COLLECTION BY DISTRESS. CIVIL REMEDIES AND PROCEDURE - EXECUTIONS AND OTHER MEANS OF RECOVERY - GARNISHMENT. HOMESTEAD AND OTHER EXEMPTIONS - WAGES EXEMPT. SECTION 58.1-3952 APPLICATION TO INCLUDE NOTICE OF GARNISHMENT EXEMPTIONS. WAGE LIMITATION UNDER § 34-29 NOT APPLICABLE.

March 10, 1987

The Honorable Mayo K. Gravatt
Commonwealth's Attorney for Nottoway County

You ask whether § 34-29 of the Code of Virginia, limiting the amount of earnings subject to garnishment, and § 8.01-512.4, requiring and prescribing a notice to the judgment debtor of exemptions from garnishment, are applicable to a tax collection proceeding brought pursuant to § 58.1-3952.

I. Applicable Statutes

Section 58.1-3952 provides, in part:

The treasurer or other tax collector of any county, city or town may apply in writing to any person indebted to or having in his hands estate of a taxpayer for payment of taxes more than thirty days delinquent out of such debt or estate. . . . The treasurer or collector shall send a copy of the application to
the taxpayer, with a notice informing him of the remedies[1] provided in this chapter. [Emphasis added.]

Section 8.01-512.4 provides, in part, that "[n]o summons in garnishment shall be issued or served unless a notice of exemptions and claim for exemption form are attached."

Section 34-3 provides, in part, that "[the] exemption under §§ 34-26, 34-27, 34-29 and 64-121 shall not extend to distress for state, county, or corporation taxes or levies." (Emphasis added.) The collection procedure authorized by § 58.1-3952 above falls within the category of distress procedures authorized by Art. 3, Ch. 39 of Title 58.1 (§ 58.1-3940 et seq.).

Section 34-29 provides, in part:

(a) Except as provided in subsections (b) and (b½), the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed the lesser of the following amounts:

(1) Twenty-five per centum of his disposable earnings for that week, or

(2) The amount by which his disposable earnings for that week exceed thirty times the federal minimum hourly wage . . . .

* * *

(b) The restrictions of subsection (a) do not apply in the case of

* * *

(3) Any debt due for any state or federal tax.

* * *

(d) For the purposes of this section

* * *

(3) The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt. [Emphasis added.]

II. Section 34-29 Is Not Applicable to Collection of Local Tax Pursuant to § 58.1-3952

Section 58.1-3952 provides a means for the collection of delinquent local taxes. Any county, city or town tax collector may serve an application upon any person indebted to a delinquent taxpayer or who possesses some part of his estate. It requires that the tax collector send a copy of the application to the delinquent taxpayer, with a notice informing him of his legal remedies.

Section 34-29 is a limitation on the amount of earnings that may be subjected to garnishment. A prior Opinion of this Office concludes that the broad definition of "garnishment" in § 34-29(d)(3) includes a tax collection proceeding under § 58-1010 (now § 58.1-3952). See 1970-1971 Report of the Attorney General at 370(1). Since § 34-29(b)(3) specifically exempts from the garnishment limitation of § 34-29 only "[a]ny debt due for any state or federal tax" (emphasis added) and not local taxes, the Opinion concludes that § 34-29 did apply to the collection of taxes by a local political subdivision of the State pursuant to former § 58-1010.
A second previous Opinion takes a view to the contrary and, relying on § 34-3 which states, in part, that "[t]he exemption under ... § 34-29 ... shall not extend to distress for ... county, or corporation taxes or levies," concludes that § 34-29 did not apply to the collection of local taxes pursuant to former § 58-1010. See 1970-1971 Report of the Attorney General at 370(2).

Based on the latter Opinion, it is my opinion that § 34-3 controls, and that the wage garnishment limitation of § 34-29 does not apply to the collection of local taxes pursuant to § 58.1-3952.

III. Section 58.1-3952 Application Should Provide Notice to Taxpayer of How to Claim All Exemptions Afforded by § 8.01-512.4

Section 8.01-512.4 requires that the prescribed information set out for notice of exemptions from garnishment be given to the judgment debtor along with the summons.

A previous Opinion of this Office has addressed the question whether § 8.01-512.4 applies to a proceeding under § 58.1-3952. See 1984-1985 Report of the Attorney General at 311. Although this Opinion recognizes that garnishment is a different procedure from the local tax collection procedure, it concludes that the rule of Harris v. Bailey, 574 F. Supp. 966 (W.D. Va. 1983) and the resulting legislative amendments to the garnishment statutes require localities using § 58.1-3952 to ensure that a copy of a notice of exemptions is sent in a timely manner to the taxpayer and that the notice outline certain of the exemptions listed in § 8.01-512.4. I am in accord with the conclusion reached in this Opinion, except that it is my opinion that the notice should outline all of the exemptions listed in § 8.01-512.4, whether federal or State. I find no basis for concluding that only federal, but not State, exemptions from garnishment apply to tax claims. 1

1The remedies mentioned are those available for correction of erroneous assessments found in § 58.1-3980 et seq. There is no requirement for the notice to include any reference to § 34-29 or § 8.01-512.4.

The Harris case involved an attack on Virginia garnishment statutes which have since been amended to cure the constitutional defects found by the court in that case. Because of the similarity of procedures, it is probable that the holding in Harris would be applicable to § 58.1-3952.

2It is possible that the prior conclusion resulted from an overly broad reading of §§ 34-3 and 34-29.

TAXATION - REVIEW OF LOCAL TAXES - COLLECTION BY TREASURERS, ETC. CONSTITUTION OF VIRGINIA - TAXATION AND FINANCE. CITY TREASURER MAY CHARGE NEWLY ANNEXED AREA CITIZENS, DELINQUENT IN PAYMENT OF PERSONAL PROPERTY AND REAL ESTATE TAXES, PENALTY AND INTEREST AND FOLLOW USUAL PROCEDURES FOR DELINQUENT TAX COLLECTION; MAY DENY CITIZENS CITY DECALS FOR MOTOR VEHICLES, TRAILERS AND SEMITRAILERS UNTIL TAXES, PENALTY AND INTEREST PAID.

February 23, 1987

The Honorable Dorothy B. Saunders
Treasurer for the City of Franklin

This is in response to your inquiry whether you may take certain actions in regard to several residents of an area recently annexed to the City of Franklin who refuse to pay their city personal property and real estate taxes. You ask whether your office may (1) charge these residents penalty and interest1 and follow procedures for delinquent tax collection,2 and (2) deny them the right to buy city decals for their automobiles.3
I. Facts

On January 1, 1986, the City of Franklin annexed approximately four square miles of land formerly located in Southampton County. The United States Department of Justice has ruled that the annexation provisions for elections did not conform to the federal Voting Rights Act. Further, the Department of Justice has prohibited citizens in the newly annexed area from voting in any city elections until compliance with the federal Act is achieved. Consequently, several such citizens have refused to pay real estate or personal property taxes.

II. Constitution of Virginia Requires All Property Be Taxed Uniformly

In a recent Opinion involving the taxation of annexed territory, this Office noted that Art. X, § 1 of the Constitution of Virginia (1971) provides as follows:

All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly may provide for differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits . . . .


Article X, § 4 provides that real estate and tangible personal property are to be segregated and made subject to local taxation. The City of Franklin is empowered to tax such property under § 2.03(A) of its charter. See Ch. 155, 1962 Va. Acts 222, 223. The City of Franklin, therefore, is granted general powers sufficient to tax the newly annexed citizens.

III. Code of Virginia Requires City Treasurers to Collect Tax from All City Residents

Section 58.1-3910 et seq. of the Code of Virginia requires that your office mail tax bills to each taxpayer in your city and receive those taxes and other amounts payable into the treasury of the City of Franklin. Section 58.1-1 defines "taxpayer" as

[e]very person, corporation, partnership, organization, trust or estate subject to taxation under the laws of this Commonwealth, or under the ordinances, resolutions or orders of any county, city, town or other political subdivision of this Commonwealth.

Thus, it is clear that your office is required to collect local taxes from the newly annexed citizens of the City of Franklin.

IV. Case Law Supports Taxation of Newly Annexed Citizens

In Duncan v. Town of Blacksburg, Virginia, 364 F. Supp. 643 (W.D. Va. 1973), the federal district court held that unequal voting rights had not been created and that no equal protection violation had occurred by a town's annexation of a surrounding county. This conclusion was reached even though the new residents had not been permitted to vote in elections prior to the effective date of the annexation and the next opportunity for the new residents to vote was more than a year later. The court stated:

Assuming that there may exist, for a limited period of time, some representational disparity between old and new residents of the town, if so, it is temporary, unintended, and self-correcting. Indeed, there is nothing here that would justify the wholesale disruption of local government throughout the State that would result from the rescission of the annexation decree, or declaring the Virginia laws invalid.
Id. at 646 (emphasis added). See also Avens v. Wright, 320 F. Supp. 677 (W.D. Va. 1970) (upheld constitutionality of Virginia reapportionment statutes which authorized circuit court judges to increase the number of magisterial districts in a county through reapportionment and then to appoint persons to represent the newly annexed citizens on the county board of supervisors).

V. Conclusion: Mere Postponement of Elections in Annexed Area Does Not Excuse Residents from Payment of Taxes

Based on the above, it is my opinion that you may charge the residents of the newly annexed area who are delinquent in the payment of their personal property and real estate taxes penalty and interest and follow usual procedures for delinquent tax collection, and may deny them city decals for their motor vehicles, trailers and semitrailers until the taxes, penalty and interest are paid. The temporary inability of the new residents to vote in city elections does not preclude you from treating all citizens in your jurisdiction uniformly with regard to local taxation matters.

1 See §§ 58.1-3915, 58.1-3916 and 58.1-3918 of the Code of Virginia.
2 See generally Ch. 39 of Title 58.1.
3 See § 46.1-65(c).
4 While the exact duration of this prohibition is not stated in your letter, it is likely to be resolved in the foreseeable future. Thus, this condition is of a temporary nature.

TAXATION - REVIEW OF LOCAL TAXES - COLLECTION BY TREASURERS, ETC. DELINQUENT. REAL ESTATE. ONLY SINGLE PAST-DUE TAX BILL REQUIRED UNDER § 58.1-3912.

August 15, 1986

The Honorable William E. Jones
Treasurer for Dinwiddie County

You ask whether the procedure of your office for sending past-due tax bills to taxpayers complies with § 58.1-3912 of the Code of Virginia.

I. Facts

You indicate that your office (a) mails tax bills not later than 14 days prior to the due date of December 5 of each year, and (b) upon nonpayment, sends a second notice in the month of February of the succeeding year and a third notice during the month of March of the same succeeding year. You then present a specific fact situation in which you timely sent a bill for 1982 real estate taxes, and when these taxes were not paid by December 5 of that tax year, you sent past-due tax notices in February and March of 1983. You ask whether it was your responsibility to mail past-due tax notices in November 1983 and November 1984 for the 1982 delinquent taxes.1

II. Applicable Statute

Section 58.1-3912 provides, in pertinent part, as follows:

A. The treasurer of every city and county shall, as soon as reasonably possible in each year, but not later than fourteen days prior to the due date of the taxes, send by United States mail to each taxpayer assessed with taxes and levies for that year amounting to five dollars or more . . . a bill or bills in the form prescribed by the Department of Taxation . . . Upon nonpayment of taxes by . . . the [taxpayer], a past-due tax bill will be sent to the taxpayer. [Emphasis added.]
III. Conclusion: Code Requires Only One Past-Due Tax Bill

The past-due tax bill requirement in § 58.1-3912 is written in the singular form. Clearly then, there is no requirement to send multiple past-due tax notices or to continue to send such notices in each year in which the tax bill remains delinquent.

It is my opinion, therefore, that a single past-due tax bill sent within a reasonable time after the tax becomes delinquent would satisfy the requirements of § 58.1-3912. Your procedures comport with this finding and, in fact, your third notice mailed in March is not statutorily mandated. Finally, no past-due tax bills with respect to the 1982 delinquent taxes were required to be sent in November 1983 and November 1984 because the past-due notice mailed in February 1983 satisfied the requirements of § 58.1-3912.

1With respect to this question, you indicate that no tax bill for 1983 or 1984 real estate taxes was sent because the property was exempt from taxation for those years as property of an elderly person granted such an exemption under an ordinance adopted pursuant to § 58.1-3210 et seq. That fact is not addressed herein because it does not affect the past-due tax bill provision of § 58.1-3912.

2On the other hand, the treasurer's duty to collect taxes continues until the taxes are paid or the land is sold as provided in § 58.1-3965 et seq. Past-due tax bills sent in subsequent years may aid tax collection efforts. See §§ 58.1-3919, 58.1-3927 and 58.1-3928.

3No specific time for sending the past-due tax bill is set forth in the statute. Such a bill sent thirty to ninety days after the taxes become delinquent would appear to meet the "reasonable time" standard.

TAXATION - REVIEW OF LOCAL TAXES - COLLECTION BY TREASURERS, ETC. PENALTY FOR FAILURE TO PAY TAXES BY DECEMBER 5. NO-FAULT STANDARD DEFINED.

August 15, 1986

The Honorable William E. Jones
Treasurer for Dinwiddie County

You ask whether the penalty imposed under § 58.1-3915 of the Code of Virginia for failure to pay the real property tax when due should be imposed in circumstances which the taxpayer claims are not his fault.

1. Facts

You present the following fact situation:

A taxpayer is assessed for 1985 real estate taxes in accordance with § 58.1-3281 of the Code of Virginia. The taxpayer held title to the property on January 1, 1985, thereby being assessed with the tax. The taxpayer dies January 30, 1985, and wills all her property to a cousin. The heir is also the executor of the estate. The will was recorded on March 1, 1985. The heir is now owner of the property and becomes a property owner and taxpayer of Dinwiddie County. The property had an outstanding balance due on its 1982 taxes.

The 1985 tax statements were mailed in October 1985 to the name of the deceased taxpayer at the deceased taxpayer's address. The heir makes a payment that does not cover the total of amount of tax that is due [for both 1982 and 1985].

His payment was credited in accordance with § 58.1-3913 [to the most delinquent account, which was 1982]. Having a balance still due on the 1985 statement, a penalty of 10% was added to the remaining unpaid tax. The
heir refuses to pay the penalty on the grounds that he was not billed for the delinquent taxes fourteen days before December 5, 1985, declaring 'no fault.'

II. Failure to Perform Duty and Misconduct Constitute Taxpayer Fault

Section 58.1-3915 states that "[n]o penalty shall be imposed for failure to pay any tax if such failure was not the fault of the taxpayer." As you note, this Office has issued several prior Opinions which discuss this no-fault standard. In order for the taxpayer not to be at fault for failure to pay, the taxpayer "must not have purposefully failed in a duty or engaged in conduct that materially contributed to the problem complained of." See Garcia v. Rosewell, 43 Ill.App.3d 512, 517, 357 N.E.2d 559, 563 (1976). See also Reports of the Attorney General: 1983-1984 at 387; 1981-1982 at 393.

III. Executor Has Duty to Inquire About All of Decedent's Delinquent Tax Liabilities

In the situation related by you, the executor of the estate has a statutory duty under § 58.1-23 to "make inquiry of the treasurer of the county or city wherein the decedent last resided and of the Department [of Taxation] with respect to any unpaid taxes and levies assessed against his decedent." Assuming the decedent last resided in Dinwiddie County, the executor was under a duty to make such an inquiry of you. If he had done so, he would have had notice that the 1982 real property taxes remained unpaid. Whether the executor purposefully failed to make such an inquiry is a determination of fact for you to make.

IV. Failure to Receive Tax Bill Does Not Relieve Taxpayer of Obligation to Pay Taxes When Due

The gist of the executor's complaint is that the bill for 1985 taxes was mailed to the decedent and not to him as executor. It appears from the facts, however, that the executor had actual notice of the 1985 tax bill because a tender of payment for those taxes was made. Moreover, failure to receive a tax bill is no defense to a penalty for late payment. See 1981-1982 Report of the Attorney General, supra.

V. Conclusion: Penalty May Not Be Waived When Taxpayer at Fault

The determination whether the failure to pay was the fault of the taxpayer is a matter of fact for decision by the treasurer. See 1980-1981 Report of the Attorney General at 348. Under the circumstances in this case, however, it is my opinion that the treasurer could find that the executor does not meet the no-fault standard of § 58.1-3915. If such a finding were made, a waiver of penalty would not be authorized under § 58.1-3915 or any other section of the Code.

TAXATION - REVIEW OF LOCAL TAXES - CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS - COLLECTION BY TREASURERS, ETC. - COLLECTION BY DISTRESS, SUIT, LIEN, ETC. LOCAL GOVERNING BODY LACKS INDEPENDENT AUTHORITY TO REFUND LOCAL TAX ASSESSMENTS.

April 29, 1987

The Honorable W. O. Conley, Jr.
Commissioner of the Revenue for the City of Bristol

You ask whether a city council has the authority to refund a personal property tax payment, and, if the city council lacks such authority, what steps a commissioner of the revenue should take to reassess the property when such a refund has occurred. You explain that the city council in your jurisdiction has agreed to refund a personal property tax payment and that the refund has been made to the taxpayer. You, as commissioner
of the revenue, have not certified that the assessment was erroneous.

I. Applicable Law

Virginia follows the Dillon Rule of strict construction concerning the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication from such conferred powers. County Board v. Brown, 229 Va. 341, 344, 329 S.E.2d 466, 470 (1985); 1984-1985 Report of the Attorney General at 99, 100.

Article 5, Ch. 39 of Title 58.1, §§ 58.1-3980 et seq., details the procedures and remedies for the correction of erroneous assessments of local taxes. Sections 58.1-3980, 58.1-3981 and 58.1-3990 provide for the nonjudicial correction of erroneously assessed local taxes upon application of a taxpayer.1 Section 58.1-3980 generally authorizes the application to a commissioner of the revenue or other appropriate official for correction of erroneous assessments.

Section 58.1-3981 requires the commissioner of the revenue to correct assessments when he is satisfied that he has erroneously assessed the applicant-taxpayer. Upon certification by the commissioner, concurred in by the attorney for the jurisdiction,2 that an assessment exceeds the proper amount, the local governing body is authorized to direct its treasurer to refund taxes already paid.

Section 58.1-3990 similarly authorizes cities and counties to provide by ordinance for the refund of taxes erroneously paid. Under such an ordinance, the tax-collecting officer is authorized to refund local taxes upon certification by the commissioner of the revenue that he has erroneously assessed such taxes. Section 58.1-3990 also permits a local governing body to grant refunds of any local tax which a court of competent jurisdiction has declared unconstitutional.

II. City Council Has No Independent Authority to Refund Local Taxes

I am aware of no statute, other than §§ 58.1-3981 and 58.1-3990, which would permit a refund of the personal property taxes in question. Assuming that no court has declared the tax at issue unconstitutional, as provided in § 58.1-3990, I am of the opinion that a city council lacks the authority to refund personal property tax payments in the absence of a certification of an erroneous tax assessment by the commissioner. See Reports of the Attorney General: 1986-1987 at 317 (board of supervisors has no independent authority to compromise claims for assessed taxes); 1957-1958 at 282 (board of supervisors has no authority voluntarily to refund erroneously assessed real estate taxes).

III. No Reassessment of Personal Property Taxes Required Because Refund by City Council Is Nullity

Your second inquiry concerning reassessment of the personal property taxes improperly refunded by a city council is controlled by the fact that the action of the city council is ultra vires. An ultra vires act is one that is beyond the powers conferred upon the municipality by law. Black's Law Dictionary 1365 (5th ed. 1979). Such acts are void ab initio. Jenkins v. Henderson, 214 N.C. 244, 248-49, 199 S.E. 37, 40 (1938); see also 1982-1983 Report of the Attorney General at 66 (town's contract for indebtedness beyond its charter limitations is void, at least to the extent of the excess).

The refund by city council, therefore, is without legal effect. The original personal property tax assessment is valid, and no reassessment is necessary. The taxpayer should be given written notice of the continuing applicability of the original tax assessment, although refunded, and repayment should be requested. The treasurer or other appropriate official should then be notified to continue collection of the assessment as provided in Arts. 2 and 3, Ch. 39 of Title 58.1.
Section 58.1-3981 also permits a commissioner of the revenue to correct a clerical error or calculation with or without a taxpayer application.

"[C]onsent of the town, city or county attorney, or if none, the attorney for the Commonwealth" is required. Section 58.1-3981.

TAXATION - REVIEW OF LOCAL TAXES - CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS. LOCAL GOVERNMENT HAS AUTHORITY TO COMPROMISE CLAIMS MADE BY OR AGAINST IT; NO AUTHORITY TO COMPROMISE CLAIM FOR ASSESSED TAXES. COURT MAY PROVIDE FOR ABATEMENT OR EXONERATION OF ASSESSED TAXES BY JUDICIAL DECREE.

March 17, 1987

The Honorable C. Richard Cranwell
Member, House of Delegates

You ask two questions concerning the authority of a county board of supervisors (the "board") to settle litigation related to the assessment of county taxes on an alleged tax-exempt institution.

I. Facts

In February 1984, a property owner (the "plaintiff") brought suit under § 58-1145 of the Code of Virginia (now § 58.1-3984) challenging the assessment of local taxes by the commissioner of the revenue (the "commissioner"). During the course of the litigation, hearings were held and at least one interlocutory ruling was made. On February 9, 1987, a final decree was entered. The final decree refers to a memorandum of agreement entered into by the board and the plaintiff with the approval of the commissioner. The final decree, prepared by the attorneys for the parties and submitted to the court for entry, contains the following operative provisions:

(1) A declaration that the plaintiff is a tax-exempt organization;

(2) A declaration that certain portions of the plaintiff's property are exempt from taxation and other portions are to be subject to real property taxes;

(3) A statement that the board, as the real party in interest in the litigation, is authorized to agree to forgive accrued taxes as consideration for the compromise; that the agreement of the board to forgive such taxes is reasonable; and that unpaid taxes assessed on the plaintiff's property are exonerated pursuant to the memorandum of agreement;

(4) An order that the commissioner and the county treasurer shall note the exonerations of the assessed taxes in the appropriate records; and

(5) An order that penalties or interest which may have accrued against the parcels remaining subject to taxation are also exonerated.

The final decree was entered by the judge and endorsed by the attorneys for the plaintiff and the board. The commissioner noted his objection to the entry of the final decree.

II. County Has No Independent Authority to Compromise Claim for Taxes; Court Has Authority to Grant Relief from Assessed Taxes

You first ask whether the board has the authority, in the settlement of pending litigation concerning taxation of an alleged tax-exempt institution, to abate or exonerate taxes already assessed against that institution.
A. Local Government Has General Authority to Compromise Claims

It is a well-established principle that a local government has the authority "to settle and adjust unascertained or disputed claims made against it, or made by it against others, as a necessary incident to its right to contract and to sue and be sued." McKennie v. Charlottesville R. Co., 110 Va. 78, 78, 65 S.E. 503, 506 (1909). See also 17 McQuillin, Municipal Corporations § 48.17 (1982); 56 Am. Jur. 2d Municipal Corporations, Etc., § 896 (1971); 64 C.J.S. Municipal Corporations §§ 2181, 2197 (1950).

B. Local Government Has No Independent Authority to Compromise Claim for Assessed Taxes Absent Statute Authorizing Such Compromise

The authority to settle and compromise claims, however, does not extend to the authority to compromise claims or suits relating to legally assessed taxes absent specific statutory authority. See 17 McQuillin, supra; 56 Am. Jur. 2d, supra, at § 825; 64 C.J.S., supra, at § 2073.

I am unaware of any statute expressly authorizing local governments to compromise claims for taxes. Compare § 58.1-105 (statute authorizing State Tax Commissioner to settle and compromise doubtful or disputed claims for taxes). In accord with the authorities cited above, therefore, it is my opinion that the board has no independent authority to compromise claims for legally assessed taxes.

C. Court Authorized by § 58.1-3984 to Grant Relief from Local Assessments

In this instance, the board and the plaintiff have entered into the memorandum of agreement, the court has found the provisions of that agreement to be reasonable, and the final decree orders the exoneration of the previously assessed taxes. The compromise of the board's claim for the assessed taxes, therefore, has been judicially reviewed and the exoneration of assessed taxes specifically provided for by the court's final decree. Section 58.1-3984 specifically authorizes a court to grant relief from local assessments challenged under the statute. Accordingly, it is my opinion that although the board has no independent authority to abate or exonerate previously assessed taxes to resolve a tax suit seeking correction of an erroneous assessment, a court, pursuant to its authority under § 58.1-3984, may provide for the abatement or exoneration of previously assessed taxes by judicial decree.

III. Commissioner Not Bound by Terms of Memorandum of Agreement; Bound by Provisions of Court's Final Decree

You next ask whether the board has the authority to settle pending litigation as co-defendant with the commissioner without the commissioner's concurrence.

In this instance, there are two relevant documents: the memorandum of agreement and the final decree entered by the court. The commissioner, as an independent constitutional officer, would not be bound by the terms of a memorandum of agreement to which he is not a party if the agreement attempts to limit the commissioner's discretion in his area of responsibility. Compare, e.g., Reports of the Attorney General: 1985-1986 at 276; 1984-1985 at 320; 1983-1984 at 349 (eligibility of property owned by educational institutions for tax exemption under Art. X, § 6(a)(4) of the Constitution of Virginia (1971) is a determination of fact which is the responsibility of the office of the commissioner of the revenue). The commissioner would, however, be bound by the provisions of the final decree, entered pursuant to the court's authority under § 58.1-3984, notwithstanding his objection to the entry of that decree.

It is my opinion, therefore, that the board, as the real party in interest in a proceeding under § 58.1-3984, may enter into an agreement to settle litigation. Any provision of such an agreement which attempts to control the commissioner in the exercise of his duties, however, would be unenforceable against the commissioner. Nonetheless, the commissioner would be bound, in my opinion, by those provisions in the court's final de-
cree which are applicable to him. Compare, e.g., University of Richmond v. Goochland, 218 Va. 801, 802, 241 S.E.2d 751, 752 (1978) (trial court should incorporate in final order directive to county's assessing officer to strike from the land book of taxable real estate property held by court to be tax exempt).

IV. Summary

To summarize, it is my opinion that (1) the board has no independent authority to compromise claims for assessed taxes; (2) a court may provide for the abatement or exoneration of previously assessed taxes in a judicial decree; (3) the commissioner would not be bound by the terms of an agreement to which he was not a party; and (4) the commissioner would be bound by the provisions of a final decree in a suit for erroneous assessment brought under § 58.1-3984.

1 As discussed infra, I do not construe the phrase "is authorized to agree to forgive accrued taxes" to suggest that the board may agree to abate disputed taxes unless such agreement is understood to be subject to ratification by the court.

2 I note that the final decree does not include an express finding that the taxes in question were erroneously assessed. The final decree, however, specifically declares that (1) the plaintiff is a tax-exempt organization, and (2) specified portions of the plaintiff's property are to be exempt from taxation.

3 In Leesburg v. Loudoun Nat. Bk, 141 Va. 244, 126 S.E. 196 (1925), the Supreme Court of Virginia held that the true parties to proceedings to correct erroneous assessments are either the county or municipality for the use of which the specific levy is made. See also School Board v. Shockley, 180 Va. 405, 168 S.E. 419 (1933) (school board has the independent power to appeal decision of lower court concerning relief from certain levies for local taxes when levy made by board of supervisors to support the operations of the public schools).

TAXATION - REVIEW OF LOCAL TAXES - CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS. TAXPAYER RESPONSIBLE FOR PAYMENT OF DELINQUENT TAX BILL BASED UPON ASSESSMENT FOUND ERRONEOUS SUBSEQUENT TO EXPIRATION OF THREE-YEAR STATUTE OF LIMITATIONS FOR CORRECTION THEREOF.

October 16, 1986

The Honorable Mary F. Altemus
Treasurer for Gloucester County

You ask my opinion on whether the three-year statute of limitations for correction of erroneous tax assessments set forth in § 58.1-3980 of the Code of Virginia prohibits the correction of errors discovered after the expiration of that period. You note that real estate taxes are subject to a twenty-year collection period and that tangible personal property taxes are subject to a five-year collection period.1 You inquire, therefore, whether you must collect a bill for delinquent taxes from a taxpayer where it now appears that the delinquent tax bill is based upon an erroneous assessment for which the mistake made by the county was not discovered prior to the end of the three-year period.

I. Applicable Statute

Section 58.1-3980 provides as follows:

Any person, firm or corporation assessed by a commissioner of the revenue or other official performing the duties imposed on commissioners of the revenue under this title with local taxes on tangible personal property, machinery and tools, or merchants' capital, or a local license tax, aggrieved by any such assessment, 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 for
or such other official who made the assessment for a correction thereof.

Sections 58.1-3980 through 58.1-3983 shall also apply to erroneous assessments of real estate if the error sought to be corrected in any case was made by the commissioner of the revenue or such other official to whom the application is made. [Emphasis added.]

II. Statutes of Limitations Intended to Avoid Unreasonable Delay

Statutes of limitations are dictated by a policy which denies a remedy to one who has unreasonably delayed the assertion of his rights. It is presumed that a party will exercise due diligence to discover the wrong of which he is aggrieved and assert his remedy accordingly. See Housing Authority v. Laburnum Corp., 195 Va. 827, 80 S.E.2d 574 (1954). Moreover, the running of the statute is not prevented or postponed until such party discovers the relevant facts or learns of his rights, even though he may not discover his injury until it is too late to take advantage of the appropriate remedy. See Page v. Shenandoah Life Ins. Co., 185 Va. 919, 40 S.E.2d 922 (1947).

With regard to tax assessments, therefore, it is incumbent upon a taxpayer to discover errors in his tax bills within the allotted three-year period. Even where the erroneous assessment has already been collected, the locality "is protected by [the three-year statute of limitations] and can retain all amounts erroneously assessed... to the disadvantage of the taxpayer." American Tobacco Co. v. Richmond, 125 Va. 29, 34, 99 S.E. 777, 779 (1919).

III. Statutory Time Limitation Is Condition Precedent to Statutory Remedy

The Supreme Court of Virginia held in Leesburg v. Loudoun Nat. B'k, 141 Va. 244, 126 S.E. 196 (1925), that where both a right and a remedy are accorded by the same statute,

the limitation of time thereby prescribed is so incorporated in the remedy given as to make it an integral part of it, and hence makes it a condition precedent to the maintenance of the proceeding. It is a special limitation prescribed by the same statute which creates the right.

Id. at 247, 126 S.E. at 197, citing Commonwealth v. Deford, 137 Va. 542, 551, 120 S.E. 281, 284 (1923). Under the common law a taxpayer had no right to apply for a correction of an assessment against him. See 1984-1985 Report of the Attorney General at 316. His remedy is purely statutory and it is incumbent upon the taxpayer seeking statutory relief to proceed strictly according to the statute. See Washington County v. Sullins College, 211 Va. 591, 179 S.E.2d 630 (1971). Thus, making application to the appropriate local official within the three-year period set forth in § 58.1-3980 is a condition precedent to the maintenance of the proceeding provided therein for correction of an erroneous assessment. The local jurisdiction must follow this statutory procedure because, in the absence of such a statute, the general rule is that taxes voluntarily paid cannot be recovered back by the taxpayer. See Commonwealth v. Ferries Co., 120 Va. 827, 92 S.E. 894 (1917).

IV. Conclusion: Taxpayer Has No Remedy at Law for Correction of Erroneous Assessments Discovered After Expiration of Statute of Limitations

The time limitation prescribed in § 58.1-3980 is integral to the remedy for correction of an erroneous assessment set forth therein and must be adhered to by an aggrieved taxpayer. He is, therefore, responsible for the payment of a delinquent tax bill, even though it is based upon taxes erroneously assessed where neither he nor the assessing locality discovers the error within the three-year period of the statute of limitations.
The assessment may not be corrected after the expiration of the three-year period. While I am cognizant that this result may appear harsh, I can find no arguable result under the governing statute other than that the taxpayer in this situation has no remedy at law and must therefore pay the full amount of the delinquent tax, penalty and interest.

1See § 58.1-3940.
2In analogous circumstances, the Supreme Court of Virginia has suggested that "[i]n the forum of conscience, such a claim does not appeal to the natural sense of justice." American Tobacco Co., 125 Va. at 33, 99 S.E. at 779.

TAXATION - REVIEW OF LOCAL TAXES. PENALTY ASSESSED FOR FAILURE TO PAY MAY NOT BE RELIEVED BECAUSE OF SUBSEQUENT REDUCTION OF UNDERLYING ASSESSMENT.

July 31, 1986

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You ask whether a penalty for the late payment of property tax should be imposed in the following situation: A taxpayer in your jurisdiction was assessed for 1986 personal property taxes on a motor vehicle he owned as of January 1, 1986. This taxpayer felt that the assessed value placed by your office on the vehicle was excessive, and he protested the assessment to both the treasurer and you prior to the June 5, 1986 payment deadline. The taxpayer made a partial payment on his bill before June 5, 1986, representing the tax which he felt was due based on his opinion of the value of the car. The remaining portion of the bill was unpaid as of June 5, 1986. At some point after June 5, 1986, you determined that because of the condition of the vehicle, the assessment should be reduced, but not as much as the taxpayer requested.

Specifically, you ask (1) whether the taxpayer's refusal to pay the full amount of tax before the payment deadline because of the unresolved assessment dispute is a failure to pay the tax on time, which is not the fault of the taxpayer within the meaning of § 58.1-3916 of the Code of Virginia; and, if so, (2) whether the local tax collecting official has the authority to exonerate the late payment penalty on the unpaid portion of the bill when such penalty has already been imposed. I assume from your questions that neither the additional tax nor the penalty has been paid by the taxpayer.

I. Applicable Statute

Section 58.1-3916 was amended by Ch. 353, 1986 Va. Acts 585, and now provides, in pertinent part, as follows:

Penalty and interest for failure ... to pay a tax shall not be imposed if such failure was not the fault of the taxpayer. The treasurer shall make such determinations of fault, or in jurisdictions not having a treasurer the governing body may delegate to the appropriate local tax officials the responsibility to make the determination of fault.

II. Taxpayer's Withholding of Taxes in Protest Constitutes Fault

In prior Opinions, this Office has discussed the definition of the term "fault" for purposes of this statute and has held that if all the facts and circumstances lead the treasurer to believe that "the taxpayer (1) did not 'purposefully' fail in [the taxpayer's] duty to report and pay the taxes due or (2) did not engage in conduct that 'materially contributed' to the failure to report and pay the tax when due, then the treasurer must
waive the penalty." 1983-1984 Report of the Attorney General at 387. In the situation presented, neither of these prerequisites is evident. Indeed, a taxpayer has the duty to pay the tax assessed upon his property by the due date and must do so in order to escape any prescribed penalties. See Reports of the Attorney General: 1966-1967 at 280; 1960-1961 at 301. The penalty for late payment is assessed at the time of the failure to pay and, thus, the taxpayer is responsible to pay the full amount of tax on time or suffer penalty and interest. See 1971-1972 Report of the Attorney General at 426.

III. No Authority for Taxpayer to Utilize Self-Help Remedies

Furthermore, there is no statutory authority by which a taxpayer may utilize the self-help remedy of withholding taxes in protest. The remedies available to a taxpayer aggrieved by a local assessment are limited by statute. See, e.g., §§ 58.1-3980 and 58.1-3984. The Code does not authorize a taxpayer to determine his own property tax liability and pay taxes accordingly. Additionally, a treasurer is under no duty to accept a noncompliant payment. Cf. 1959-1960 Report of the Attorney General at 371 (holding that the tender of one check for payment of both State and local taxes may be returned to the taxpayer).

IV. No Statutory Authority for Relief of Entire Penalty Due to Subsequent Reduction in Assessment

Section 58.1-3916 provides, in pertinent part, that the amount of the penalty for late payment shall not "exceed ten percent of the tax past due."1 (Emphasis added.) In the case you describe, the amount of the penalty is calculated upon the amount of the assessment withheld in protest.

Where an assessment is determined to be erroneous, § 58.1-3990 prescribes that, pursuant to a local ordinance

[i]f the taxes have not been paid, the applicant shall be exonerated from payment of so much thereof as is erroneous, and if such taxes have been paid, the tax-collecting officer or his successor in office shall refund to the applicant the amount erroneously paid, together with any penalties and interest paid thereon.

This statute does not expressly provide for the proration or exoneration of a penalty assessed upon a taxpayer who has paid a portion, but not the full amount, of the taxes due, regardless of a subsequent reduction of the underlying assessment. Reading §§ 58.1-3916 and 58.1-3990 in pari materia, however, I am persuaded that the taxpayer in this case should not be required to pay any greater penalty than that penalty which would have been assessed upon failure to pay the entire amount of the reduced assessment. It is my opinion, therefore, that any additional tax and penalty payable as a result of the corrected assessment should be based upon the amount of the corrected assessment and that the excess penalty should be exonerated.

V. Conclusion: Taxpayer Voluntarily Withholding Taxes Is at Fault for Late Payment and Not Entitled to Exoneration of Late Payment Penalty

Based on the facts presented, it is my opinion that (1) the taxpayer is at fault for the late payment of taxes; (2) a taxpayer is not entitled to the use of nonstatutory, self-help remedies; and (3) the Code provides only for the exoneration of the excess penalty assessed for failure to pay taxes when the underlying assessment is subsequently reduced. Accordingly, the taxpayer's late payment penalty should be exonerated to the extent it exceeds the amount of penalty calculable on the corrected assessment.

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1In contrast, the amount of penalty for failure to file a return shall not "be greater than ten percent of the tax assessable." Section 58.1-3916 (emphasis added).
As noted above, the treasurer is under no obligation to accept tender of payment less than the amount of tax due.

TAXATION - STATE RECORDATION. DEEDS OF TRUST RECORDED INCIDENT TO DIVORCE OR SEPARATION PARTIALLY EXEMPTED UNDER § 58.1-806(B).

December 29, 1986

The Honorable Ronald P. Livingston
Clerk, Circuit Court of Chesterfield County

You ask whether a particular deed of trust presented for recordation qualifies for the favorable tax treatment provided in § 58.1-806(B) of the Code of Virginia for "deed[s] transferring property" pursuant to a written instrument incident to a divorce or separation.

I. Applicable Statute

Section 58.1-806(B) provides:

The tax on any deed transferring property pursuant to a decree of divorce or of separate maintenance or pursuant to a written instrument incident to such divorce or separation, shall be fifty cents per deed.

II. Facts

The instrument presented for recordation is a deed of trust by which the grantors (husband and husband's solely owned business corporation) convey property to trustees to secure a debt of the husband which arose under an agreement between the husband and wife. I assume that the agreement between the husband and wife is a written instrument incident to a divorce or separation, as required in § 58.1-806(B).

III. Deed of Trust Is "Deed Transferring Property" Under § 58.1-806(B)

The term "deed of trust" is encompassed within the generic term "deed." See 21A M.J. Words and Phrases 390-91 (Repl. Vol. 1980); Black's Law Dictionary 373 (5th ed. 1979). Moreover, this Office has previously concluded that deeds of trust are included within the language "deed or other instrument" as it appeared in former § 58-65, which dealt with payments requisite to the recordation of certain instruments. See 1971-1972 Report of the Attorney General at 140, 141.

A prior Opinion of this Office has also concluded that § 58-57, the predecessor to § 58.1-806(B), "applies to all deeds transferring property pursuant to a decree of divorce, regardless whether cash payments and financing arrangements are also part of the divorce proceedings, as in many cases they are." 1974-1975 Report of the Attorney General at 514, 515. The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view. Browning-Ferris v. Commonwealth, 225 Va. 157, 161, 300 S.E.2d 603, 605-06 (1983), quoting Deal v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983). The General Assembly has exercised its discretion to provide for a reduced rate on recordation of deeds transferring property pursuant to a decree of divorce, and nothing in the statute would exclude deeds of trust from its operation.

IV. Conclusion: Recordation of Deed of Trust Arising from Decree of Divorce or Separate Maintenance Is Taxed at Fifty Cents Per Deed

Based on the above, it is my opinion that a deed of trust is a "deed transferring
The deed of trust presented to you, therefore, would qualify for favorable tax treatment under § 58.1-806(B) as long as you are satisfied that the deed of trust is executed "pursuant to a decree of divorce or of separate maintenance or pursuant to a written instrument incident to such divorce or separation."

1The fact that one of the grantors (the husband's business corporation) is not a party to the divorce or separation does not defeat the applicability of § 58.1-806(B) where, as here, there is an identity between the spouse and the owner of the corporation.

Section 58.1-806(B) does not require that the deed being presented for recordation and taxation pursuant to that statute contain any reference to the divorce or separation. The clerk must be satisfied from other evidence, however, such as affidavits of the parties, a copy of the divorce decree or other written instrument, that the deed arises out of a decree of divorce or separate maintenance or written instrument incident to a divorce or separation. See 1972-1973 Report of the Attorney General at 433(2).

3The quoted language now appears in § 58.1-812(B) as "deed, deed of trust, contract or other instrument . . . ."

4This Opinion dealt with a wife who transferred her interest in real property to her husband, who then paid the wife a cash sum and assumed an unpaid deed of trust on the real estate.

I note, however, that "deed" does not include "deed of trust" when those terms generally are used in the recordation tax statutes. See 1971-1972 Report of the Attorney General, supra; compare § 58.1-801 with § 58.1-803; § 58.1-811(A) with § 58.1-811(B).

TAXATION - STATE RECORDATION. FARMERS HOME ADMINISTRATION CONVEYANCE TO PURCHASERS AT PUBLIC AUCTION SUBJECT TO GRANTOR'S AND GRANTEE'S TAX.

December 30, 1986

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

You ask whether a certain quitclaim deed offered for recordation is subject to (1) the grantee's tax imposed by § 58.1-801 of the Code of Virginia and (2) the grantor's tax imposed by § 58.1-802. By this deed, the Farmers Home Administration ("FHA") conveys real property to private purchasers at a public auction of such property on which the government had previously foreclosed. The deed recites that

[the UNITED STATES OF AMERICA, Acting through the Administrator of the [FHA], United States Department of Agriculture, CONVEYS and QUIT-CLAIMS to [husband and wife], tenants by the entirety, Grantee, for the sum of TEN DOLLARS ($10.00) and other valuable consideration all interest in the following described real estate . . . .]

I. No Exceptions to Grantee's Tax Imposed by § 58.1-801 Apply

The grantee's tax is imposed by § 58.1-801, which states that "[o]n every deed admitted to record, except a deed exempt from taxation by law, there is hereby levied a state recordation tax." (Emphasis added.) The fact that the deed presented is a quitclaim deed is irrelevant to its tax status. A quitclaim deed is subject to tax unless a specific exemption otherwise applies. See Virginia Recordation Tax Regulation § 630-14-801(A)(11) (1985). Exemptions from the grantee's tax are found in § 58.1-811(A). None of the thirteen exemptions listed applies to the facts in this case, and I am aware of no other exemption under which the grantees in question can avoid the tax.
II. Grantor's Tax Not Computed on Any of Three Prohibited Taxation Bases

The grantor's tax is imposed by § 58.1-802, which provides, in pertinent part:

[A] tax is hereby imposed 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. The rate of the tax, when the consideration or value of the interest exceeds $100, shall be . . . .


By enacting 42 U.S.C. § 1490h, Congress has given its consent to the taxation of certain property held by the FHA. The statute provides general consent to allow state and local taxation of FHA-held property. The statute then limits this consent, however, by prohibiting a tax on or with respect to any instrument if the tax is based on any one of three enumerated bases. Generally, a tax is prohibited if it is based on (1) the value of any notes or mortgages held by or transferred to the Secretary of Agriculture; (2) any notes or lien instruments administered by the FHA which are made, assigned, or held by a person otherwise liable for the tax; or (3) the value of any property conveyed or transferred to the Secretary of Agriculture.

The grantor’s tax in § 58.1-802 is not computed on any of these three prohibited bases. Rather, the value upon which the tax is computed is the amount of consideration given, exclusive of the value of any lien or encumbrance remaining on the property at the time of the sale. See § 58.1-802(A). Moreover, the third basis for prohibiting the tax is inapplicable for the additional reason that the property is not conveyed or transferred to the Secretary of Agriculture.

III. Conclusion: Both Grantee's and Grantor's Tax Should Be Imposed

Based on the above, it is my opinion that the quitclaim deed offered for recordation is subject to both the grantee's tax imposed by § 58.1-801 and the grantor's tax imposed by § 58.1-802.

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Section 1490h states as follows: "All property subject to a lien held by the United States or the title to which is acquired or held by the Secretary under this title other than property used for administrative purposes shall be subject to taxation by a State, Commonwealth, territory, possession, district, and local political subdivisions in the same manner and to the same extent as other property is taxed: Provided, That no tax shall be imposed or collected on or with respect to any instrument if the tax is based on—

1. the value of any notes or mortgages or other lien instruments held by or transferred to the Secretary;
2. any notes or lien instruments administered under this title which are made, assigned, or held by a person otherwise liable for such tax; or
3. the value of any property conveyed or transferred to the Secretary, whether as a tax on the instrument, the privilege of conveying or transferring, or the recordation thereof; nor shall the failure to pay or collect any such tax be a ground for refusal to record or file such instruments, or for failure to impart notice, or prevent the enforcement of its provisions in any State or Federal court." (Emphasis in original.)

TAXATION - STATE RECORDATION - REVIEW OF LOCAL TAXES. CIVIL REMEDIES
The Honorable F. R. Howard  
Clerk, Circuit Court of Loudoun County

You ask whether the recordation tax imposed by § 58.1-802 of the Code of Virginia (commonly called the "grantor's tax") would apply to a deed executed by a special commissioner for the sale of delinquent tax lands pursuant to §§ 58.1-3965 et seq.

I. Applicable Statutes

A. Sale of Delinquent Tax Lands

Sections 58.1-3965 through 58.1-3974 set forth procedures for the judicial sale of real estate on which county, city or town taxes are delinquent. Such real estate may be sold when any taxes thereon are delinquent on December 31 following the third anniversary of the date on which such taxes have become due. See § 58.1-3965. Section 58.1-3967 provides that the proceedings for the sale of real estate for delinquent taxes shall be by bill in equity, filed in the circuit court of the locality in which such real estate is located. That section also specifies that the proceedings shall be held in accordance with the requirements to effect the sale of real estate by a creditor's bill in equity.

Section 58.1-3969 provides for an order of reference to a commissioner in chancery or special master to preside over the proceedings to subject the real estate to the lien for delinquent taxes. This section also permits the appointment by the court of a special commissioner to sell the properties and execute the necessary deeds when a sale of delinquent tax lands is found necessary or advisable.

B. General Provisions for Special Commissioner's Deed Execution in Creditor's Bill in Equity

Section 8.01-110 gives courts the jurisdiction to appoint a special commissioner in a judgment creditor's suit to execute a deed on behalf of any party to enforce payment of a judgment out of the real property of the debtor. That section provides:

A court in a suit wherein it is proper to decree the execution of any deed or writing may appoint a special commissioner to execute the same on behalf of any party in interest and such instrument shall be as valid as if executed by the party on whose behalf it is so executed. [Emphasis added.]

C. Grantor's Tax and Exemption Therefrom for Political Subdivisions

Section 58.1-802 imposes a recordation tax upon deeds or other writings whereby realty is sold. The legal incidence of the tax is on the grantor and not the grantee. The Virginia Department of Taxation Regulation VR § 630-14-802(C) (1985).

Section 58.1-811(C)(3) provides an exemption from the grantor's tax for deeds from the Commonwealth or any county, city, town, district or other political subdivision thereof. For this exemption to apply, the Commonwealth or political subdivision must be the grantor of the deed.

II. Special Commissioner Executes Deed on Behalf of Taxpayer

The provisions for the sale of delinquent tax lands, §§ 58.1-3965 et seq., establish a
procedure whereby a county, city or town may institute judicial proceedings to recover delinquent real estate taxes by selling the property belonging to the delinquent taxpayer. These provisions include appointment by the court of a special commissioner who is empowered to execute the deed when a delinquent tax sale occurs. The statutes do not state on whose behalf the special commissioner acts when he executes the deed.

As noted heretofore, pursuant to § 58.1-3967, proceedings for delinquent tax sales are to follow statutory law applicable to a creditor's bill in equity. Section 8.01-110 is such a statute. This section permits the appointment of a special commissioner in a judicial sale of land and specifies that the commissioner executes the deed "on behalf of any party in interest."

Applying § 8.01-110 to the facts presented, it is my opinion that the "party in interest," on whose behalf the special commissioner executes the deed under § 58.1-3969, is the taxpayer. This conclusion rests on the fact that the lands being sold for delinquent taxes under § 58.1-3965 et seq. belong to the taxpayer; the political subdivision has no legal title to the lands. As owner of the lands, the delinquent taxpayer is the grantor, the party holding the interest in the lands sold, on whose behalf the special commissioner acts in a forced tax sale.

III. No Exemption from Grantor's Tax for Recordation of Deed in Delinquent Tax Sale Transaction

The exemption from the grantor's tax provided in § 58.1-811(C)(3) applies only to deeds conveying real estate from the Commonwealth or a political subdivision thereof. The grantor in a delinquent tax sale transaction is the legal owner, the delinquent taxpayer, on whose behalf the special commissioner executes the deed. Such a deed is not given by the county. The exemption of § 58.1-811(C)(3), therefore, does not apply. I am aware of no other statutory exemption from the grantor's tax which would apply to property sold by a special commissioner for delinquent taxes.

IV. Conclusion: Burden of Grantor's Tax in Forced Sale of Land for Delinquent Taxes Falls on Delinquent Taxpayer

Accordingly, it is my opinion that the grantor's tax imposed by § 58.1-802 would be chargeable on a deed given by a special commissioner in a sale of delinquent tax lands because such deed is given on behalf of the delinquent taxpayer, the legal owner of the property. Because the delinquent tax sale deed is not a deed from a political subdivision, the exemption under § 58.1-811(C)(3) would not apply. The delinquent taxpayer is therefore charged with the burden to pay the grantor's tax.

See also § 8.01-111, which requires that deeds executed by a special commissioner set forth whose right, title or interest is being conveyed.

TAXATION - STATE RECORDATION. TYPEWRITTEN ENTRY ON FACE OF REFINANCING DEED OF TRUST FALLS WITHIN PROVISO OF § 58.1-803(D) FOR CERTIFICATION OF EXISTING DEBT.

October 15, 1986

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

You ask whether a typewritten entry located at the head of a certain deed of trust meets the certification proviso of § 58.1-803(D) of the Code of Virginia. The deed of trust instrument is in standard form and secures a loan of $69,338.00. The entry in question states as follows:
Refinance - Same Lender  
Difference - $3,972.57  
Payoff - $65,365.43  
Section 58.1-803(D), Code of Virginia.

I. Applicable Statutes

Subject to certain limitations and exceptions, § 58.1-803 imposes a tax on the recordation of a deed of trust or mortgage. Subparagraph D of that section reads:

On deeds of trust or mortgages, the purpose of which is to refinance or modify the terms of an existing debt with the same lender, which debt is secured by a deed of trust or mortgage on which the tax imposed hereunder has been paid, the tax shall be paid only on that portion of the amount of the bond or other obligation secured thereby which is in addition to the amount of the existing debt secured by a deed of trust or mortgage on which the tax has been paid. The instrument shall certify the amount of existing debt.

II. Amount of Recordation Tax Imposed on Refinancing Instrument Is Limited to New Amount Financed in Excess of Existing Debt, Provided that Instrument Certifies Amount of Existing Debt

This Office has held that § 58.1-803(D) limits the tax imposed by § 58.1-803 to the amount of the bond or other obligation secured by a refinancing instrument in excess of the amount of the existing debt, provided, inter alia, that the instrument certifies the amount of existing debt.1

The instrument in question secures a loan of $69,338.00. The entry at the head of the subject page recites the purpose of such loan and the identification of the lender. The reference to § 58.1-803(D) conveys an intent to comply with that section. The figure referred to as "payoff" indicates an existing debt of $65,365.43, with a "difference" figure of $3,972.57, indicating the excess amount of secured debt to be taxed.

III. Certification Implies Written Assurance

The requirement of § 58.1-803(D) that an instrument "certify the amount of existing debt" implies that there be a formal assertion of such in writing. See definition of "certification," found in Black's Law Dictionary 206 (5th ed. 1979). Compare also 1985-1986 Report of the Attorney General at 264. Although the assertion of existing debt could have been better expressed, I am of the opinion that the entry evidencing the same, which appears on the face of the subject instrument, comes within the meaning of certification for purposes of § 58.1-803(D).

IV. Conclusion

Assuming that the other requirements of the section are met, it is my opinion that the entry in question meets the proviso in § 58.1-803(D) for the certification of existing debt. The recordation tax imposed by § 58.1-803 should be collected on $3,972.57, the additional amount of debt secured.

1This section also requires that "(a) the purpose of the deed of trust is to refinance or modify the terms of the existing debt; (b) the lender is the same; (c) the tax imposed under [former] § 58-55 was paid on the original deed of trust securing the debt; and (d) the instrument certifies the amount of the existing debt." 1982-1983 Report of the Attorney General at 595, 596. See also 1983-1984 Report of the Attorney General at 410.
The Honorable R. Wayne Compton
Commissioner of the Revenue for Roanoke County

You ask for clarification of a previous Opinion of this Office, found in the 1982-1983 Report of the Attorney General at 359, regarding the situs of motor vehicles for purposes of tangible personal property taxation. You refer specifically to the holding in that Opinion that the place of issuance of the registration and license tags is not controlling in determining the situs of a motor vehicle for the purpose of personal property taxation and that no Virginia locality has the authority to assess vehicles normally garaged or parked outside of Virginia.

I. Facts

Your questions all concern the fact that you have obtained information from the Department of Motor Vehicles ("DMV") indicating that certain motor vehicles are registered to owners whose addresses are in Roanoke County, although the taxpayers claim that the vehicles are not located there. You present four situations which have two common fact patterns. In two of the situations, the Roanoke County residents claim that their vehicles are garaged or parked in states which do not impose personal property taxes on motor vehicles. The remaining two situations present circumstances where Roanoke County residents own vehicles which they claim are garaged or parked in other Virginia jurisdictions but no personal property tax is paid on the vehicles to those other jurisdictions. You wish to know whether you may assess these vehicles for tangible personal property taxes owed to Roanoke County.

II. Applicable Statutes

Section 58.1-3511(A) of the Code of Virginia provides, in part:

"The situs for purposes of assessment of motor vehicles ... as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked. Any person domiciled in another state, whose motor vehicle is principally garaged or parked in this Commonwealth during the tax year, shall not be subject to a personal property tax on such vehicle upon a showing of sufficient evidence that such person has paid a personal property tax on the vehicle in the state in which he is domiciled. In the event it cannot be determined where such personal property, described herein, is normally garaged, stored or parked, the situs shall be the domicile of the owner of such personal property. [Emphasis added.]

Section 58.1-3519 provides as follows:

If any taxpayer, liable to file a return of any [personal property] neglects or refuses to file such return for any year within the time prescribed, the commissioner of the revenue shall, from the best information he can obtain, enter the fair market value of such property and assess the same as if it had been reported to him. [Emphasis added.]

III. Jurisdiction to Tax Motor Vehicle Rests in Locality Where Vehicle is Normally Garaged or Parked

Pursuant to § 58.1-3511, motor vehicles are subject to assessment for personal
property tax in the Virginia jurisdiction where they are normally garaged or parked, unless the owner is domiciled in another state and shows sufficient evidence of payment of a personal property tax on the vehicle in the domiciliary state. The exception in § 58.1-3511 concerning vehicles owned by an out-of-State domiciliary does not apply to vehicles owned by Virginia residents which are normally garaged or parked out of State. A prior Opinion of this Office has determined that the term "normally garaged or parked" means that it must have been so located for a significant portion of the year (e.g., six months or more). See 1979-1980 Report of the Attorney General at 353.

IV. DMV Listing of Addresses for Registrants and Licensees Does Not Determine Tax Situs

It is within your authority as commissioner of the revenue under § 58.1-3519 to make an assessment based upon the best information of situs you can obtain. The DMV listing certainly may be used for this purpose. It clearly would be impossible for your office to verify the accuracy of every entry on the DMV listing for purposes of making assessments. If the assessment is improper because Roanoke County does not have jurisdiction to impose the tax on the vehicle in question, however, the fact that DMV lists the vehicle as registered or licensed to an address in Roanoke County does not validate the assessment. See, e.g., Reports of the Attorney General: 1982-1983, supra; 1978-1979 at 283.

V. Conclusion: Commissioner of the Revenue May Require Taxpayer to Furnish Evidence of Actual Situs if Inconsistent with DMV Listing

Based on the above, it is my opinion that, if the vehicles in the four situations you present are in fact normally garaged or parked in another state or in a Virginia jurisdiction other than Roanoke County, you may not lawfully assess those vehicles for personal property taxes owed to Roanoke County. To ascertain whether an assessment is proper, however, you, as the commissioner of the revenue, have the authority to require from the taxpayer evidence that is satisfactory to you that the motor vehicle is not normally garaged or parked in Roanoke County. See §§ 58.1-3110 and 58.1-3111. If you are not able to determine where the motor vehicle is normally garaged and parked, the situs of the vehicle for personal property tax purposes becomes the domicile of the owner—which, in the four situations you present, is Roanoke County. See § 58.1-3511(A). Furthermore, before any assessment may be abated, § 58.1-3981 requires that the commissioner of the revenue be satisfied that his assessment is erroneous.

If DMV has issued a listing of the addresses of the registrants and licensees which contains erroneous information, you may furnish corrected information to DMV, including the fact that a motor vehicle is not normally garaged or parked in your jurisdiction. See 1982-1983 Report of the Attorney General, supra.

TAXATION - TANGIBLE PERSONAL PROPERTY, MACHINERY, TOOLS - SITUS. VEHICLE TAXED IN JURISDICTION WHERE NORMALLY PARKED EACH NIGHT, EVEN IF USED EACH DAY IN ANOTHER JURISDICTION.

May 30, 1987

The Honorable Margaret Y. Anderson
Commissioner of the Revenue for the City of Waynesboro

You ask whether you may assess tangible personal property tax under § 58.1-3519 of the Code of Virginia on a vehicle belonging to a resident of your city. The owner refuses to file a return because of his belief that situs of the vehicle for tax purposes is in another jurisdiction where the taxpayer owns real property.
I. Facts

The taxpayer and his wife live in the newly annexed area of the City of Waynesboro. While he drives the car each day, he returns the vehicle to his Waynesboro residence at night. He drives the vehicle each weekend to property he owns in Augusta County. The vehicle is not registered to a Waynesboro address by the Virginia Department of Motor Vehicles ("DMV").

II. Applicable Statutes

Section 58.1-3511(A) provides, in part:

[T]he situs for purposes of assessment of motor vehicles ... as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked. ... In the event it cannot be determined where such personal property, described herein, is normally garaged, stored or parked, the situs shall be the domicile of the owner of such personal property. [Emphasis added.]

Section 58.1-3519 provides as follows:

If any taxpayer, liable to file a return of any [personal property], neglects or refuses to file such return for any year within the time prescribed, the commissioner of the revenue shall, from the best information he can obtain, enter the fair market value of such property and assess the same as if it had been reported to him.

III. Situs of Vehicle Used Each Day in One Jurisdiction, Parked Each Night in Another, Is Place Where Vehicle Normally Parked

Pursuant to § 58.1-3511(A), motor vehicles are assessed for personal property tax in the Virginia jurisdiction where they are normally garaged or parked (with an exception that does not apply here). A prior Opinion of this Office has concluded that vehicles owned and used during the day by a business in one jurisdiction are not taxable in that jurisdiction because the vehicles were driven home at night to other jurisdictions. See 1972-1973 Report of the Attorney General at 292; see also 1982-1983 Report of the Attorney General at 613.

The fact that a vehicle is not registered by DMV in a given jurisdiction is irrelevant to its tax situs if the vehicle is normally garaged and parked in that jurisdiction. See 1986-1987 Report of the Attorney General at 329; see also Reports of the Attorney General: 1982-1983 at 359; 1978-1979 at 283.

IV. If No Return Filed, Commissioner of the Revenue May Assess Based on Best Information Obtainable

If the taxpayer refuses or neglects to file a return, § 58.1-3519 authorizes the commissioner of the revenue to make an assessment based upon the best information obtainable. If you believe that you have insufficient information to make the assessment, or you wish to confirm the facts known to you, you have the authority to require the taxpayer to answer questions and produce evidence relevant to your determination of the situs of the vehicle in issue. Sections 58.1-3110, 58.1-3111; see 1946-1987 Report of the Attorney General, supra.

V. Conclusion: Situs Is City of Waynesboro; Tax Assessable Under § 58.1-3519

Based on the foregoing, under the facts presented, you could reach the opinion that the vehicle is normally garaged and parked in the City of Waynesboro. Accordingly, if
the taxpayer does not file a return, you have the authority to make an assessment under § 58.1-3519.

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TAXATION - TAX EXEMPT PROPERTY - PROPERTY EXEMPTED BY CLASSIFICATION OR DESIGNATION BEFORE JULY 1, 1971. SECTION 58.1-3606(A)(5) NOT APPLICABLE TO NURSING HOMES OR HOMES FOR ADULTS.

February 28, 1987

The Honorable M. Richard Walker
Commissioner of the Revenue for Smyth County

You ask whether a home for the elderly and nursing home facility is eligible for an exemption from real property taxation pursuant to § 58.1-3606(A)(5) of the Code of Virginia.

I. Facts

A nonstock, nonprofit corporation operates the Smyth County Community Hospital. The hospital enjoys tax exempt status under § 58.1-3606(A)(5). This corporation also operates, Francis Marion Manor, a nursing home facility not located on the hospital grounds, and plans to build a "home for the elderly" located on the grounds of the hospital facility. The corporation has owned and operated the Francis Marion Manor since approximately 1965.

You ask whether the new home for adults enjoys the same tax exempt status under § 58.1-3606(A)(5) as the remainder of the hospital property. You also ask whether the exemption of § 58.1-3606(A)(5) would apply to the Francis Marion Manor facility.

II. Applicable Statute

Section 58.1-3606 provides, in pertinent part:

A. Pursuant to the authority granted in Article X, § 6(a)(6) of the Constitution of Virginia to exempt property from taxation by classification, the following classes of real and personal property shall be exempt from taxation:

* * *

5. Property belonging to and actually and exclusively occupied and used by ... orphan or other asylums, reformatories, hospitals and nunneries, 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).[3]

* * *

B. Property, belonging in one of the classes listed in subsection A of this section, which was 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.

The quoted statutory language exempts from property taxation the property belonging to the classes listed, including hospitals operated by nonstock, nonprofit corporations. The effect of subsection B is that property in existence and eligible for exemption on July 1, 1971, because of its membership in one of the classes listed in subsection A, continues its exempt status under the rules of liberal construction applicable under the 1902 Constitution.5
III. Francis Marion Manor Nursing Home

A. Rule of Liberal Construction for Exemption from Property Taxation to Be Applied

The facts you have presented indicate that the Francis Marion Manor Nursing Home was in existence on July 1, 1971. Accordingly, its current tax status must be determined by applying liberal rules of construction to the exemption provisions.

B. Francis Marion Manor Nursing Home Not Exempt From Property Taxation

I have examined the Virginia constitutional and statutory real property tax exemptions related to classes of property. The term "nursing home" does not appear in those provisions. The only exempt classes of property which might encompass nursing homes are nonprofit asylums or hospitals exempt under § 58.1-3608(A)(5). In order to resolve whether "nursing homes" belong to either the class "asylums" or the class "hospital," the meaning of these terms must be examined.

1. "Nursing Home" and "Hospital" Are Distinct Classifications

The terms "nursing home" and "hospital" are not defined in either the Constitution of Virginia or Title 58.1 of the Code. In the Virginia licensing and inspection statutes, however, both terms are defined and are not synonymous.

For licensing and inspection purposes, "nursing home" means:

[A]ny facility or any identifiable component of any facility in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more nonrelated individuals, including facilities known by varying nomenclature or designation such as convalescent homes, skilled care facilities, intermediate care facilities, extended care facilities and infirmaries.

Section 32.1-123(2). On the other hand, § 32.1-123(1) defines "hospital" as

any facility in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanitoriums, sanitariums and general, acute, short-term, long-term, outpatient and maternity hospitals[.]

The predecessor statute to § 32.1-123(1), § 32-298(2), included the term "nursing home" within the definition of the term "hospital." Nevertheless, the definition classified "ordinary hospitals" as a term separate from "nursing homes."7

Further indication that "hospitals" and "nursing homes" are distinct classifications for the purposes of Virginia property tax exemption statutes may be garnered from the remarks of the Honorable Theodore V. Morrison, Jr., Member, House of Delegates, during the debates in the House of Delegates considering the provisions of Art. X, § 6 of the 1971 Constitution. Delegate Morrison stated that para. (a) of Art. X, § 6 of the proposed Constitution was designed to allow broad authority for the General Assembly to provide for tax exemption of property by classification, such as nonprofit hospitals, nursing homes, parks or playgrounds.

Proceedings and Debates of the House of Delegates pertaining to Amendment of the Constitution at 354 (Ex. Sess. 1969). See also McManus v. Equitable Life Assur. Soc. of U. S., 583 S.W.2d 271 (Mo. 1979) (nursing home principally providing convalescent and rehabilitative care and not equipped for surgery is not a "hospital" under an insurance policy where "hospital" was defined as an institution having on the premises organized
facilities, including diagnostic and major surgical facilities, for the care and treatment of sick and injured persons and not including institutions operating principally as a rest or nursing facility or a facility for convalescents; Morris v. Monterey Yorkshire Nursing Inn, Inc., 29 Ohio App.2d 98, 278 N.E.2d 686 (1971) (one-year statute of limitations for malpractice actions is not applicable to a nursing home because, not being a hospital, the home could not be guilty of malpractice under Ohio law). 9

2. Nursing Home Is Not "Hospital" Exempt from Property Taxation Under § 58.1-3606(A)(5)

Based on these definitions, I conclude that the term "hospital" in § 58.1-3606(A)(5) does not encompass nursing homes, even utilizing a liberal rule of construction. Because the terms "hospital" and "nursing home" clearly refer to two distinct classes, as illustrated by the Virginia licensing and inspection definitions and the comments of Delegate Morrison in the House Debates on the proposed constitutional revision, I find no basis to exempt nursing homes from property taxation under § 58.1-3606(A)(5). It follows, therefore, that the Francis Marion Manor Nursing Home is not exempt from taxation as a "hospital" pursuant to § 58.1-3606(A)(5).

3. Nursing Home Is Not an "Asylum"

No definition of the term "asylum" appears in the Constitution of Virginia or property tax exemption statutes. I am not aware of any other Code section defining this term. It is necessary, therefore, to look to the ordinary meaning of this word to determine whether it encompasses nursing homes. An asylum in the ordinary sense has been defined as a

retreat, shelter or institution for the protection or relief of the unfortunate, destitute or afflicted. . . . The term has been frequently applied to almshouses . . . orphan asylums and institutions for the afflicted such as those for the insane or for the blind, deaf or dumb . . .


Using this ordinary meaning of "asylum," the Blitz court determined that a nursing home was not an "asylum" within certain building restrictions prohibiting the use of land in a real estate development for an asylum. Similarly, it is my opinion that the term "asylum" as used in § 58.1-3606(A)(5) does not apply to nursing homes. The Francis Marion Manor Nursing Home, therefore, is not exempt from property taxation under § 58.1-3606(A)(5) as an "asylum."

IV. Planned Home for Adults

A. Rules of Strict Construction for Post-1971 Property Tax Exemptions Apply

In accordance with Art. X, § 6(f), exemptions from real property taxation are to be construed strictly against the taxpayer for property not in existence on July 1, 1971. Because the planned home for adults was not in existence on July 1, 1971, whether the home is exempt from property tax in Virginia requires an examination of the exemption provisions utilizing a narrow construction of the language therein.

B. Planned Home for Adults Not Exempt from Property Taxation

The phrase "home for adults" or "home for the elderly" does not appear as a classification in any Virginia constitutional or statutory property tax exemption provisions. Furthermore, I am aware of no exempt class to which such homes might belong.
1. Definition of "Home for Adults" Does Not Contemplate Medical Treatment

In common usage, a home for the elderly or home for the aged has been described as a place where persons of advanced years go to live. . . . Persons do not resort to such institutions for medical or surgical treatment but to be provided with the necessities and a part or all of the comforts of home. The need of such treatment [medical or surgical is not] the main purpose of such an institution . . . .

*Frax Realty Co. v. Kleinert*, 123 Misc. 455, 456, 205 N.Y.S. 728, 729 (1924) (home for the aged is not a hospital).

In 1973, the General Assembly amended §§ 63.1-172 through 63.1-175, § 63.1-177, and §§ 63.1-179 through 63.1-182 to eliminate the term "home for the aged" and to replace all such references by the phrase "home for adults." Thus, § 63.1-172(A) defines "home for adults" for the purpose of Virginia licensing as any place, establishment, or institution, public or private, including any day-care center for adults, operated or maintained for the maintenance or care of four or more adults who are aged, infirm or disabled . . . . [Emphasis added.]

2. Under Ordinary Meaning, Home for Adults Is Not a Hospital or Asylum Exempt from Property Taxation Under § 58.1-3606(A)(5)

Utilizing the foregoing ordinary meaning of a "home for the elderly" or the statutory definition of "home for adults," I conclude that the planned home for adults you describe is not within the classification of "hospital" or "asylum" as those terms are defined in Part II of this Opinion. A home for adults is primarily a home substitute for the elderly, although some limited nursing services may be available. By way of contrast, a hospital is primarily a place for the treatment and diagnosis of sick and injured persons, and an asylum is a place for such persons as the poor, deaf and mute, or insane. A home for adults would not, therefore, be exempt from property taxation under § 58.1-3606(A)(5). The fact that the same corporation operates the hospital and will operate the planned home for adults facility on the hospital grounds does not make the new facility a "hospital" and, thereby, exempt under § 58.1-3606(A)(5).

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1. The Francis Marion Manor property is licensed to operate as a nursing home pursuant to § 32.1-123 et seq.
2. This home has been authorized to operate as a "home for adults" under § 63.1-172 et seq. The Code of Virginia does not use the designation "home for the elderly"; therefore, the term "home for adults" will be used in this Opinion.
3. With the exception of the introductory language, the operative language in ¶ 5 appeared in § 58-12(5), the predecessor to § 58.1-3606(A)(5). Prior to the adoption of the Constitution of Virginia (1971), § 58-12 simply mirrored the 1902 constitutional exemptions with several additions not relevant here. See § 183(e) of the Constitution of Virginia (1902).
4. Prior to the enactment of Ch. 495, 1985 Va. Acts 801, effective July 1, 1980, the exemptions of § 58.1-3606 and its predecessor § 58-12 had been interpreted by this Office not to apply to classes of property. See 1983-1984 Report of the Attorney General at 353 ("Mapp Opinion"). The Mapp Opinion held that the earlier statutory language exempted only property owned by an organization which existed and held the subject property on July 1, 1971, and the property was either (a) exempt, or (b) entitled to be exempt under the 1902 Constitution.
This subsection codifies Art. X, § 6(f) of the 1971 Constitution. See Mapp Opinion, supra, at 356-57.

Additionally, Francis Marion Manor is not exempt by designation. See § 58.1-3607.

Section 32-298(2) provided, in pertinent part: "Hospital" means any institution, place, building or agency by or in which facilities for any accommodation are maintained ... or offered for the hospitalization of two or more nonrelated mentally or physically sick or injured persons, or for the care of two or more nonrelated persons requiring or receiving medical or nursing attention or service as chronics, convalescents ... including, but not to the exclusion of other particular kinds with varying nomenclature or designation, ordinary hospitals, sanitoriums, sanitariums, rest homes, nursing homes, infirmaries and other related institutions and undertakings ...." (Emphasis added.)

But see State, Dept. of Rev. Gross I. T. Div. v. Bethel San., Inc., 332 N.E.2d 808 (Ind. 1975) (licensing definition of "hospital" does not apply to the tax code; the word "hospital" is not used in a technical sense in the tax code so that the broad definition of hospital as an institution for the care of sick, wounded, infirm or aged persons applied to an exemption from gross income tax for nonprofit hospitals); St. Vincent's Nursing Home v. Department of Labor, 169 N.W.2d 456 (N.D. 1969) (nonprofit nursing home rendering medical and nursing care and treating disabled persons as well as aged and infirm persons with hospital equipment and medical supplies is a "hospital" within the Labor-Management Relations Act provision exempting hospitals from the definition of employer).

Two prior Opinions of this Office have held that homes for the aged were exempt from property taxation as asylums. See Reports of the Attorney General: 1961-1962 at 248; 1960-1961 at 297. I find these Opinions distinguishable on their facts because both involved homes for the elderly poor and could be classified as asylums (almshouses) on that basis. The facts of your inquiry do not indicate that the planned home for adults is to be operated solely for the indigent.

TAXATION. VIRGINIA MOTOR VEHICLE SALES AND USE TAX. IMPOSED AT RATE IN EFFECT AT TIME VEHICLE TITLED IN VIRGINIA.

March 10, 1987

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

You ask whether the increased motor vehicle sales and use tax rate adopted by the 1986 Special Session of the General Assembly is applicable to a motor vehicle purchased in North Carolina prior to January 1, 1987, but titled in Virginia subsequent to that date.

I. Applicable Statutes

Chapter 11, 1986 Va. Acts 24, 29 (Spec. Sess.) amended § 58.1-2402 of the Code of Virginia, effective January 1, 1987, to increase the rate of tax levied on the sale or use of a motor vehicle in Virginia from two percent to three percent of the sale price. As amended, § 58.1-2402(A) provides, in pertinent part, as follows:

There is hereby levied, in addition to all other taxes and fees of every kind now imposed by law, a tax upon the sale or use of motor vehicles in Virginia, other than a sale to or use by a person for rental as an established business or part of an established business or incidental or germane to such business.

* * *

The amount of tax to be collected shall be determined by the Commissioner by the application of the following rate against the gross sales price:

1. Three percent of the sale price of each motor vehicle sold in Virginia.
2. Three percent of the sale price of each motor vehicle ... not sold in Virginia but used or stored for use in this Commonwealth. When any such motor vehicle ... is first used or stored for use in Virginia six months or more after its acquisition, the tax shall be based on its current market value.

Although § 58.1-2402 provides that the tax is levied on the sale or use of motor vehicles in Virginia, the tax is not actually imposed until the motor vehicle is titled in Virginia. Section 58.1-2404 provides, in pertinent part, that

[the tax on the sale or use of a motor vehicle shall be paid by the purchaser or user of such motor vehicle and collected by the Commissioner at the time the owner applies to the Division of Motor Vehicles for, and obtains, a certificate of title. ... No tax shall be levied or collected under this chapter upon the sale or use of a motor vehicle for which no certificate of title is required by this Commonwealth. [Emphasis added.]

II. Motor Vehicle Sales and Use Tax Imposed at Time of Titling, Not Purchase

Unlike the retail sales and use tax1 and the motor vehicle sales tax imposed by other states, the Virginia motor vehicle sales and use tax is not imposed until the vehicle is titled in Virginia.2 The Virginia motor vehicle sales and use tax is collected directly from the purchaser or user of the vehicle by the Commissioner of the Department of Motor Vehicles, and not by motor vehicle dealers as it is in other states.3 A motor vehicle purchased by a Virginia resident from a North Carolina motor vehicle dealer, for example, is subject to the North Carolina sales and use tax because that tax is imposed and collected by motor vehicle dealers at the time the vehicle is sold.4 North Carolina Gen. Stat. § 105-164.4 (1985). In contrast, a motor vehicle purchased in Virginia by a North Carolina resident normally will not be subject to the Virginia motor vehicle sales and use tax because the vehicle will be titled in North Carolina and not in Virginia.

III. Conclusion: Increased Motor Vehicle Sales and Use Tax Rate Applies

As discussed above, the Virginia motor vehicle sales and use tax is actually imposed at the time the motor vehicle is titled. It is my opinion, therefore, that the tax should be imposed at the rate in effect at that time, and not at the rate in effect when the vehicle was actually purchased.

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1Section 58.1-600 et seq.
2Although it is denominated a sales and use tax in the Code, the motor vehicle sales and use tax is commonly referred to as the "titling tax" in Virginia.
3The motor vehicle sales and use tax in North Carolina, like the retail sales and use tax both in North Carolina and Virginia, is actually a license or business privilege tax on the seller. See N.C. Gen. Stat. § 105-164.4 (1985) and Va. Code § 58.1-603. In contrast, the Virginia motor vehicle sales and use tax is clearly a tax on the purchaser or user, not on the seller.
4When the Virginia resident titles the motor vehicle in Virginia, a credit will be given on the Virginia sales and use tax for the amount of the tax paid in the state in which the vehicle was purchased. Section 58.1-2424.

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UNEMPLOYMENT COMPENSATION - DEFINITIONS. INDIVIDUAL WHO CONTRACTS WITH LOCAL DEPARTMENT OF SOCIAL SERVICES TO PROVIDE COMPANION SERVICES TO ELIGIBLE COUNTY RESIDENTS NOT "EMPLOYEE" OF THAT DEPARTMENT.

April 2, 1987

Mr. Bruce D. Jones, Jr.
County Attorney for Accomack County
You ask whether certain individuals providing companion services\(^1\) to eligible county residents must be considered employees of the Accomack County Department of Social Services (the "department"). You state that the department has for years provided companion services to county residents whose circumstances warrant it and does so by contracting with individuals rather than employing persons on a full-time or part-time basis. The department does not provide these contractors with the same level of compensation or fringe benefits received by its regular employees.

I. Determination of Employer-Employee Relationship

Is Question of Supervision and Control

In deciding whether an employer-employee relationship exists, "the power of control is the determining factor in ascertaining the parties' status." Va. Emp. Comm. v. A.I.M. Corp., 225 Va. 338, 347, 302 S.E.2d 534, 539 (1983). In a contractual relationship, only where the principal has the authority under the contract to supervise the contractor's day-to-day operations and to control the detailed physical performance of the contractor, can it be said that an employer-employee relationship exists. Wood v. Standard Products Co., Inc., 671 F.2d 825, 829-30 (4th Cir. 1982); Richmond Newspapers v. Gill, 224 Va. 92, 98, 294 S.E.2d 840, 843 (1982).

II. Social Security Administration Concludes Department Is Not Employer

In 1976, the Social Security Administration of the United States Department of Health, Education, and Welfare examined the same question you present for purposes of determining coverage under the Social Security Act. The Social Security Administration concluded\(^2\) that "the degree of control exercised by the [local] welfare departments is not sufficient to find them to be the common-law employer of the worker."\(^3\)


III. Conclusion: Provider of Companion Services Not "Employee" of Department

I am aware of no changes in the contractual arrangements utilized by the local departments of social services or of any changes to the Social Security Act which would affect the prior determination by the Social Security Administration. It is my opinion, therefore, that an individual who contracts with the department to provide companion services to eligible recipients is not an "employee" of that department.

\(^1\)Companion services include assistance with personal hygiene, cooking, cleaning, household shopping, and general supervision. VII Department of Social Services, Manual of Policy and Procedures for Local Welfare Departments § IV, Ch. B, at 1-2 (July 1985).


\(^3\)The Social Security Administration noted that the department requires the companion provider to make periodic reports, but that such control was merely for fiscal purposes. Id.

\(^4\)See also § 60.2-219(20) of the Code of Virginia, which provides that the term "employment," for purposes of unemployment compensation, shall not include the services provided by companions pursuant to an agreement with a public human services agency.

WATERS OF THE STATE, PORTS AND HARBORS - WATERCOURSES GENERALLY. MARINE RESOURCES COMMISSION. AUTHORITY TO ASSESS ROYALTIES FOR
ENCROACHMENT ON STATE-OWNED SUBMERGED LAND; ROYALTIES ASSESSED ON ANNUAL BASIS.

August 15, 1986

Mr. William A. Pruitt
Commissioner, Marine Resources Commission

You ask two questions concerning the authority of the Marine Resources Commission (the "Commission") to assess royalties pursuant to § 62.1-3 of the Code of Virginia. You first ask whether the current language of § 62.1-3 authorizes the Commission to assess royalties when issuing permits for encroachment upon State-owned submerged land. Secondly, you ask whether the statutory authority to assess royalties granted in § 62.1-3 enables the Commission to assess an annual fee in perpetuity in lieu of a one-time payment.

I. Applicable Statute

Section 62.1-3 provides, in part, as follows:

It shall be unlawful... for anyone to build, dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean... which are the property of the Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission...

The Marine Resources Commission shall have the authority to issue permits for... reasonable uses of state-owned bottomlands, including but not limited to, the taking and use of material, the placement of wharves, bulkheads, dredging and fill, by owners of riparian lands, in the waters opposite such riparian lands, provided that such wharves, bulkheads and fill shall not extend beyond any lawfully established bulkhead line.

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The permits issued by the Marine Resources Commission shall be in writing and shall specify such conditions, terms and royalties as the Marine Resources Commission deems appropriate. [Emphasis added.]

II. Commission Authorized to Assess Royalties

Section 62.1-3 explicitly authorizes the Commission to assess such royalties as it deems appropriate for encroachments on State-owned bottomlands, provided the encroachments are not among the statutory exceptions. The only issue raised by such assessments, then, is whether the statute itself involves a constitutional delegation of legislative power.

III. Legislative Delegation of Authority to Assess Royalties Is Constitutional

"Every act of the legislature is to be presumed to be constitutional..." Waterman's Assoc. v. Seafood Inc., 227 Va. 101, 110, 314 S.E.2d 159, 164 (1984), citing Bosang v. Iron Belt Building & Loan Ass'n, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). Although it is the function of the legislature to determine and declare what the law should be,

[this does not mean, however, that no discretion can be left to administrative officers in administering the law. Government could not be efficiently carried on if something could not be left to the judgment and discretion of administrative officers to accomplish in detail what is authorized or required by law in general terms.

[Emphasis added.]
Thompson v. Smith, 155 Va. 367, 379, 154 S.E. 579, 584 (1930). It therefore is necessary for administrative agencies, like the Commission, to have some discretion in enforcing the law in order to protect the best interests of the Commonwealth. Accordingly, it is my opinion that the legislative delegation of authority to the Commission authorizing it to assess appropriate royalties is constitutional.

IV. Commission May Require Annual Royalty Payments in Lieu of One-Time Assessments

Nothing in § 62.1-3 specifies the manner in which royalties are to be paid. A royalty is defined as "a share of the product or profit reserved by the owner for permitting another to use the property." Greene v. Carter Oil Company, 152 So.2d 611, 616 (La. App. 1963), citing 58 C.J.S. Mines and Minerals § 213 (1948). In the present case, the royalty represents the value of the use foregone by the public in a common resource. See § 62.1-1. There is no requirement that royalty payments be made in lump sum; in fact, royalties for the use of natural resources are customarily paid periodically over the time of use. See, generally, Coal Co. v. Alderson, 125 W.Va. 747, 26 S.E.2d 226 (1943).

V. Conclusion: Commission May Assess Royalties as Annual Payments

Based on the above, it is my opinion that § 62.1-3 authorizes the Commission to assess royalties for encroachment on State-owned submerged land and to collect those royalties as annual payments.

The Honorable Robert M. Yacobi
Chief Judge, Seventh Judicial District

You ask whether a director of a local department of welfare/social services may file a grievance under the State grievance procedure where that local department has been accepted into the grievance procedure of the locality and where that procedure excludes the director from being eligible to file a grievance.

I. Applicable Statutes and Regulations

Section 2.1-114.5:1(C) of the Code of Virginia deals with grievance procedures and provides, in part, as follows:

Employees of local welfare departments and local welfare boards shall be included within the coverage of the state grievance procedure; however, these employees may be accepted in a local governing body's grievance procedure at the discretion of the governing body of the county, city or town but shall be excluded from such a locality's personnel system.

Section 63.1-25 describes the general rule-making authority of the State Board of Social Services (the "Board") and provides, in part, as follows:

The State Board shall make such rules and regulations, not in conflict with this title, as may be necessary or desirable to carry out the true purpose and intent of this title.
Section 63.1-26 gives the Board the authority to establish entrance and performance standards and other necessary rules and regulations for State and local personnel within the social service system and provides:

The Board shall establish minimum entrance and performance standards for the personnel employed by the Commissioner [of Social Services], local boards and local superintendents in the administration of the succeeding chapters of this title and make necessary rules and regulations to maintain such entrance and performance standards, including such rules and regulations as may be embraced in the development of a system of personnel administration meeting requirements of the federal Department of Health [and Human Services] under appropriate federal legislation relating to programs administered by the Board; provided, however, the grievance procedure promulgated by the Governor under § 2.1-114 shall apply to the personnel employed by the Commissioner and personnel employed by local boards and local superintendents, unless the local governing body elects to include employees of local welfare departments and local welfare boards under the grievance procedure adopted pursuant to § 15.1-7.1.

Volume 1A of the Local Personnel Administrative Manual for the Virginia Department of Social Services contains regulations adopted by the Board for personnel of local departments of welfare/social services. Chapter D(3)(b)(2) of Vol. 1A covers grievance procedures for these personnel and states:

In this regard, Local Superintendents/Directors are considered local welfare employees, and as such shall have access either to the locality's grievance procedure or to the State's Grievance Procedure pursuant to Section 2.1-114.5:1 .... Consequently the local jurisdiction has the option of maintaining the exclusion of the Social Services Superintendent/Director from the application of its local grievance procedure, however, in the event of a grievance by the Superintendent/Director, such grievance must be handled under the State Grievance Procedure.1

II. Board's Regulations Have Force and Effect of Law

Pursuant to its rule-making authority in §§ 63.1-25 and 63.1-26, the Board has adopted a regulation which provides that a director of a local department of welfare/social services must be allowed to initiate a grievance under the State grievance procedure if precluded from doing so under a locality's grievance procedure. Because this regulation was properly promulgated by the Board, it has the force and effect of law.2 See Carbaugh v. Solem, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983).

III. Conclusion: Local Director May File Grievance Under State Procedure

Accordingly, I am of the opinion that a director of a local department of welfare/social services may file a grievance under the State grievance procedure where that local department has been accepted into the grievance procedure of the locality but where the director has been excluded from that local grievance procedure.

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1This was one of a large number of personnel policies and regulations which were adopted by the Board at its November 1982 meeting and which became effective on January 1, 1983.

2Section 2.1-114.5:6(7) empowers the Director of the Department of Employee Relations Counselors to make and disseminate interpretations regarding the State's grievance procedure. No interpretation, however, has been rendered which addresses the issue raised in your request.
September 26, 1986

Mr. William L. Lukhard
Commissioner, Department of Social Services

You ask whether the 1986 amendment to § 20-60.5(C) of the Code of Virginia affects the conclusions reached in my April 14, 1986 Opinion to the Honorable Von L. Piersall, Jr., Judge, Third Judicial District, 1985-1986 Report of the Attorney General at 147. That Opinion held that, under § 20-60.5(C), a payee was required to execute an assignment of support rights before he or she could receive support payments collected by the Department of Social Services (the "Department") pursuant to a court order. The Opinion also held that a payee must apply for support enforcement services and pay any required fee before the Department is authorized to disburse court-ordered payments.

I. Either Assignment of Support Rights or Authorization to Seek or Enforce Support Obligation Now Required

Effective July 1, 1986, an amendment to § 20-60.5(C) renders part of the advice given in my April 1986 Opinion to Judge Piersall obsolete. See Ch. 594, 1986 Va. Acts 1472, 1473. The amended section now requires that

> the Department ... shall promptly pay to the payee all support payments collected by it which have been ordered by a court to be paid to or through the Department to the payee and for which the Department has an assignment of rights or has been given an authorization to seek or enforce a support obligation, as those terms are defined in § 63.1-250. [Emphasis added.]

The plain language of the amendment requires the Department to accept either an assignment of rights or an authorization to seek or enforce a support obligation before it disburses payments to the payee. Thus, it is my opinion that an assignment of rights is no longer required in every case before a payee may receive court-ordered child support payments which have been collected by the Department.

II. Application for Services and Payment of Fees Still Required

There were no amendments to § 63.1-250.2 which require modification of the holding in the April 1986 Opinion to Judge Piersall that an application for services and payment of the established fee is required from the payee before the Department may disburse court-ordered payments or provide other authorized support enforcement services.

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1Section 63.1-250(12) defines an "[a]ssignment of rights" as "the legal procedure whereby an individual assigns support rights to the Commonwealth on behalf of a dependent child or spouse and dependent child."

2Section 63.1-250(16) defines "[a]uthorization to seek or enforce a support obligation" as "a sworn, written authorization to the Commonwealth to seek or enforce support on behalf of a dependent child or a spouse and a dependent child."
You ask whether a surviving spouse's entitlement to the family allowance, exempt property and homestead allowance under §§ 64.1-151.1, 64.1-151.2 and 64.1-151.3 of the Code of Virginia depends upon there being minor children of the decedent whom the decedent was obligated to support.

I. Legislative History and Rules of Statutory Construction

Enacted in 1981, these statutes were designed to respond to the immediate economic needs of the surviving spouse and minor children of a deceased Virginia domiciliary. Chapter 580, 1981 Va. Acts 897, repealed §§ 64.1-126 and 64.1-127, which were intended for a more agricultural society, and thus often inadequately provided for a non-agricultural family's basic needs for food, shelter and clothing. The three allowances now in question are patterned after provisions in the Uniform Probate Code ("U.P.C."). The commentary accompanying these provisions in the U.P.C. specifically explains that all of these allowances pass to the spouse. See U.P.C. §§ 2-401 through 2-404 (1983).

The starting point on a question of statutory interpretation is the language of the statute itself. Where the language is clear and unambiguous, the statute should be enforced as written. See Anderson v. Commonwealth, 182 Va. 560, 29 S.E.2d 838 (1944); Shackelford v. Shackelford, 181 Va. 869, 27 S.E.2d 354 (1943). A brief review of each of the provisions in question demonstrates the intent of the General Assembly to protect a decedent's dependents, including a spouse without minor children.

II. Family Allowance

Section 64.1-151.1 states that "[u]pon the death of a domiciliary of this State, the surviving spouse and minor children whom the decedent was obligated to support are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration [of the estate]." Section 64.1-151.4 provides that the administrator may disburse funds of up to six thousand dollars or petition the circuit court for a larger sum. It is important to your inquiry that § 64.1-151.1 specifically notes that if there are minor children not living with the surviving spouse, the family allowance may be made "partially to the spouse and partially to the person having the child's care and custody as their needs may appear." The statute does not indicate that this allowance is unavailable to the surviving spouse in the event that he or she does not care for minor children or that minor children do not exist. Clearly, this indicates that the General Assembly intended to protect the surviving spouse, regardless of the existence of minor children.

III. Exempt Property

Designed to ensure that a surviving dependent has a minimum quantity of household furniture and personal effects, § 64.1-151.2 provides, in part, that

the surviving spouse of a decedent who was domiciled in this State is entitled from the estate to value not exceeding three thousand five hundred dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the minor children of the decedent are entitled in equal shares to the same value.

The statute specifically states that the surviving spouse is entitled to this exemption. Again, there is no requirement in the statute that minor children exist, nor any provision for a different outcome if they do not exist. The final clause quoted reempha-
sizes that this exemption belongs to the surviving spouse by providing that it would go to
the minor children in the event there is no surviving spouse.

IV. Homestead Allowance

The surviving spouse of a decedent also is entitled to a homestead allowance of five
thousand dollars. Section 64.1-151.3 provides, similarly to § 64.1-151.2, that if there is
no surviving spouse, each minor child is entitled to an equal share of the five thousand
dollar value. This allowance is in lieu of any share passing to the surviving spouse or
minor children by the will of a decedent or by intestate succession. Section 64.1-151.4
describes how the surviving spouse, guardian of the minor children or a personal repre-
sentative may select the homestead allowance and exempt property, and how the per-
sonal representative may execute a deed of distribution to establish the ownership of the
homestead allowance or exempt property. Again, the statute specifically confers the
homestead allowance on the surviving spouse; it does not describe any alteration of this
right in the absence of minor children.

V. Exemption Statutes to be Construed Liberally

To deny a surviving spouse these exemptions simply because there are no minor
children in the family would work an unfair hardship on a decedent's surviving dependent.
Exemption statutes are to be construed liberally in favor of debtors and strictly against
creditors. See Home Owners' Loan Corp. v. Reese, 170 Va. 275, 196 S.E. 625 (1938); Brown

VI. Conclusion: Surviving Spouse Not Required to Have Minor
Children in Order to Benefit from Allowance and Benefits

Given the express language of §§ 64.1-151.1, 64.1-151.2 and 64.1-151.3 and the gen-
eral rule of construction which favors a liberal interpretation of exemption statutes, I am
of the opinion that a surviving spouse is not required to have minor children in order to
benefit from the allowances and exemptions established under these provisions.

"Section 64.1-126 provided that any livestock and dead victuals shall remain available
to the decedent family. Section 64.1-127 provided that upon the death of a "house-
holder", any of his property exempt under §§ 34-26 and 34-27 would vest in the surviving
spouse or minor children. This "piggyback statute" extended to the surviving dependents
the debtor's exemption from levy by creditors of a limited amount of household goods,
clothes and farm tools. The exemptions under Title 34 exist to protect a spouse without

"See J. Johnson, Wills, Trusts, and Estates, 68 Va. L. Rev. 521 (1982); J. Johnson, Sup-
port of the Surviving Spouse and Minor Children in Virginia: Proposed Legislation v.

WORKERS' COMPENSATION - OCCUPATIONAL DISEASES. FIRE FIGHTERS AND
LAW ENFORCEMENT OFFICERS ENUMERATED IN § 65.1-47.1 ENTITLED TO REBUT-
TABLE PRESUMPTION OF OCCUPATIONAL DISEASE.

November 21, 1986

The Honorable Clifton A. Woodrum
Member, House of Delegates

You asked whether a heart attack would be presumed to be a "bodily injury" pursu-
ant to § 65.1-47.1 of the Code of Virginia.
I. Occupational Disease Presumption

Section 65.1-47.1 provides, in relevant part:

The death of, or any condition or impairment of health of, salaried or volunteer fire fighters... or of any member of the State Police Officers Retirement System, or 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 [Workers' Compensation] Act unless the contrary be shown by a preponderance of competent evidence....

Section 65.1-7 further provides that "[u]nless the context otherwise requires, 'injury' and 'personal injury' mean only injury by accident, or occupational disease...." Consequently, an occupational disease is considered an "injury" for the limited purposes of the Workers' Compensation Act (the "Act"). The statute, however, does not define the term "bodily injury"; that term therefore does not have any particular legal significance under the Act or judicial interpretation of the Act.

II. Conclusion

Since the term "bodily injury" has no particular legal significance under the Act, the presumption set forth in § 65.1-47.1 likewise has no specific application to that term. In view of the specific language of § 65.1-47.1, however, it is my opinion that the fire fighters and law enforcement officers enumerated in that section who suffer a total or partial disability as a result of hypertension or heart disease would be entitled to a rebuttable presumption that they have an "occupational disease" and, unless the context otherwise requires, that disease would be considered an "injury" or "personal injury" under § 65.1-7.

ZONING - COUNTIES, CITIES AND TOWNS - PLANNING, SUBDIVISION OF LAND AND ZONING - MOBILE HOMES. LOCAL GOVERNING BODY MAY RESTRICT LOCATION OF MOBILE HOMES TO MOBILE HOME PARKS.

October 30, 1986

Mr. Michael T. Soberick
County Attorney for Gloucester County

You request my opinion concerning the legality and constitutionality of a proposed amendment to the Gloucester County zoning ordinance which, if adopted, would restrict mobile homes in the county to mobile home parks only.

I. Facts

At the present time, mobile homes are a permitted use in Gloucester County in both rural zones and mobile home parks. The proposed ordinance would delete mobile homes as a permitted use in rural zones, leaving them as a permitted use only in mobile home parks. The reasons you present for the county adopting the proposed ordinance include problems related to high density development, the unfavorable effect of mobile homes on conventional residential and other development, less stable occupancy of mobile homes, the effect of mobile homes on property values, the need for municipal services mobile homes generate, and the inadequate tax revenues from such homes.

II. Recent Relevant Opinions

Several recent Opinions of this Office have addressed the scope of a locality's
power to regulate mobile homes. See Opinions found in the 1985-1986 Report of the Attorney General at 343 (a county may not, in its zoning restrictions, distinguish between single-wide and double-wide mobile homes solely on the basis of aesthetic considerations or on the basis that one type of mobile home is more easily transportable than the other because they are transported in the same manner); and at 90 (§ 15.1-489(6) of the Code of Virginia authorizes a county to impose minimum lot sizes for mobile homes, mobile home parks and campgrounds, provided such regulations are a reasonable exercise of the zoning powers delegated to the county). See also Opinion to the Honorable A. L. Philpott, Speaker, House of Delegates, found in the 1985-1986 Report of the Attorney General at 345, in which I stated:

As a general rule, courts have recognized that mobile homes are subject to specific regulation under a locality's zoning powers. In distinguishing between mobile homes and site-built housing, courts have recognized certain special characteristics of mobile homes, including their mobility, special requirements concerning utility connections and inspection, physical deterioration, impact of their placement on the surrounding area, and aesthetic considerations. On the other hand, zoning provisions which operate to exclude mobile homes totally from a locality have been held to be unreasonable exercises of the police power. See Annot. 17 A.L.R.4th 106 (1982); Annot. 42 A.L.R.3d 598 (1972); Annot. 96 A.L.R.2d 232 (1964); 54 Am. Jur. 2d Mobile Homes, Trailer Parks, and Tourist Camps §§13, 14 (1971); 101A J.S. Zoning & Land Planning § 62 (1979).

Your inquiry, although closely related to the issues addressed by the above Opinions, presents the question of a locality's authority under its zoning power to limit mobile homes to mobile home parks.

III. Restrictions on Location of Mobile Homes to Mobile Home Parks Upheld in Majority of Jurisdictions

Prior Opinions of this Office have consistently held that mobile homes are subject to specific zoning restrictions under a locality's zoning power. See Reports of the Attorney General: 1986-1987, supra; 1985-1986, supra. The standards governing the validity of zoning ordinances are discussed in detail in the 1985-1986 Report of the Attorney General, supra, at 345. Such ordinances are presumptively valid and will be upheld if the question of their reasonableness is fairly debatable. See City of Manassas v. Rosson, 224 Va. 12, 294 S.E.2d 799 (1982), cert. denied, 459 U.S. 1166 (1983).

The legality and constitutionality of local restrictions on the location of mobile homes to mobile home parks is the subject of a detailed annotation entitled "Validity of Zoning or Building Regulations Restricting Mobile Homes or Trailers to Established Mobile Home or Trailer Parks," found in 17 A.L.R.4th 106 (1982). Although the decisions are not uniform, the courts in a majority of jurisdictions have upheld such restrictions against challenges to the reasonableness of the restrictions and allegations that the restrictions amount to exclusionary zoning. See also E. Yokley, 6 Zoning Law and Practice § 35-76 (4th ed. 1980); R. Anderson, 2 American Law of Zoning 2d § 14.08 (1976).

IV. Conclusion: Restrictions Valid on Facts Presented

You suggest a number of justifications supporting the proposed restrictions. The justifications you list appear to be consistent with the factors accepted by the courts in the majority of jurisdictions as distinguishing mobile homes from site-built housing. See 1985-1986 Report of the Attorney General, supra, at 345. It is my opinion, therefore, that the county may adopt zoning regulations which restrict the location of mobile homes to mobile home parks. Such regulations will be accorded a presumption of validity that can be overcome only by a showing that the regulations are not reasonably related to the county's police power interests or constitute exclusionary zoning.
Valid planning and zoning legislation necessarily prohibits certain types of land use in particular areas. By contrast, "exclusionary zoning" legislation has as its real purpose or actual result not the promotion of the health, safety or general welfare of the community, but the segregation of persons of certain economic levels by limiting their influx into the community, and is therefore invalid. See Fairfax County v. DeGroff, 214 Va. 235, 198 S.E.2d 600 (1973); Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959); Reports of the Attorney General: 1985-1986, supra, at 345; 1981-1982 at 461(2); 1975-1976 at 437. See also Annot. 48 A.L.R.3d 1210 (1973).

I note that there have been two recent legislative attempts to narrow the authority of local governing bodies to restrict the placement of mobile homes. See S.B. No. 5, 1986 Reg. Sess. of the General Assembly, and H.B. No. 1676, 1985 Reg. Sess. These bills grew out of the Report of the Joint Subcommittee Studying Manufactured Housing, H. Doc. No. 22, 1985 Reg. Sess. The report acknowledges "that many of the local governments in Virginia, through their land use policies, have made it difficult for citizens in many localities to avail themselves of housing by means of the purchase of a mobile home." Id. at 4. The subcommittee also acknowledges its "aware[ness] of reactions of neighboring property owners to the siting of mobile homes, of the tenor of public opinion which a local governing body may face, and of the governing body's desire to retain a housing balance in its jurisdiction." Id. Nevertheless, the subcommittee "finds that the practical exclusion of mobile homes in some cases is contrary to state policy and the interest of the Commonwealth in providing safe and affordable housing to all citizens." Id. Had the legislation passed, the subcommittee would have achieved its objective "to require that no more restrictive conditions be placed on the siting of newer [those built since 1976] mobile homes in rural, undeveloped areas than is imposed on a site-built home." Id. at 5.

ZONING. ORDINANCES. "STATEMENT OF INTENT" PRECEDING REGULATORY PROVISIONS OF ORDINANCE DOES NOT ESTABLISH CONDITION PRECEDENT TO ESTABLISHMENT OF USE EXPRESSLY PERMITTED UNDER PROVISIONS. IF REGULATORY PROVISIONS AMBIGUOUS, STATEMENT OF INTENT MAY BE USED AS AID IN CONSTRUCTION.

March 20, 1987

The Honorable Robert S. Bloxom
Member, House of Delegates

You ask whether the language of a preamble to an article of a town zoning ordinance is a proper basis for an appeal to the local board of zoning appeals (the "board").

I. Facts

A group of citizens has protested the noise and dust resulting from the transshipment of gravel from barge to dock to trucks taking place in a small area of the Town of Onancock zoned as "Industrial-Limited, District M-1" (the "District"). The citizens believe the transshipment activity violates certain sections of the town's zoning ordinance and are demanding the protections they believe are specifically set forth for property owners in the ordinance.

The transshipment of gravel operation began after the adoption of the zoning ordinance. The activity is a permitted use in the District. The adjacent residents intend to request the board to grant relief basing their appeal on the language of the "Statement of Intent" preceding the regulatory provisions of Article 4 of the zoning ordinance. The town attorney, however, has expressed his opinion that the Statement of Intent could not serve as a basis for such an appeal to the board.

II. Applicable Provisions of Town's Zoning Ordinance

The Statement of Intent to the portion of the zoning ordinance describing the Dis-
The primary purpose of this district is to permit certain industries, which do not in any way detract from residential desirability, to locate in any area adjacent to residential uses. The limitation on or provisions relating to:

1. Height of building, horsepower, heating, flammable liquids or explosives,
2. Controlling omission [sic] of fumes, odors and/or noise,
3. Landscaping,
4. And the number of persons employed, are to be imposed to protect and foster adjacent residential desirability while permitting industries to locate near a labor supply.

Section 4-1-13, a portion of the ordinance's regulatory provisions, sets out as a permitted use: "Draying, freighting or trucking yards or terminals."

Section 7-2-3, a portion of the ordinance dealing with the powers of the board, authorizes the board to reverse, affirm or modify determinations made by the zoning officials of the town.

III. Attorney General Does Not Render Opinions Interpreting Local Ordinances

This Office has long followed a policy of responding to official Opinion requests only when such requests concern an interpretation of federal or State law, rule or regulation. In instances when a request requires an interpretation of a local ordinance, this Office has declined to respond so as to avoid becoming involved in matters solely of local concern and over which the local governing body has control. Any ambiguity which exists in a local ordinance is a problem which can and should be rectified by the local governing body rather than by an interpretation by this Office. See Reports of the Attorney General: 1981-1982 at 471; 1977-1978 at 31; 1976-1977 at 17. Accordingly, I have limited my comments to the effect of a preamble to an article of a zoning ordinance on an interpretation of the ordinance's regulatory provisions. I have not attempted to resolve any ambiguity which may exist in the specific language of the town's zoning ordinance.

IV. Appeals to Boards of Zoning Appeals Must Be Pursuant to Statutory Procedure

The Supreme Court of Virginia has held that a board of zoning appeals has jurisdiction over various matters only as is expressly authorized by statute. See Fairfax Zoning Board v. Cedar Knoll, 217 Va. 740, 232 S.E.2d 767 (1977); Lake George Corp. v. Standing, 211 Va. 733, 180 S.E.2d 522 (1971). You have provided no facts outlining the procedure by which the citizens' group's "appeal" is to be transmitted to the board. See generally Reports of the Attorney General: 1982-1983 at 775; 1974-1975 at 26, 600 (Opinions concerning procedures of boards of zoning appeals). I express no opinion, therefore, as to the procedure by which the citizens' group's appeal is to be transmitted to the board.

V. Language of Preambles Does Not Establish Condition Precedent to Establishment of Use Expressly Permitted by Regulatory Provisions

Preambles are a common device used in zoning ordinances as a "guide to construction by including a fuller articulation of the legislative purpose than is convenient in the regulatory sections of the ordinance." R. Anderson, American Law of Zoning § 18.11 (3d ed. 1986). Courts have generally held that the language of a preamble does not establish a condition precedent to the establishment of a use expressly permitted under the regulatory provisions of the ordinance. See, e.g., East Bayside Homeowners v. Board of Standards, 77 A.D.2d 858, 430 N.Y.S.2d 676 (1980), appeal denied, 438 N.Y.S.2d 1025 (1981) (language of preamble does not establish condition precedent for granting a building permit for school in residential district when schools permitted as of right under operative provisions of ordinance); Clarke v. County Commissioners for Carroll Cty., 270 Md. 343, 311 A.2d 417 (1973) (preamble of article establishing agricultural district held not to prohibit residential development when residential use expressly permitted in district); Dillow v. City of Peoria, 49 Ill.2d 314, 274 N.E.2d 96 (1971) (language in preamble concerning low density residential area does not limit construction of two-family
dwellings when such dwellings permitted as of right in district). These decisions are consistent with the general rule that a preamble may be used as an aid in interpreting an ordinance if the meaning of the ordinance is doubtful but, to the extent the preamble is inconsistent with the language of an ordinance, the operative provisions will control. See R. Anderson, supra; 6 McQuillin, Municipal Corporations, § 20.59 (3d ed. 1980). Compare Wiley v. Hanover County, 209 Va. 153, 163 S.E.2d 160 (1968) ("Statement of Intent" preceding regulatory provisions of zoning ordinance quoted but not expressly considered in interpretation of the regulatory provisions of the ordinance).

VI. Conclusion

Based on the above, it is my opinion that the language of a "Statement of Intent" preceding the regulatory provisions of a zoning ordinance does not establish a condition precedent to the establishment of a use expressly permitted under the regulatory provisions of the ordinance. In the event the regulatory provisions are ambiguous, however, the "Statement of Intent" may be referred to as an aid in interpreting the legislative intent underlying the ambiguous provisions.
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