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

from January 1, 1989 to December 31, 1989

Commonwealth of Virginia
Office of the Attorney General
Richmond
1989
THE 1989 REPORT OF THE ATTORNEY GENERAL

was prepared by

BARBARA H. SCOTT

with editorial assistance by

JANE A. PERKINS

and

JANICE M. SIGLER
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*The complete listing of all cases handled by this Office is not reprinted in this Report. Selected cases pending and/or decided by the Supreme Court of the United States and the Supreme Court of Virginia are included, as required by Va. Code Ann. § 2.1-128 (Supp. 1989).*

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

***The Name Index is an alphabetical listing of individuals to whom Opinions in this Report are rendered. This index will be helpful in locating prior Opinions referred to in this Report within the time period January 1, 1989 to December 31, 1989. Opinions begin on the page on which the headnote first appears.*
LETTER OF TRANSMITTAL

January 15, 1990

The Honorable L. Douglas Wilder
Governor of Virginia
State Capitol
Richmond, Virginia 23219

My dear Governor Wilder:

As the chief executive officer of the Commonwealth's Department of Law, the Attorney General is charged by the Constitution of Virginia and the Code of Virginia with providing legal representation to hundreds of state officials, agencies and institutions, with rendering official Opinions to various state and local officials interpreting state law, with rendering conflict of interests advisory opinions pursuant to the State and Local Government Conflict of Interests Act and the General Assembly Conflict of Interests Act, and with a variety of other legal duties.

This Report covers the period from January 1, 1989 through December 31, 1989, and includes all 167 official Opinions rendered by the Attorney General to state and local government officials pursuant to § 2.1-118 of the Code during that period.

During the period covered by this Report, the Office of the Attorney General has provided representation in more than 23,400 court cases and administrative proceedings involving practically every aspect of state government. Attorneys in the Office have conducted seminars across the Commonwealth at the request of state and local government organizations, as well as bar associations, on the Freedom of Information Act, the Procurement Act, and other topics of statewide concern.

It is through the qualified men and women employed in the Office of the Attorney General that this Office maintains its prominent role in the conduct of the Commonwealth's business. The constitutional and statutory mandates of the Attorney General are met largely due to the dedication and ability of these employees.

With kindest regards, I am

Sincerely,

Mary Sue Terry
Attorney General
## Personnel of the Office

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<td>Michael G. Ellison</td>
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<tr>
<td>James W. Mitchell</td>
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<td>Myrna R. Dabney</td>
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<tr>
<td>Alice L. Headley</td>
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<tr>
<td>Claudine M. Conwell</td>
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<tr>
<td>Marian W. Schuttrumpf</td>
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<tr>
<td>Karen L. Murray</td>
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<td>Sheila B. Overton</td>
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<td>Janice S. White</td>
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<td>Mary Lee Baker</td>
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<td>Ellen E. Anderson</td>
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<tr>
<td>John J. Richardson II</td>
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ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 1989

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. Boeock .................................................. 1852-1857
John Randolph Tucker ........................................... 1857-1865
Thomas Russell Bowden ......................................... 1865-1869
Charles Whittlesey (military appointee) ..................... 1869-1870
James C. Taylor .................................................. 1870-1874
Raleigh T. Daniel ................................................ 1874-1877
James G. Field .................................................... 1877-1882
Frank S. Blair ..................................................... 1882-1886
Rufus A. Ayers .................................................... 1886-1890
R. Taylor Scott ................................................... 1890-1897
R. Carter Scott ................................................... 1897-1898
A.J. Montague ...................................................... 1898-1902
William A. Anderson ............................................. 1902-1910
Samuel W. Williams .............................................. 1910-1914
John Garland Pollard .......................................... 1914-1918

1 J.D. Hank Jr. .................................................... 1918-1918

2 Abram P. Staples ............................................... 1934-1947

1 Hon. J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.

2 Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. John R. Saunders and served until October 6, 1947.
3. Harvey B. Apperson ............................................. 1947-1948

4. J. Lindsay Almond Jr. ........................................ 1948-1957

5. Kenneth C. Patty ............................................. 1957-1958


10. Anthony F. Troy .............................................. 1977-1978


14. Mary Sue Terry .............................................. 1986-

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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.

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


8 Hon. William G. Broaddus was appointed Attorney General on July 1, 1985, to fill the unexpired term of Hon. Gerald L. Baliles upon his resignation on June 30, 1985, and served until January 10, 1986.
CASES DECIDED IN THE SUPREME COURT OF VIRGINIA


Buchanan v. Commonwealth. From Cir. Ct. Amherst County. Death penalty based upon multiple murders in same transaction and three of four first-degree murder convictions affirmed.

Burrell v. Commonwealth. From Cir. Ct. City of Richmond. Plaintiff correctional officer sought $40,000 for agency failure to include overtime compensation as part of award following grievance panel decision to reinstate with back pay. Aff'd.

Ciaccio v. Williams. From Cir. Ct. Fairfax County. Appeal by defendant on whether case should have been dismissed by circuit court for failure to satisfy time limits of Va. Sup. Ct. R. 2A:2. Denied.


Commonwealth v. Eades. From Cir. Ct. City of Richmond. Petition for writ of mandamus to direct clerk to issue subpoenas in accordance with law. Dismissed.


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

Cullum v. Faith Mission Home, Inc. From Cir. Ct. Albemarle County. Appeal of ruling that Department of Mental Health, Mental Retardation and Substance Abuse Services cannot regulate group facility for mentally retarded operated by religious organization. *Aff'd.*


Donati v. Warden. From Cir. Ct. Augusta County. Suit by inmate alleging improper assignment to investigative hold and reduction of good conduct credits. *Dismissed.*


Edmonds v. Warden. Orig. juris. habeas corpus. Whether mentally retarded may be executed. *Denied.*


Ford Motor Co. v. Courtesy Motors, Inc. From Cir. Ct. City of Buena Vista. Appeal of Virginia Court of Appeals decision declaring administrative hearing decision rendered by Department of Motor Vehicles void in dealer franchise dispute due to advisory board being improperly constituted. *Rev'd.*

Four Thirty Seven Land Co., Inc. v. King. From Cir. Ct. Loudoun County. Developer contends Transportation Department's refusal to take over certain subdivision roads not meeting expected traffic load was unconstitutional taking. *Appeal denied.*


In re Dixon. From Cir. Ct. Charlotte County. Petition for writ of mandamus to prohibit court from proceeding further in divorce action. Dismissed.

In re Gilliam. From Cir. Ct. Lee County. Inmate's petition for writ of mandamus to command lower court to schedule hearing in domestic case. Dismissed.

In re Holden. From Cir. Ct. Southampton County. Petition for writ of mandamus to command clerk of lower court to provide copies of certain documents. Dismissed.

In re Int'l Union United Mine Workers. From Cir. Ct. Russell County. Petition for writ of prohibition to prohibit court from using counsel of coal company as special commissioners to collect fines imposed against union. Dismissed.

In re Jones. From Cir. Ct. Wise County. Petition for writ of mandamus to have judge enter default judgment in plaintiff's favor. Dismissed.

In re Knopp. From Cir. Ct. Fairfax County. Petition for writ of mandamus to demand court to quash writ of possession previously issued. Dismissed.

In re McKenzie. From Cir. Ct. Hanover County. Petition for writ of mandamus to command judge to vacate support order. Denied.

In re Miller. From Cir. Ct. City of Richmond. Petition for writ of prohibition to prohibit court from trying petitioner for distribution of cocaine, alleging violation of double jeopardy clause. Dismissed.

In re Palmer. From Cir. Ct. Fairfax County. Petition for writ of prohibition to prohibit judge and court from preventing enforcement of judgment entered in plaintiff's favor. Denied.


In re Weidman. From Cir. Ct. Fairfax County. Petition for writ of prohibition to direct judge to dismiss pending divorce action. Dismissed.

In re Wellons. From Cir. Ct. Nottoway County. Petition for writ of mandamus or prohibition commanding judge to enter default judgment in legal claim filed by petitioner. Denied.

In re Young. From Cir. Ct. Halifax County. Petition for writ of mandamus to command judge to permit petitioner to obtain criminal charges against individual. Dismissed.
Johnson v. Commonwealth. From Cir. Ct. City of Richmond. Appeal of dismissal of claim alleging plaintiff was institutionalized for 12 years without having commitment reviewed. Refused.

Konick v. Rothrock. From Cir. Ct. Fairfax County. Petition for writ of prohibition to enjoin judge from conducting retrial of traffic cases in which petitioner was defendant. Withdrawn.


Maxwell v. City of Norfolk. From Cir. Ct. City of Norfolk. Appeal of decision refusing to enjoin City from removing sand spit which grew from its beach and extended in front of plaintiff's property. Writ denied.


Moore v. Gillis. From Cir. Ct. City of Richmond. Action alleging unsafe conditions caused plaintiff to be injured when he was hit by slamming door. Dismissed.

Morrison v. Oast. From Cir. Ct. City of Portsmouth. Petition for writ of mandamus to have judge vacate order appointing special prosecutor. Dismissed.


Robinson v. Ward. From Cir. Ct. City of Staunton. Appeal by contestants of will from trial court order upholding probate of will with VPI as one of beneficiaries. Decision in favor of VPI.


Stokes v. Terry. From Cir. Ct. Powhatan County. Decision that circuit court is without jurisdiction to review interpretation of Department of Personnel and Training rule that hourly state employees are not automatically entitled to permanent state employment.


Wellons v. Early. From Cir. Ct. Nottoway County. Appeal of dismissal of tort claim against correctional officer for injuries received when plaintiff was beaten by fellow inmate. Dismissed.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Alston v. Commonwealth. From Cir. Ct. City of Richmond. Appeal of dismissal of tort claim for injuries received when inmate allegedly struck on back of head by guard.

Cheng v. Commonwealth. From Cir. Ct. Arlington County. Death penalty based upon conviction of capital murder in commission of abduction and/or robbery.


Crowell v. Warden. Orig. juris. Plaintiff's petition for writ of mandamus or prohibition claiming living conditions at correctional center are unconstitutional and denial of necessary psychiatric treatment.


In re Abramson. From Cir. Ct. City of Norfolk. Petition for writ of mandamus to have action returned to court of origin.

In re Jaffe. From Gen. Dist. Ct. Prince Wm. County. Petition for writ of prohibition to prohibit court from acting on order and from further action in arbitration matter.

In re Moorehouse. From Cir. Ct. City of Staunton. Petition for writ of mandamus to command judge to appoint counsel for petitioner.
 Kirby v. Cir. Ct. Chesterfield Co. From Cir. Ct. Chesterfield County. Petition for writ of mandamus to have court appoint counsel for petitioner.


 Sheffield v. Commonwealth. From Cir. Ct. Washington County. Appeal of lower court's decision that sovereign immunity prohibits action in ejectment against Department of Transportation right-of-way acquisition.


 Stevens v. Robinson. From Cir. Ct. Page County. Petition for writ of prohibition to prohibit and restrain judge from pursuing further action in two cases in which plaintiff is party.


 Va. St. Bar v. Gay. From St. Bar Disciplinary Bd. Appeal by attorney whose license to practice law was suspended for three years.


 Zaczek v. Warden. Orig. juris. Petition for writ of *habeas corpus* on grounds of numerous unconstitutional conditions of confinement at correctional center.

CASES IN THE SUPREME COURT OF THE UNITED STATES


Brown v. Johnson. From 4th Cir. Ct. App. Appeal of decision dismissing inmate's complaint that he was assigned cellmate who made threats against him. Pending.


Deel v. Jackson. From 4th Cir. Ct. App. Petition for writ of certiorari on issue of whether Virginia could have transfer of assets rule for AFDC program. Denied.


In re Guinn. From Cir. Ct. Loudoun County. Petition for certiorari for emergency relief to direct circuit court to produce transcript of proceedings, and other relief. Cert. denied.

In re Wessendorf. From Va. Ct. App. Petition for writs of mandamus and/or prohibition to stay proceedings and direct judge to disqualify himself. Cert. denied.


Moore v. City of Richmond. From Cir. Ct. City of Richmond. Appeal of dismissal of pro se action alleging plaintiff was improperly terminated. Cert. denied.


Murray v. Giarratano. From 4th Cir. Ct. App. Decision requiring Virginia to provide attorneys to represent inmates sentenced to death in habeas corpus proceedings. Rev'd.

Richard Anderson Photography v. Radford Univ. From 4th Cir. Ct. App. Petition for writ of certiorari challenging finding that Eleventh Amendment precludes suit for damages pursuant to Copyright Act against state-supported university. Denied.


Stokes v. Murray. From 4th Cir. Ct. App. Whether in forma pauperis status was properly denied. Denied.

Sullivan v. Stroom. From 4th Cir. Ct. App. Petition for writ of certiorari on issue of whether social security child's insurance benefits were "child support payments" within meaning of AFDC statute. Pending.


Members of York County School Board Selection Commission not insured through state's insurance plan for public liability.

July 27, 1989

Mr. William M. Hackworth
County Attorney for York County

You ask whether the York County School Board Selection Commission (the "Commission"), which is appointed by the Circuit Court of York County, is insured through the state's insurance plan for public liability pursuant to § 2.1-526.8(A)(1)(a) of the Code of Virginia.

I. Applicable Statutes

State agencies currently insure their regular employees through a self-insurance plan. Section 2.1-526.8 describes the plan and authorizes liability protection for state employees for "[a]ny 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." Section 2.1-526.8(A)(1)(a).

Members of the Commission are appointed by the Circuit Court of York County pursuant to § 22.1-35, which provides, in part:

In each county to which the provisions of this article are applicable there shall be a school board selection commission composed of three members appointed from the county at large or, upon the request of the county governing body, one member appointed from each election district of such county. Members shall be qualified voters, shall reside in the county and shall not be county or state officers. Members shall be appointed by the circuit court of the county within thirty days after the first day of July, 1950, and every four years thereafter. Any vacancy occurring other than by expiration of term shall be filled by the circuit court within thirty days after the vacancy occurs. Each member shall receive twenty-five dollars for each day actually engaged in the performance of duties as such member, to be paid out of the funds of the school board.

II. Test Used to Determine Whether Commission Member Is State Employee Is Member's Nexus to State

The answer to your inquiry depends on whether members of the Commission are considered state or local employees. If they are state employees, they would be covered by the state's public liability insurance plan. The test developed by both state and federal courts to determine whether a person is a state or local employee in a particular context is whether the employee has a closer nexus to the state or to the locality. Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984). "[W]hen Virginia courts must classify an officer as state or local, they will determine whether the policies, responsibilities, and concerns of the officer bear a closer nexus to the state than to a local government entity." McConnell v. Adams, 829 F.2d 1318, 1327 (4th Cir. 1987).
Although Commission members are appointed by state judges, the statute authorizing their appointment does not also grant the appointing judge the parallel authority to remove the Commission member from office. See 1984-1985 Att'y Gen. Ann. Rep. 273. The member is appointed for the county, rather than for the entire State, and the member's duties and functions involve only the county, particularly the county's school board. The Commission member's compensation is paid from local school board funds. In short, the Commonwealth has no measurable control over the duties, policies, compensation or discharge of Commission members.

III. Commission Is Independent, Not Insured Through State Insurance Plan

The United States District Court for the Western District of Virginia has held that Virginia's school board selection commission "is a completely autonomous body." Peters v. Moses, 613 F. Supp. 1328, 1330 (W.D. Va. 1985). It is my opinion, consistent with this judicial decision, that Commission members are not state employees for purposes of being insured through the state's insurance plan for public liability pursuant to § 2.1-526.8(A)(1)(a).

ADMINISTRATION OF GOVERNMENT GENERALLY: DISABILITIES TO HOLD OFFICE — STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT.

CONSTITUTION OF VIRGINIA: JUDICIARY.

Honorarium may be waived to permit participation by general district court judge in program sponsored by federal agency with payment only of per diem reimbursement for meals, lodging and transportation.

October 24, 1989

The Honorable Marcus D. Williams
Judge, Fairfax County General District Court

You ask whether § 2.1-30 of the Code of Virginia permits you to participate in the American Participant Program (the "Program"), sponsored by the federal United States Information Agency (the "USIA").

I. Facts

You have been asked by the USIA to participate in the Program, which is designed to foster effective discussion on major issues with overseas audiences. Your participation will involve speaking engagements in Africa concerning the American judicial system and the Constitution of the United States. The USIA will pay you an honorarium of $100 per day for any day you participate in Program events, and you estimate that your participation in the Program will continue for two weeks. In addition to the honorarium, the USIA will pay you the United States government per diem rate for the particular city in which you stay to cover meals, lodging, transportation and related expenses.

II. Applicable Statute

Article VI, §§ 1 and 8 of the Constitution of Virginia (1971) vest the judicial power of the Commonwealth in the Supreme Court of Virginia, other state courts of record and courts not of record. A general district court is a court not of record. See § 16.1-69.5(a).

Section 2.1-30 provides:
No person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city, or town thereof. [Emphasis added.]

III. Statute Enacted to Ensure Loyalty and Fidelity to Commonwealth; Honorarium Constitutes Emolument from United States Government

The Supreme Court of Virginia has held that the object sought to be accomplished by former § 2-27, the substantively identical predecessor statute to § 2.1-30,

was, and is, to safeguard and protect the state's independent sovereignty by requiring strict and undivided allegiance to the duties and obligations of a public office by its incumbent. Its justification and the need for its enactment is traceable to and based on the principle that complete and unimpaired loyalty and fidelity are owed by a public officer to his trust and to the sovereign that created the office and made it available to the electee. Recognition of and adherence to the age-old truth are as important today as when the legislation was first adopted.


The question presented by your inquiry, therefore, is whether the honorarium or the per diem to be paid to you by the USIA for your participation in the Program constitutes an "emolument," as that term is used in § 2.1-30. "Emolument" has been construed by this Office as a term broader than salary, and generally defined as any pecuniary gain in addition to reimbursement for expenses. See Op. to Hon. Robert K. Cunningham, H. Del. Mbr. (Jan. 11, 1989); Att'y Gen. Ann. Rep.: 1982-1983 at 236, 237; 1981-1982 at 301, 304 n.9. A prior Opinion of this Office further concludes that the mere reimbursement of actual expenses, without further compensation, does not constitute an emolument of office. See 1961-1962 Att'y Gen. Ann. Rep. 122.

A judge of a general district court, without question, is an "office of honor, profit [and] trust under the Constitution of Virginia." Section 2.1-30. This statute, therefore, clearly prohibits a general district court judge from receiving from the federal government "in any way any emolument whatever."

I am in agreement with the prior Opinions discussed above. It is my opinion, therefore, that the acceptance of the $100-per-day honorarium in the facts you present would constitute the receipt of an emolument from the federal government by a person holding an office of honor, profit or trust under the Constitution of Virginia, in violation of § 2.1-30, and also would operate to vacate your position as a general district court judge in the Commonwealth.

It is further my opinion, however, consistent with these prior Opinions, that acceptance of the per diem you describe as reimbursement for meals, lodging, transportation and related expenses, without further compensation, does not constitute the receipt of an emolument from the federal government.
1989 REPORT OF THE ATTORNEY GENERAL

IV. Honorarium May Be Waived to Permit Program Participation with Payment Only of Per Diem

Even though I conclude that the honorarium in the facts you present constitutes an "emolument," as that term is used in § 2.1-30, a prior Opinion of this Office also concludes that such an emolument may be waived by the state official so that participation in certain federal programs is not precluded. See Op. to Hon. Robert K. Cunningham, supra. Accord 1 A. Howard, Commentaries on the Constitution of Virginia 483 n.35 (1974). Based on the above, it is my opinion that your participation in the Program, including your acceptance of the per diem reimbursement for meals, lodging and transportation, would not violate § 2.1-30 if there is a waiver of the honorarium that normally would be paid for each day of your Program participation.

You also ask whether your participation in the Program violates any provision of the State and Local Government Conflict of Interests Act, §§ 2.1-639.1 to 2.1-639.24 (the "Act"). The only portion of the Act that is implicated by the facts you present is § 2.1-639.6, which prohibits or restricts certain contracts by officers and employees of state governmental agencies. These facts demonstrate that no "personal interest" under the Act exists because none of the required criteria in § 2.1-639.2 is present. Even if a "personal interest" in the contract with the federal agency does exist, however, a prior advisory opinion of this Office concludes that the prohibitions and restrictions of § 2.1-639.6 do not apply to a state officer's or employee's contracts with, or appointments to, federal agencies. See C.O.I. Adv. Op. No. 8-A01 (1988).

ADMINISTRATION OF GOVERNMENT GENERALLY: INVESTMENT OF PUBLIC FUNDS.

PROPERTY AND CONVEYANCES: APPORTIONMENT OF MONEYS; MANAGEMENT OF INSTITUTIONAL FUNDS - UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT.

CORPORATIONS: VIRGINIA NONSTOCK CORPORATION ACT.

FIDUCIARIES GENERALLY: INVESTMENTS.

Foundation established by political subdivision; investment powers and standard of care controlled by Uniform Management of Institutional Funds Act.

November 17, 1989

The Honorable V. Thomas Forehand Jr.
Member, House of Delegates

You ask whether the Chesapeake Hospital Authority Foundation ("CHA Foundation") may invest in any and all legal investments or whether CHA Foundation is restricted in its investment activities by the provisions of Chapter 18 of Title 2.1, §§ 2.1-327 through 2.1-329.1 of the Code of Virginia, concerning the investment of public funds.

I. Facts

The Chesapeake Hospital Authority (the "Authority") is a public body politic and corporate, deemed to be a public instrumentality of the Commonwealth, and exercising public and essential governmental functions. The Authority was created and operates pursuant to Chapter 271, 1966 Va. Acts 442. Chapter 271 was substantially amended in Chapter 396, 1987 Va. Acts 486 (Reg. Sess.) ("Chapter 396"). The Authority is governed
by a board of eleven members appointed by the city council of the City of Chesapeake. See id. § 2, at 487. The Authority has engaged the services of an investment advisor, and questions have arisen concerning the type of investments the Authority and its subsidiaries may make.

CHA Foundation is a Virginia nonstock corporation, organized and operated exclusively to carry out the charitable, educational and scientific purposes of the Authority and such other organizations as may be operated, supervised or controlled by the Authority, as long as these organizations are of the same type described in §§ 501(c)(3) and 509(a)(1)-(2) of the Internal Revenue Code of 1986, as amended (West 1988 & Supp. 1989). See Articles of Incorporation of CHA Foundation Art. II. CHA Foundation was established by the Authority in 1983. CHA Foundation's Articles of Incorporation permit it to do anything that a not-for-profit Virginia nonstock corporation may do. See id.

CHA Foundation has a single class of members and the only member of that class is the Authority. The Authority has the exclusive power to elect CHA Foundation's directors. Members of the Authority's board and staff serve as CHA Foundation's board of directors. Over the years, the Authority has funded CHA Foundation with excess funds received by the Authority from its operations.

II. Applicable Statutes

Section 7.1(3) of Chapter 396 authorizes the Authority to assist in or provide for the creation of stock and nonstock corporations and to purchase, receive, subscribe for and to otherwise acquire a broad range of investment instruments. 1987 Va. Acts, supra, at 488. Section 7.1(10) of Chapter 396 authorizes the Authority to exercise all other powers granted to nonstock corporations pursuant to § 13.1-826, as in effect on January 1, 1987. Id. Section 13.1-826(A)(5) authorizes a Virginia nonstock corporation to purchase, receive, subscribe for, or otherwise acquire a broad range of investment interests.

Section 2.1-328 provides:

The Commonwealth, all public officers, municipal corporations, other political subdivisions and all other public bodies of the Commonwealth may invest any and all moneys belonging to them or within their control other than sinking funds in securities that are legal investments for fiduciaries under the provisions of subdivisions (1), (2), (3), (4), (5) and (24) of § 26-40, but this section shall not apply to retirement funds to be invested pursuant to §§ 51-111.24 through 51-111.24:8.

Section 2.1-329.1 provides:

When investments are made in accordance with this chapter, no treasurer or public depository shall be liable for any loss therefrom in the absence of negligence, malfeasance, misfeasance, or nonfeasance on his part or on the part of his assistants or employees.

The Uniform Management of Institutional Funds Act, §§ 55-268.1 through 55-268.10 (the "Uniform Act") provides guidelines governing the management of institutional funds. Section 55-268.4 establishes the investment authority of an institution's governing board with respect to an institutional fund. Section 55-268.5 authorizes an institution's governing board to delegate the investment management of an institutional fund. Section 55-268.6 establishes the standard of care that must be exercised in the making and retention of investments.
III. CHA Foundation's Investment Authority Detailed in § 55-268.4; CHA Foundation Not Restricted by § 2.1-328 in Investing Funds

Section 2.1-328 generally has been interpreted as an enabling statute authorizing the investment of public funds in specific types of investment instruments while limiting the scope of the investment activity authorized to those types of instruments specified. See Att'y Gen. Ann. Rep.: 1986-1987 at 25, 26-27; 1982-1983 at 638. If a public investor engages in investment activities other than those specified in § 2.1-328, the protection against potential liability provided in § 2.1-328.1 would not be available and a rule of strict liability for losses would apply. See 1982-1983 Att'y Gen. Ann. Rep., supra.

In this instance, however, the Authority has been expressly authorized to acquire a broad range of investment instruments other than those instruments specified in § 2.1-328. See 1987 Va. Acts, supra § 7.1(3), (10), at 488. The Authority, pursuant to the power granted by § 7.1(3) of Chapter 396, has established CHA Foundation and funded CHA Foundation's capitalization and operations. The Authority exercises significant, if not complete, control over CHA Foundation. Compare 1986-1987 Att'y Gen. Ann. Rep. 54 (Commonwealth does not control independent private foundations established to support the educational activities of state institutions of higher education). CHA Foundation itself has the power to acquire a broad range of investment instruments pursuant to § 13.1-826(A)(5) and its Articles of Incorporation. As noted above, CHA Foundation exists solely to carry out the charitable, educational and scientific purposes of the Authority.

It is my opinion that CHA Foundation is an "institution," and any fund it maintains for CHA Foundation's or the Authority's use, benefit or purposes is an "institutional fund" within the meaning of § 55-268.1(1) and (2) of the Uniform Act. Section 55-268.4, therefore, is the appropriate statute establishing the authorized range of investment activities by CHA Foundation. Due to the application of § 55-268.4 and the provisions of Chapter 396, it is further my opinion that (1) CHA Foundation is not restricted in its investment activities to those instruments specified in § 2.1-328, and (2) § 55-268.6 establishes the appropriate standard of care for CHA Foundation in making and retaining investments of its institutional fund.

1The Uniform Act was enacted to clarify the law governing the legal obligations and potential liabilities attendant to the maintenance of institutional funds. See Unif. Mgmt. of Inst'l Funds Act, 7A U.L.A. 706-07 (1985). The standard of care specified in § 6 of the Uniform Act (codified as § 55-268.6) is more analogous to that of a director of a business corporation than to that of a professional private trustee. Id. at 707-08. In Virginia, the standard of care applicable to trustees, the "prudent man rule," is codified in § 26-45.1. See Hoffman v. First Virginia Bank, 250 Va. 834, 839-40, 263 S.E.2d 402, 406 (1980).

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

Complimentary ticket to fund-raising event reportable in Statement of Economic Interests Sched. E must be valued at estimate of cost of meal or refreshments received. Bond closing conference not "meeting" within meaning of Sched. D; declarant not required to report travel, meals and lodging received in connection with bond closing outside Commonwealth. Receipt of travel and meals reimbursement does not make declarant paid officer or director for purpose of Sched. A. Reporting period for declarant taking office or beginning employment after January 15 annual filing date is 12-month period preceding actual filing.
Mr. David T. Stitt  
County Attorney for Fairfax County

You ask certain questions requiring the interpretation of various questions and schedules in the Statement of Economic Interests which certain state and local officers and employees are required to file pursuant to §§ 2.1-639.13 and 2.1-639.14 of the Code of Virginia, a portion of the State and Local Government Conflict of Interests Act, §§ 2.1-639.1 through 2.1-639.24 (the "Act").

I. Applicable Statutes

The complete text of the Statement of Economic Interests is contained in § 2.1-639.15. The intent of these reporting requirements is to further the general purposes of the Act, as detailed in § 2.1-639.1, by establishing a written record of economic interests which may affect the judgment of governmental officers and employees in the performance of their official duties. References in this Opinion to questions and schedules will be to those set forth in the Statement of Economic Interests.

II. Complimentary Ticket to Fund-Raising Event Reportable in Schedule E Must Be Valued at Estimate of Cost of Meal or Refreshments Received

You first ask how a complimentary invitation to a fund-raising event should be valued for the purpose of disclosure on Schedule E. For example, if an officer attends an event for which tickets cost in excess of $200, you ask whether the officer is required to disclose the full price of the ticket, even though the value of the meal or refreshments served at the event is less than $200.

Schedule E requires the disclosure of each business, governmental entity, or individual which furnished a declarant with money, gifts, or other things of value, whose total value exceeded $200 during the past 12 months and for which the declarant neither paid nor rendered services in exchange. See 1987-1988 Att'y Gen. Ann. Rep. 23, 27. Schedule E excludes from the reporting requirements business entertainment related to a declarant's private profession or occupation. Gifts and other things of value received by a declarant also are excluded when given by a relative or personal friend for reasons clearly unrelated to the declarant's public position.

In the facts you present, the only tangible value received as a result of the complimentary ticket is the meal or the refreshments served at the event. Since you characterize the event as a fund raiser, the profit from the tickets sold will be given to the political candidate, organization, or other entity for which the event is sponsored. It is my opinion, therefore, that the valuation on Schedule E of the complimentary ticket in the facts you present should be a good faith estimate of the value of the meal or refreshments served at the event. Of course, if the value of these items from one source does not exceed $200 during the 12-month reporting period of the financial disclosure form, the disclosure of these items is not required. See Sched. E.

III. Declarant Is Not Required to Report Travel, Meals and Lodging Received in Connection with Bond Closing Outside Commonwealth

You next ask whether an officer or employee is required to disclose the value of travel, meals, and lodging received in connection with attendance at a bond closing outside the Commonwealth. If these expenses are subject to disclosure, you also ask whether the expenses should be reported on Schedule D or on Schedule E.

July 14, 1989
The reporting requirements of Schedule E are reviewed above. Schedule D requires the disclosure of each source from which a declarant received during the past 12 months lodging, transportation, money, or other thing of value (excluding meals or drinks coincident with a meeting) with a combined value exceeding $200 for the declarant's presentation of a single talk, participation in one meeting, or publication of a single work in the declarant's capacity as an officer or employee of a governmental agency. A declarant must report payments or reimbursements by an agency only for meetings or travel outside the Commonwealth. Payments by a governmental agency to a declarant, therefore, are not required to be reported if the meeting attended was held in Virginia.

A prior Opinion of this Office concludes that the travel reimbursement disclosure requirement of Schedule D does not extend to all travel an officer or employee may undertake on behalf of his governmental agency. This disclosure requirement is directed at formal meetings or conferences. This prior Opinion identifies professional conferences and association meetings as meetings that give rise to the travel reimbursement disclosure requirement. See 1987-1988 Att'y Gen. Ann. Rep., supra.

Bond closings generally are conducted to formalize the issuance and sale of bonds by a local government. Meetings among the parties to the transaction and the signing of the necessary documents occur. County officers and employees who attend a bond closing presumably do so as part of their official duties and perform services on behalf of the county while attending this conference.

Although a bond closing conference is a formal gathering, it is held to consummate a complex business transaction. This type conference is distinguishable from a professional or associational conference or meeting that would generally trigger the disclosure requirements. It is my opinion, therefore, that a bond closing conference is not a "meeting" within the meaning of Schedule D. The expenses paid for a county officer or employee in connection with his attendance at a bond closing conference, therefore, are not subject to disclosure in Schedule D.

Because an officer or employee performs services on behalf of the county while attending a bond closing conference, it is my opinion that the expenses paid for an officer or employee similarly are not subject to reporting in Schedule E.

IV. Receipt of Travel and Meals Reimbursement Does Not Make Declarant a Paid Officer or Director for Purpose of Schedule A

Your third question is whether the receipt of "per meeting compensation" makes a declarant a paid officer or director within the meaning of Schedule A, if such compensation is intended as a travel and meals reimbursement.

Schedule A requires that a declarant identify each business of which he or a member of his immediate family is a paid officer or a paid director. Question 6 requires that a declarant list each employer that pays the declarant or a member of his immediate family in excess of $10,000 annually.

The manifest intent of the financial reporting requirements of Question 6 and Schedule A is to identify those employers and businesses in which a declarant has a financial interest. A paid officer or director is generally compensated for services rendered for a business. If a declarant is not paid for services rendered to a business in his capacity as an officer or director, Schedule A does not require that the declarant report the position held with the business.

In the facts you present, the payments to the declarant are intended as a travel and expense reimbursement, rather than compensation for services rendered. It is my opinion,
therefore, that the receipt of "per meeting compensation" intended as a travel and expense reimbursement does not make a declarant a paid officer or director within the meaning of Schedule A, provided the payments to the declarant are based on actual attendance at meetings and the amount paid reasonably approximates the travel and expense costs incurred.

V. Reporting Period for Declarant Taking Office or Beginning Employment After Annual Filing Date Is 12-Month Period Preceding Actual Filing

Your final question concerns the correct reporting period for a declarant who takes office, or is employed, after the January 15 annual filing date.

Sections 2.1-639.13(A) and 2.1-639.14(A) require that state and local officers file the required Statement of Economic Interests as a condition of assuming office or employment and annually thereafter on or before January 15.

The Statement of Economic Interests, as prepared by the Secretary of the Commonwealth, includes the explanation that: "This statement constitutes a report of economic interests and activities for the calendar year beginning January 1 and ending December 31." The statutory language, however, establishes the relevant reporting period as "during the past 12 months" and does not specifically refer to the calendar year. Section 2.1-639.15 [Question 4 (Sched. D); Question 5 (Sched. E); Questions 8A through 8C (Scheds. G-1 to G-3)].

The text of the Statement of Economic Interests, as detailed in § 2.1-639.15, expressly requires the reporting of financial information as of the time the Statement is filed for certain types of disclosure (e.g., Question 3 (Sched. C)) or "during the past 12 months." The statutory language does not refer to the prior calendar year. Based upon the express statutory language of § 2.1-639.15, therefore, it is my opinion that the reporting period for a declarant who takes office, or is employed, after the January 15 annual filing date is the 12-month period preceding the declarant's filing date. The reporting period for existing officers and employees who must file on the January 15 annual filing date is the immediately preceding calendar year.

1Section 2.1-639.15 sets forth the "long" financial disclosure form to be used for filings required by § 2.1-639.13(A), (D), and § 2.1-639.14(A), (D). Section 2.1-639.15:1 was added by the 1988 Session of the General Assembly and sets forth the "short" financial disclosure form which is to be filed by certain state and local officers and employees rather than the "long" form required by § 2.1-639.15.

Pursuant to §§ 2.1-639.13(A) and 2.1-639.14(A), the "long" financial disclosure form must be filed by statewide elected officials, all judges, members of the State Corporation Commission, Industrial Commission, Commonwealth Transportation Board and State Lottery Board, persons in offices or positions of trust or employment in state government so designated by the Governor, persons in positions of trust or employment in the legislative branch of state government so designated by the joint Rules Committees of the General Assembly, members of local governing bodies in localities with populations in excess of 3,500, and persons designated to file by ordinance of a local governing body who occupy positions of trust appointed by such body or positions of employment with the locality.

Pursuant to § 2.1-639.13(B), nonsalaried citizen members of state policy and supervisory boards, commissions and councils, as designated in Ch. 1.4 of Tit. 9, other than the Commonwealth Transportation Board and the State Lottery Board, are required to file the "short" disclosure form, as are nonsalaried members of other state boards, commissions and councils who are designated by the Governor to file an annual financial disclosure form. Pursuant to § 2.1-639.14(D), local governing bodies may designate which, if
any, nonsalaried citizen members of local boards, commissions and councils must file a financial disclosure form. If such members are required to so file, they must file the "short" form set forth in § 2.1-639.15:1.

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

Local governing body may adopt ordinance requiring board or commission appointees to file financial disclosure form, with grandfather clause providing that no current member of designated board/commission required to file disclosure form for remainder of his/her present term; ordinance may not amend disclosure form specified by statute.

November 6, 1989

Mr. Sterling E. Rives III
County Attorney for Hanover County

You ask several questions concerning the financial disclosure requirements applicable to local government officers and employees pursuant to the 1987 State and Local Government Conflict of Interests Act, §§ 2.1-639.1 through 2.1-639.24 of the Code of Virginia (the "1987 Act").

I. Applicable Statutes

Section 2.1-639.1 provides, in part:

The General Assembly of Virginia, recognizing that our system of representative government is dependent in part upon (i) citizen legislative members representing fully the public in the legislative process and (ii) its citizens maintaining the highest trust in their public officers and employees, finds and declares that the citizens are entitled to be assured that the judgment of public officer[s] and employees will not be compromised or affected by inappropriate conflicts. To that end and 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 this State and Local Government Conflict of Interests Act so that the standards of conduct of such officers and employees may be uniform throughout the Commonwealth.

This chapter [Chapter 40.1 of Title 2.1] 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. [Emphasis added.]

Section 2.1-639.14(A) provides:

The members of every governing body of each county and city and of towns with populations in excess of 3,500, and persons occupying such positions of trust appointed by such bodies as may be designated to file by ordinance of the governing body, and persons occupying such positions of employment as may be designated to file by ordinance of the governing body shall file, as a condition to assuming office or employment, a disclosure statement of their personal interests and other information as is specified on the form set forth
in § 2.1-639.15 and thereafter shall file such a statement annually on or before January 15. [Emphasis added.]

The text of the "long" financial disclosure form is detailed in § 2.1-639.15. The introductory statement to § 2.1-639.15 provides: "The disclosure form to be used for filings required by § 2.1-639.13A and D, and § 2.1-639.14A and D shall be substantially as follows . . . ."

II. Local Governing Body May Adopt Ordinance Requiring Filing of Financial Disclosure Statement; Ordinance May Include Grandfather Clause

You first ask whether a local governing body may adopt the ordinance as provided in § 2.1-639.14(A) with a "grandfather" clause providing that no current member of a designated board or commission would be required to file the disclosure form for the remainder of his or her present term. In other words, the ordinance would apply to current members of the designated boards and commissions only when they are appointed to serve a new term.

Section 2.1-639.14(A) authorizes a local governing body to designate by ordinance persons occupying positions of trust appointed by the local governing body and persons occupying positions of employment to file the financial disclosure statement. This grant of authority is discretionary; a local governing body is not required to adopt such an ordinance. The adoption of an ordinance that includes a grandfather clause would operate only to delay the application of the filing requirement for certain offices. Any person accepting appointment to any of the offices designated in the ordinance would do so with notice of the filing requirement. Those persons who had accepted such appointments in the past, however, would not be subject to the filing requirement. The delay in applying the filing requirement to the grandfathered offices, in my opinion, would not be inconsistent with the language of § 2.1-639.14(A) and would be within the range of discretion granted to a local governing body pursuant to the statute. It is my opinion, therefore, that a local governing body may adopt an ordinance as provided in § 2.1-639.14(A) with a grandfather clause providing that no current member of a designated board or commission would be required to file the disclosure form for the remainder of his or her present term.

III. Local Governing Body May Not Amend Disclosure Form Specified in § 2.1-639.15

You next ask whether a local governing body may amend the financial disclosure form specified in § 2.1-639.15 to delete or amend certain questions for those persons designated by the local governing body to file a disclosure form. You assume, for purposes of your question, that a local governing body may determine that the information required by certain questions on the form detailed in § 2.1-639.15 is unnecessary for the purpose of assuring that its designated appointees have no conflict of interests and, therefore, may wish to prescribe different questions for the designated appointees.

Section 2.1-639.1 provides that one purpose of the 1987 Act is to establish uniform standards applicable to state and local government employees. Section 2.1-639.14(A) provides that the officers and employees designated by ordinance must file "a disclosure statement of their personal interests and other information as is specified on the form set forth in § 2.1-639.15." As noted above, § 2.1-639.15 details the complete text of the financial disclosure form.

The language of § 2.1-639.14(A) specifically refers to the disclosure form in § 2.1-639.15. In addition, the introductory sentence to § 2.1-639.15 indicates that the disclosure statement required by § 2.1-639.14(A) shall be substantially as provided in § 2.1-639.15. Given these provisions, and the uniformity requirement in § 2.1-639.1, it is
my opinion that a local governing body may not amend the financial disclosure form in § 2.1-639.15 to delete or amend certain questions for those persons designated to file a financial disclosure form.1


2In addition, § 2.1-639.14(B) authorizes a local governing body to require designated nonsalaried citizen members of local boards, commissions and councils to file the "short" disclosure form detailed in § 2.1-639.15:1. The disclosure form in § 2.1-639.15:1 is significantly shorter and requires the disclosure of less information than is required by the disclosure form in § 2.1-639.15. Your inquiry, however, pertains to the § 2.1-639.15 "long form" referenced in § 2.1-639.14(A).

3Prior to 1987, repealed § 2.1-599, a portion of the 1983 Comprehensive Conflict of Interests Act (the "1983 Act"), expressly provided that local governments could adopt ordinances and regulations governing the conduct of their officers and employees, unless such ordinances or regulations were less stringent than the requirements of the 1983 Act. See Ch. 122, 1984 Va. Acts 270, 271. This provision was not included in the 1987 Act.

4A local governing body could, however, require designated nonsalaried citizen members of local boards, commissions and councils to file the "short form" set forth in § 2.1-639.15:1 rather than the "long form" set forth in § 2.1-639.15.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

Decision to charge newspaper reporter, or his newspaper, for salary of town employee to oversee reporter's inspection of town council meetings unauthorized by Act, unreasonable in facts presented.

February 21, 1989

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask whether a town may charge a newspaper reporter, or the reporter's newspaper, for the salary of a town employee whose sole function for the time charged is to watch the reporter as he inspects the minutes of the town council.

I. Facts

Pursuant to The Virginia Freedom of Information Act, the reporter has asked to examine the minutes of meetings of a town council. You state that the mayor of the town has told the reporter that the town intends to charge the reporter, or his newspaper, for the salary to be paid to a town employee to be with the reporter during the time he examines the minutes. You further state that no request has been made for the town to research or to copy the minutes.

II. Applicable Statutes

The disclosure of public records is governed by The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). It is the express policy of the Act "to ensure ... the people of this Commonwealth ready access to records in the custody of public officials" and to recognize "that the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Section 2.1-340.1.
Section 2.1-342(A) provides:

Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records. ... The custodian of such records shall take all necessary precautions for their preservation and safekeeping. ... The public body may make reasonable charges for the copying and search time expended in the supplying of such records; however, in no event shall such charges exceed the actual cost to the public body in supplying such records....

Section 2.1-341(b) defines the phrase "official records" as

all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business.

III. Reasonable Regulations and Charges Permitted for Official Records Subject to Inspection

The minutes of a regular meeting of town council clearly are "official records" subject to disclosure pursuant to the Act. See § 2.1-341(b). Prior Opinions of this Office consistently conclude that the custodian of the official records may impose such reasonable restrictions and regulations as are necessary for the safety of the records, and that the inspection must occur in such manner and at such times as will not interfere with the business of the office. See, e.g., Att'y Gen. Ann. Rep.: 1972-1973 at 490, 491 and 495, 496. In addition to the authority granted by § 2.1-342(A) for the custodian of official records to take necessary precautions to preserve and safeguard the records, the Act also permits a public body to make reasonable charges for the search time expended in supplying the records. A prior Opinion of this Office concludes that the public body may require the "advance payment of charges where they are subject to advance determination." 1979-1980 Att'y Gen. Ann. Rep. 386, 387.

IV. Proposed Charges Unreasonable, Unauthorized for Inspection of Minutes

The reasonableness of any restrictions or regulations imposed by a public body on the inspection of official records for the safety of those records necessarily must be determined on a case-by-case basis, with due deference being given to the public body's determination that such restrictions or regulations are, in fact, necessary. In the facts you present, however, it is my opinion that the mayor's decision to charge the reporter, or his newspaper, for the salary of a town employee to oversee the reporter's inspection of minutes of town council meetings is not authorized by the Act and is unreasonable. There is no indication that the reporter may destroy the minutes or remove them from the town offices. In fact, there is no indication that the reporter desires to do anything but inspect the public minutes of a public meeting of a public body, which is precisely what the Act was designed to permit. Based on the above, in the facts you present, it is further my opinion that the town may not charge a newspaper reporter, or his newspaper, for the salary of a town employee whose sole function for the time charged is to watch the reporter as he reviews the minutes of the town council.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.
Failure to respond initially to request for records within required time violates Act. Enforcement; remedies. Act does not require public body to create official record in response to request for information; requires disclosure of existing official records.

May 4, 1989

The Honorable Frank Medico
Member, House of Delegates

You ask whether Fairfax County (the "County") violated the provisions of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), by not furnishing certain data requested by you and your legislative aide.

I. Facts

By letter dated February 22, 1989, your legislative aide requested the County Executive's Office to provide you with "budget expenditures - total costs to maintain - those persons who lobbied on behalf of [the] County during the 1988 General Assembly session." This February 22, 1989, letter makes no specific reference to the Act.

You renewed this request for information by letter dated March 14, 1989, addressed to the Chairperson of the County's Board of Supervisors. This letter refers to several telephone inquiries to County employees concerning the requested information. The March 14, 1989, letter specifically refers to the Act and requests "the total cost of the ... County staff that [was] in Richmond to lobby the general assembly members during the 1988 session."

In her letter to you, dated March 16, 1989, the Chairperson responded that "I have asked J. Lambert [the County Executive] to provide the information to you as soon as it is compiled."

I am advised by the County Attorney's office that the information you requested does not exist in the form you requested—that is, the County's expenditures concerning the legislative activities of County employees are not segregated from other County expenditures. The information requested, therefore, if it is to be communicated, must be compiled based upon existing records of County expenditures. I also am advised that the County is compiling the information you requested, and that the information will be provided to you in the near future.

II. Applicable Statutes

Section 2.1-342(A) provides for the mandatory disclosure of "official records." Section 2.1-342(A) further provides, in part:

Any public body covered under the provisions of this chapter [Chapter 21 of Title 2.1] shall make an initial response to citizens requesting records open to inspection within fourteen calendar days from the receipt of the request by the public body. Such citizen request shall designate the requested records with reasonable specificity. If the requested records or public body is excluded from the provisions of this chapter, the public body to which the request is directed shall within fourteen calendar days from the receipt of the request tender a written explanation as to why the records are not available to the requester. Such explanation shall make specific reference to the applicable provisions of this chapter or other Code sections which make the requested records unavailable. In the event a determination of the availability of the requested records may not be made within the fourteen-calendar-
day period, the public body to which the request is directed shall inform the requestor as such, and shall have an additional ten calendar days in which to make a determination of availability. A specific reference to this chapter by the requesting citizen in his records request shall not be necessary to invoke the time limits for response by the public body.

Section 2.1-342(B) excepts certain types of records from the mandatory disclosure requirement of § 2.1-342(A). See, e.g., §§ 2.1-342(B)(3) (personnel records), 2.1-342(B)(4) (memoranda, working papers and correspondence held or requested by the chief executive officer of a county).

Section 2.1-346 provides for the Act's enforcement by petition for mandamus or injunction, supported by an affidavit showing good cause, and addressed to the appropriate court of record. Section 2.1-346.1 authorizes a court to impose a civil penalty upon the appropriate "person or persons" for a willful and knowing violation of the Act.

III. Failure to Respond Initially to February 22 Letter Requesting Information Within Fourteen Days Constitutes Violation of Act; Records Should Be Provided Within Reasonable Time

Section 2.1-342(A) requires that the County make an initial response to a request for official records within fourteen calendar days from the receipt of the request. See generally Att'y Gen. Ann. Rep.: 1982-1983 at 708, 709; 1981-1982 at 440, 441-42. A request for official records must identify the records sought with reasonable specificity, but a specific reference to the Act is not necessary to invoke the time limits for response. See § 2.1-342(A). The Act, however, does not require that the County create a document in response to a request for information; rather, the Act requires the disclosure of existing official records. See Att'y Gen. Ann. Rep.: 1983-1984 at 436; 1982-1983 at 727, 728.

The initial request for "budget expenditures" was made on February 22, 1989. You renewed this request on March 14, 1989, for the "total cost of the . . . County staff that [was] in Richmond to lobby the general assembly members during the 1988 session." You were advised by letter dated March 16, 1989, that the County Executive would provide you with the information as soon as it was compiled.

Your February 22, 1989, letter was phrased as a request for information rather than a request for the disclosure of records. This letter was not identified as a request made pursuant to the Act, although such identification is not required by § 2.1-342(A). Reasonable people could differ in the determination whether the February 22, 1989, letter was a request made pursuant to the Act. It is my opinion, however, that the February 22, 1989, letter was a request made pursuant to the Act and, further, that the County's failure to respond within fourteen days constitutes a violation of the Act.

Your March 14, 1989, letter also is characterized as a request for information rather than a request for the disclosure of records, but this second request does refer specifically to the Act. The March 16, 1989, response advised you that your request had been forwarded to the County Executive and that the information requested would be provided as soon as it was compiled.

Upon receipt of the March 14, 1989, request, the County could have declined to provide the information requested because the information would have to be compiled or extracted from existing records. The County, therefore, was not obligated by the Act to provide the requested information. The Act does require, however, that the County make an initial response to such a request within fourteen days. At the time of your request for this Opinion, you had received no response from the County other than the March 16, 1989, letter.
It is my opinion that your March 14, 1989, letter that was forwarded to the County Executive was a proper request pursuant to the Act. The March 16, 1989, response from the County Chairperson, although not a response from the custodian of the requested records, was not subsequently modified or repudiated by the actual records' custodian to indicate that the County was not required to provide the information requested. Whenever a public body is required to disclose official records by § 2.1-342(A), it is my opinion that such disclosure must be made within a reasonable time considering the nature of the request and the time required to collect the requested records. Compare 1981-1982 Att'y Gen. Ann. Rep., supra. In these circumstances, the County has apparently agreed to compile the information you requested even though it was not legally required to do so. It is further my opinion, therefore, that the County should provide this information within a reasonable time considering the nature of the request and the time required to extract the information from existing County records.

IV. Enforcement of Act Results from Petition for Mandamus or Injunction; Civil Penalties May Be Imposed for Willful and Knowing Violations

You also ask who is to be held accountable for any violation of the Act and the related penalties, if any, for not providing the requested information.

Section 2.1-346 provides for the Act's enforcement by a petition for mandamus or injunction. If such a petition is filed, a circuit court may order that the County provide you with the information you request if the court concludes (1) that the information is contained in existing official records and (2) that the information is subject to mandatory disclosure. Section 2.1-346.1 authorizes a circuit court to impose a civil penalty "upon such person or persons" found to have willfully and knowingly violated the Act.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

COMMISSIONS, BOARDS AND INSTITUTIONS: VIRGINIA HEALTH SERVICES COST REVIEW COUNCIL.

Council may not meet in executive session to discuss financial reports submitted by health care institution.

October 12, 1989

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

You ask whether the Virginia Health Services Cost Review Council (the "Council") may meet in executive session to review health care institutional budgets and historical filings submitted by health care institutions pursuant to § 9-159 of the Code of Virginia.

1. Applicable Statutes

The Council operates pursuant to Chapter 26 of Title 9, §§ 9-156 through 9-166 ("Chapter 26"). The Council's general duties involve the review, analysis, and investigation of issues related to health care costs. Section 9-159(A) imposes significant financial reporting requirements on health care institutions. Section 9-159(B) provides:

The findings, recommendations and justification for such recommendations of the Council shall be open to public inspection, but individual health care
institution filings made pursuant to this chapter shall not be subject to the provisions of § 2.1-342. Individual patient and personnel information shall not be disclosed.

Section 2.1-342, a portion of The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "FOIA"), governs disclosure of official records. Section 2.1-343 provides, in part:

Except as otherwise specifically provided by law and except as provided in §§ 2.1-344 and 2.1-345, all meetings shall be public meetings, including meetings and work sessions during which no votes are cast or any decisions made.

Section 2.1-344(A) authorizes a public body to meet in executive sessions to discuss certain limited topics.

II. Council May Not Meet in Executive Session to Discuss Health Care Institution Financial Reports

The Council is a "public body" subject to the FOIA open meeting requirement imposed by § 2.1-343. See § 2.1-341. Section 9-159(B) exempts health care institution financial filings from the disclosure of official records requirement imposed by § 2.1-342 of the FOIA. No provision of Chapter 26, however, authorizes the Council to convene in executive session to discuss health care institution financial filings. I have reviewed the exceptions to the FOIA's open meeting requirement provided in § 2.1-344(A). None of these exceptions authorizes the Council to meet in executive session to discuss health care institution financial filings. In the absence of an applicable exception, it is my opinion that the Council may not meet in executive session to discuss the financial reports submitted by health care institutions. The exemption of these financial reports from the disclosure of official records requirement of the FOIA, provided by § 9-159(B), in my opinion, is not sufficient to authorize the Council to meet in executive session to discuss the reports. Compare 1983-1984 Att'y Gen. Ann. Rep. 447 (general fund revenue estimate documents held by Governor's advisory boards excepted from mandatory disclosure; advisory boards may not meet in executive session to discuss revenue estimates).

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

EDUCATIONAL INSTITUTIONS: CHRISTOPHER NEWPORT COLLEGE.

Official records of college library subject to inspection unless statutory exception to Act applies and is exercised by records custodian. Exceptions to mandatory disclosure requirements of Act.

July 14, 1989

The Honorable Alan A. Diamonstein
Member, House of Delegates

You ask whether certain library records are confidential, or whether they must be disclosed when a request is made by a citizen.
I. Facts

You state that the Librarian of Christopher Newport College (the "College") has questioned whether, in response to a request by newspaper reporters, local police, representatives of other governmental agencies or a citizen, he is required to disclose such library records as those showing the titles of books borrowed by a library patron, questions a library patron has asked at the reference desk, bibliographies prepared by reference desk librarians in response to specific requests for library patron assistance, and the titles of books ordered through the College library by faculty members.

II. Applicable Statutes

The disclosure of records is governed by The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). Section 2.1-342(A) provides, in part, that "[e]xcept as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records." The term "official records" is broadly defined in § 2.1-341 as

all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business.

Section 2.1-342(A)(4) also provides that "[p]ublic bodies shall not be required to create or prepare a particular requested record if it does not already exist." Certain statutory exceptions to the mandatory disclosure requirement of § 2.1-342(A) are enumerated in § 2.1-342(B), which provides, in part:

The following records are excluded from the provisions of this chapter [Chapter 21 of Title 2.1] but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

* * *

8. Library records which can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed.

* * *

17. Data, records or information of a proprietary nature produced or collected by or for faculty or staff of state institutions of higher learning, other than the Institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information have not been publicly released, published, copyrighted or patented.

Section 2.1-340.1 requires that "[a]ny exception or exemption from applicability shall be narrowly construed in order that no thing which should be public may be hidden from any person."

The College is established pursuant to Chapter 5.3 of Title 23, §§ 23-49.23 through 23-49.33. A portion of the operating expense of the College is funded by the General Assembly. See Ch. 800, 1988 Va. Acts 1280, 1396-97.
III. Official Records Subject to Inspection Unless Statutory Exception Applies and Is Exercised by Records Custodian

The College is a "public body" and, as a result, is subject to the provisions of the Act, since it is an agency of the Commonwealth "supported ... principally by public funds." Section 2.1-341.

The official records of the College library, including circulation records, reference desk records, bibliographies prepared by library employees and book orders, therefore, are subject to inspection and copying by any citizen unless one or more of the exceptions to mandatory disclosure in § 2.1-342(B) applies to the information requested and the custodian of the records elects to exercise a statutory exception. The Act does not require that any official records be withheld from public disclosure. See id.

IV. Books Borrowed from Library and Bibliographies or Reference Questions Excepted from Mandatory Disclosure

Library records showing the titles of books borrowed by a library patron, research questions and information provided to library patrons by library staff, bibliographies prepared by reference desk librarians in response to specific requests for library patron assistance, and the titles of books ordered through the College library by faculty members all constitute records which are excepted from the mandatory requirements of the Act pursuant to § 2.1-342(B)(8). Each of these records can be used to identify the material borrowed from a library by a library patron. The bibliographies you describe also may be excepted from mandatory disclosure pursuant to § 2.1-342(B)(17), depending on the nature of the project for which the bibliography was requested and for whom the information was collected. It is my opinion, therefore, that the College librarian is not required by the Act to disclose (1) library records showing the title of books borrowed by a library patron, (2) library records detailing research questions and information provided to library patrons by library staff, (3) bibliographies prepared by reference desk librarians in response to specific requests for library patron assistance, or (4) the titles of books ordered through the College library by faculty members.

1For purposes of this Opinion, I assume that the books ordered through the College library by faculty members remain the property of the library.

AGRICULTURE, HORTICULTURE AND FOOD: COMPREHENSIVE ANIMAL LAWS.

City or county pounds may, but not required to, accept stray or unwanted cats.

January 4, 1989

The Honorable David V. Williams
Commonwealth's Attorney for Henry County

You ask whether, in cities or counties in which there is no local ordinance to impound stray cats, a city or county pound is required to accept stray cats brought to the pound by private citizens or unwanted cats brought to the pound by their owners. If the pound is required to accept these stray or unwanted cats, you also ask whether the animal control officer may immediately euthanize the cat upon receiving it.

I. Applicable Statutes

Section 3.1-796.96 of the Code of Virginia provides, in part:
The governing body of each county or city shall maintain or cause to be maintained a pound or enclosure in accordance with guidelines issued by the Department of Agriculture and Consumer Services and shall require dogs running at large without the tag required by § 3.1-796.86 or in violation of an ordinance passed pursuant to § 3.1-796.93 to be confined therein. Such governing body shall require that any animal which has been so confined must be kept for a period of not less than five days, such period to commence on the day immediately following the day the dog is initially confined in the facility, unless sooner claimed by the owner thereof.

* * *

Nothing in this section shall be construed to prohibit confinement of other companion animals in such a pound or enclosure.

A "pound" is defined, in part, in § 3.1-796.66 as "a facility operated by the Commonwealth, or any political subdivision, for the purpose of impounding or harboring seized, stray, homeless, abandoned or unwanted animals." Section 3.1-796.66 also defines the term "companion animals" to include domestic and feral cats. Section 3.1-796.120(A) requires the governing body of any political subdivision regulating the operation of a pound to "determine the method of disposition of animals released by such pound in accordance with the provisions of § 3.1-796.96." An amendment to § 3.1-796.127 by the 1988 Session of the General Assembly designates cats, as well as dogs, as personal property and provides civil remedies for injuring or killing a dog or cat contrary to the provisions of this statute. Chapter 537, 1988 Va. Acts 665.

II. Pounds May, But Are Not Required to, Accept Stray or Unwanted Cats

A recent Opinion of this Office to you, dated November 18, 1988, concludes that "§ 3.1-796.96 also permits the confinement of 'companion animals,' including cats, in local pounds." 1987-1988 Att'y Gen. Ann. Rep. 40. Since the language of § 3.1-796.96 is permissive, and not mandatory, with regard to the confinement of companion animals, including cats, it is my opinion that city or county pounds are not required to accept stray cats brought to the pound by private citizens or unwanted cats brought to the pound by their owners.

Since I conclude that the acceptance of stray or unwanted cats in city or county pounds located in jurisdictions with no ordinance requiring the impoundment of stray or unwanted cats is not required, a response to your second inquiry is unnecessary.

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1 Section 3.1-796.66 defines the term "owner" as "any person who: (i) has a right of property in an animal, (ii) keeps or harbors an animal, (iii) has an animal in his care, or (iv) acts as a custodian of an animal."
You ask whether claims which have been made for livestock or poultry killed by dogs, and which have been allowed by the Board of Supervisors of Bland County (the "Board" and the "County") pursuant to § 3.1-796.118 of the Code of Virginia, must be paid immediately from the General Fund of the County or whether payment may be delayed until funds are available from the proceeds of the dog license tax.

I. Facts

You state that three residents of the County have filed claims for livestock killed by dogs. The Board has approved payment of these claims, but the County has not collected dog license taxes sufficient to pay them.

II. Applicable Statutes

Section 3.1-796.118 provides, in part, that "[a]ny person who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive as compensation the fair market value of such livestock or poultry not to exceed $400 per animal or fowl." Sections 3.1-796.101 and 3.1-796.102 provide for the disposition of tax funds collected from the purchase of dog licenses (the "dog fund"). Section 3.1-796.101 provides, in part:

Unless otherwise provided by ordinance of the local governing body, the treasurer of each local jurisdiction shall keep all money collected by him for dog license taxes in a separate account from all other funds collected by him. The local jurisdiction shall use the funds for the following purposes:

1. The salary and expenses of the animal warden and necessary staff;
2. The care and maintenance of a dog pound;
3. The maintenance of a rabies control program;
4. Payments as a bounty to any person neutering or spaying a dog up to the amount of one year of license fee as provided by ordinance; and
5. Payments for compensation as provided in § 3.1-796.118.

Section 3.1-796.102 permits localities to "supplement the dog fund with other funds as they consider appropriate" and requires supplementation of the dog fund "to the extent necessary to provide for the salary and expenses of the animal warden and staff and the care and maintenance of a dog pound," which are provided for in § 3.1-796.101(1) and (2).

III. Prior Opinion Concludes Payment Should Be Made from Dog Fund; Immediate Payment from General Fund Not Required

Current § 3.1-796.118 is a recodification, with two amendments, of former § 29-213.25. A prior Opinion of this Office construes former § 29-213.25 and concludes that "[c]ompensation claims need only be paid when there is money available in the dog fund to do so. Claims filed when funds are not adequate should be held, in the order they are received, until sufficient dog license taxes are received to make compensation possible." 1978-1979 Att'y Gen. Ann. Rep. 90, 91.

There have been two amendments to § 3.1-796.118 since its statutory predecessor was interpreted by this Office. A cap of $400 has been placed on the amount of compensation available to livestock owners whose animals are killed by dogs, and the requirement that claims be paid "in the order they are received when moneys become available,"
was omitted during an earlier recodification. In its report on the 1984 recodification, the Virginia Code Commission commented that the reenactment of § 29-213.25 as § 29-213.87 was not intended to amend § 29-213.25 substantively. 2 H. & S. Does., Report of the Virginia Code Commission on Consolidation of Certain Animal Laws, H. Doc. No. 40, at 21 (1984). This conclusion is supported by the principle that, when 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. See 1986-1987 Att'y Gen. Ann. Rep. 290, 291.

The conclusion that the General Assembly did not intend to alter the conclusion in the 1979 Opinion is further supported by the fact that current § 3.1-796.102, referred to above, requires that a locality supplement the dog fund for certain purposes but merely gives the locality discretion to do so for § 3.1-796.118 claims. Accord Carlo v. County of Nottoway, 232 Va. 1, 2-3, 348 S.E.2d 201, 202 (1986) (dictum) (Supreme Court expressly assumes that claim for horses killed by dogs is "payable solely from the County's dog fund pursuant to former Code § 29-213.25").

Based on the above, it is my opinion that claims which have been made for livestock and poultry that are killed by dogs and which have been allowed by the Board pursuant to § 3.1-796.118 should be paid when funds become available from the proceeds of the dog license tax to pay such claims.


CIVIL REMEDIES AND PROCEDURE: COMMENCEMENT, PLEADINGS, AND MOTIONS - PLEADINGS GENERALLY.

Section 8.01-271.1 does not limit its application to attorneys; authorizes sanctions imposed by court against parties involved in litigation and practicing attorneys.

June 22, 1989

The Honorable Robert T. Andrews
Member, House of Delegates

You ask whether § 8.01-271.1 of the Code of Virginia applies to parties involved in litigation, as well as to practicing attorneys.

I. Applicable Statute

Section 8.01-271.1 provides, in part:

Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address.

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his
knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee. [Emphasis added.]

II. Statute Applies to Attorneys and Parties; Federal Decisions Construing Fed. R. Civ. P. 11 Support Conclusion

The language of § 8.01-271.1 does not limit its application to attorneys. The statute requires an unrepresented party to sign pleadings, motions, or other papers filed with a court. The signature of a party or an attorney to a pleading certifies that the allegations made in the pleading are made in good faith. Section 8.01-271.1 expressly authorizes sanctions to be awarded by a court "upon the person who signed the paper or made the motion, a represented party, or both." (Emphasis added.)


Based on the above, it is my opinion that § 8.01-271.1 applies to parties involved in litigation, as well as to practicing attorneys.

CIVIL REMEDIES AND PROCEDURE: EVIDENCE.
COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY.
CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - COUNTY AND CITY OFFICERS.
Circuit court clerk may delegate duties to deputy clerk in absence of statute prohibiting performance of that duty by deputy clerk; attestation and certification of official records of circuit court by deputy clerk satisfies statutory requirements.

December 20, 1989

The Honorable Albert A. Dawson Jr.
Clerk, Circuit Court of the City of Petersburg

You ask whether an attestation of a copy of a criminal sentencing order by a deputy clerk as a true copy satisfies the requirements of § 8.01-389(A) of the Code of Virginia that, to be received as prima facie evidence in a judicial proceeding, such records be "authenticated and certified by the clerk of the court where preserved to be a true record."

I. Applicable Statute

As quoted above, § 8.01-389(A) provides for the receipt of certain court records as prima facie evidence, "provided that such records are authenticated and certified by the clerk of the court where preserved to be a true record."

Section 15.1-48 details the powers and duties of deputy clerks of circuit courts, and provides, in part:

The ... clerk of any circuit ... court may at the time he qualifies as provided in § 15.1-38 or thereafter appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law.

II. Deputy Clerk's Attestation Satisfies Requirements of § 8.01-389(A)


I am aware of no statute that expressly forbids a deputy circuit court clerk from authenticating and certifying official records of the court he serves. It is my opinion, therefore, that a circuit court clerk may delegate the duty of authenticating and certifying official records of that court to a deputy clerk and that attestation and certification of those records by the deputy clerk satisfies the requirements of § 8.01-389(A).

CIVIL REMEDIES AND PROCEDURE: EVIDENCE - WITNESSES GENERALLY.

Admissibility of statements of persons incapable of testifying.

July 20, 1989

To the Honorable B.A. Davis III
Judge, Circuit Court of Franklin County

You ask whether a statement made by a property owner who took his own life is admissible in a lawsuit concerning a boundary line dispute.

I. Applicable Statute

Section 8.01-397 of the Code of Virginia provides, in part:

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying ... declarations of the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence .... The phrase 'from any cause' as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury. [Emphasis added.]

II. Statements Made by Person Who Commits Suicide Are Inadmissible

The portion of § 8.01-397, quoted above, effectively creates a hearsay exception for statements of a party to a lawsuit who is incapable of testifying in an action brought by or against himself or his representative. The last sentence of § 8.01-397, however, was added to the statute by the 1988 Session of the General Assembly, and renders this exception inapplicable to cases where the party is incapable of testifying because of an intentional self-inflicted injury. In the facts you present, the party's injury was intentional and self-inflicted. It is my opinion, therefore, that the last sentence of § 8.01-397 would render any statement made by the decedent inadmissible in a later boundary dispute proceeding.

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CIVIL REMEDIES AND PROCEDURE: NOTICE OF LIS PENDENS OR ATTACHMENT.

Statutory provisions concerning duties of clerk in releasing lis pendens not in conflict. Court order not required to release every lis pendens.

February 13, 1989

The Honorable Carol W. Black
Clerk, Circuit Court of Bedford County

You ask whether the provisions of § 8.01-269 of the Code of Virginia conflict with regard to the duties of the clerk in releasing a lis pendens. You note that the first paragraph of this statute provides for the release of a lis pendens "after the expiration of the time in which [an] appeal or writ of error may be applied for" and that the second para-
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graph of § 8.01-269 requires the creditor, "within ten days after payment ... to mark such notice of lis pendens ... satisfied." Specifically, you ask whether a lis pendens may be released only by court order or whether the clerk may release a lis pendens upon the filing of a Certificate of Release of Memorandum of Lis Pendens by the creditor.

I. Applicable Statute

Section 8.01-269, which concerns the release of an attachment or lis pendens, provides:

If such attachment is quashed or dismissed or such cause is dismissed, or judgment or final decree in such attachment or cause is for the defendant or defendants, the court shall direct in its order (i) that the names of all interested parties thereto, as found in the recorded attachment or lis pendens be listed for the clerk, and (ii) that the attachment or lis pendens be released. It shall then become the duty of the clerk in whose office such attachment or lis pendens is recorded, to record the order and, unless a microfilm recording process is used, to enter on the margin of the page of the book in which the same is recorded, such fact, together with a reference to the order book and page where such order is recorded. However, in any case in which an appeal or writ of error from such judgment or decree or dismissal would lie, the clerk shall not record the order or make the entry until after the expiration of the time in which such appeal or writ of error may be applied for, or if applied for after refusal thereof, or if granted, after final judgment or decree is entered by the appellate court.

In any case in which the debt for which such attachment is issued, or suit is brought and notice of lis pendens recorded is satisfied by payment, it shall be the duty of the creditor, within ten days after payment of same to mark such notice of lis pendens or attachment satisfied on the margin of the page of the deed book in which the same is recorded, unless a microfilm recording process is used.

II. First Paragraph of Statute Concerns Release of Lis Pendens by Court Order

The first paragraph of § 8.01-269 concerns the release of a lis pendens pursuant to a court order when a case is dismissed or judgment or final decree in such case is in favor of the defendant. In this circumstance, the clerk must wait the requisite period of time for an appeal of the case by the creditor before recording the order releasing the lis pendens. See 1987-1988 Att'y Gen. Ann. Rep. 75, 76.

III. Second Paragraph of Statute Concerns Release of Lis Pendens by "Certificate of Release of Memorandum of Lis Pendens"

The second paragraph of § 8.01-269 provides that, in any case in which suit is brought and the notice of lis pendens recorded is satisfied by payment, it shall be the duty of the creditor, within ten days after payment of the debt, to mark the notice of lis pendens satisfied in the margin of the page of the deed book on which the same is recorded, unless a microfilm recording process is used. Creditors typically file a "Certificate of Release of Memorandum of Lis Pendens" ("Certificate of Release") with the clerk to comply with this statute.

IV. Provisions of § 8.01-269 Do Not Conflict

It is my opinion that the provisions of § 8.01-269 concerning the duties of the clerk in releasing a lis pendens do not conflict because the two methods for releasing a lis pend-
dens should not present themselves in the same case. When a case is dismissed or judgment or final decree is for the defendant debtor, a creditor will not file a Certificate of Release but may wish to appeal the judgment. When a creditor files the Certificate of Release indicating that the debt has been paid, there will be no court order dismissing the case or entering judgment in favor of the defendant debtor from which an appeal would be sought by the creditor. It is further my opinion, therefore, that a court order is not required to release every lis pendens. In the proper circumstance, described above, the clerk may release a lis pendens upon the filing of a Certificate of Release by the creditor.

CIVIL REMEDIES AND PROCEDURE: PROCESS - WHO TO BE SERVED.

RULES OF VIRGINIA SUPREME COURT: EQUITY PRACTICE AND PROCEDURE — PRACTICE AND PROCEDURE IN ACTIONS AT LAW.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Statutory requirement that notice of motion for judgment be mailed with motion for judgment by person causing service to defendant in action at law in circuit court.

December 20, 1989

The Honorable Jane H. Woods
Member, House of Delegates

You ask whether the amendment by the 1989 Session of the General Assembly to § 8.01-296(2)(b) of the Code of Virginia, substituting the phrase "such process" for "the pleading" when describing what the party causing service in a lawsuit must mail to a defendant when posted service is effected, is satisfied merely by mailing a copy of the motion for judgment to a defendant.

I. Applicable Statutes and Rules of the Supreme Court of Virginia

Section 8.01-296, a portion of Chapter 8 of Title 8.01, §§ 8.01-285 through 8.01-327.2 ("Chapter 8"), provides:

Process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:

1. By delivering a copy thereof in writing to the party in person; or

2. By substituted service in the following manner:

a. If the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older; or

b. If such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode, provided that not less than ten days before judgment by default may be entered, the party causing service mails to the party served a copy of such process and thereafter files in the office of the clerk of the court a certificate of such mailing. In any civil
action brought in a general district court, mailing of the application for a warrant in debt or affidavit for summons in unlawful detainer or other civil pleading which contains the date, time and place of the return, prior to filing such pleading in the general district court, shall satisfy the mailing requirements of this section;

c. The person executing such service shall note the date of such service on the copy of the process so delivered or posted under subdivision 2.

3. If service cannot be effected under subdivisions 1 and 2 of this section, then by order of publication in appropriate cases under the provisions of §§ 8.01-316 through 8.01-320. [Emphasis added.]

Section 8.01-285 further provides that, for the purposes of Chapter 8, "[t]he term 'process' shall be deemed to include notice."

Section 1-13.23:1 provides that "[t]he word 'process' shall be construed to include subpoenas in chancery, notices to commence actions at law and process in statutory actions."

Rule 2:4 of Part Two of the Rules of the Supreme Court of Virginia provides that "[t]he process of the courts in equity suits shall be a subpoena in chancery." Rule 3:3 of Part Three describes the notice of motion for judgment to be served with a motion for judgment in actions at law, and Rule 3:4 further requires the notice of motion for judgment to be served with the motion for judgment on the defendant.

II. Section 8.01-296(2)(b) Requires Mailing of Notice of Motion for Judgment and Motion for Judgment to Defendant in Circuit Court Action at Law

The provisions of §§ 1-13.23:1 and 8.01-285 both were enacted prior to the 1989 amendment to § 8.01-296(2)(b). The General Assembly is presumed to know what statutes previously have been enacted. Att'y Gen. Ann. Rep.: 1987-1988 at 1, 2; 1985-1986 at 65, 67.

Consideration of the 1989 amendment to § 8.01-296(2)(b) with the clear language of the statutes and Rules of Court cited above, therefore, clearly demonstrates that § 8.01-296(2)(b) requires more than merely mailing a copy of the motion for judgment by "the party causing service" to a defendant in an action at law in a circuit court. These statutes now contemplate that a defendant receiving process in the mail pursuant to § 8.01-296(2)(b) reasonably should be able to recognize that a lawsuit has been instituted against him and that some response to the court is required within a specified time. Otherwise, persons receiving only a copy of a motion for judgment by mail well might conclude that the document simply was a courtesy copy of a lawsuit yet to be filed which, until formally served, required no response.

Based on the above, it is my opinion that § 8.01-296(2)(b) now requires that the notice of motion for judgment be mailed with the motion for judgment by the person causing service to a defendant in an action at law in a circuit court.2

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1The emphasized portion of § 8.01-296(2)(b), quoted above, is the language in this statute about which you inquire. See Ch. 518, 1989 Va. Acts 755, 756 (Reg. Sess.).

2In equity suits, a copy of the subpoena in chancery must be mailed with the bill of complaint. See § 1-13.23:1; Va. Sup. Ct. R. 2:4.
CIVIL REMEDIES AND PROCEDURE: UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT.

COSTS, FEES, SALARIES AND ALLOWANCES -- FEES - AMOUNTS OF FEES.

Two-dollar fee proper charge for filing foreign judgment.

July 21, 1989

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

You ask what recordation fee properly may be charged for filing a foreign judgment in your office.

I. Background


II. Applicable Statutes

Section 8.01-465.2 provides for the filing of a properly authenticated foreign judgment "in the office of the clerk of any circuit court of any city or county of this Commonwealth." This statute, however, does not specify a fee for the filing of the foreign judgment.

Section 14.1-112 details the fees which shall be charged by the clerk for recording various documents, but does not specify a fee for recording a foreign judgment. Section 14.1-112(22), however, does provide, in part, that "[f]or docketing and indexing a judgment from any other court, a fee of two dollars" shall be charged. (Emphasis added.) Section 8.01-465.2 provides that "[t]he clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court of any city or county of this Commonwealth."

III. Two-Dollar Fee Should Be Charged for Filing Foreign Judgment

Since no specific filing or recordation fee for foreign judgments is provided for either in the Act or in § 14.1-112, the provisions of § 8.01-465.2 must be read together with § 14.1-112(22) to determine the appropriate fee. It is my opinion, therefore, that a fee of two dollars is the proper charge for filing a foreign judgment.

COMMERCIAL CODE—SECURED TRANSACTIONS: FILING.

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS.

Preferred method of indexing continuation of financing statements by circuit court clerk by chronological filing, but not required by statute; method used depends on whether clerk's office has manual or computerized operation.

June 9, 1989

The Honorable G. Steven Agee
Member, House of Delegates
You ask whether §§ 8.9-401 and 8.9-403 of the Code of Virginia, or any other portions of the Uniform Commercial Code, require a particular method of indexing the continuation of financing statements by the clerk of a circuit court. You state that some clerks index continuation statements chronologically with all other financing statements received on the day of filing, and that other clerks index the continuation statement on the same page as the original financing statement was indexed.

I. Applicable Statutes

Section 8.9-401 details the different places in which financing statements must be filed to perfect a security interest in certain types of collateral. Section 8.9-402 establishes the formal requisites for a financing statement, and, in subsection (4) provides, in part, that "[a]ll amendments to financing statements shall identify the original financing statement by file number."

Section 8.9-403 specifically concerns continuation statements and provides, in part:

(2) Except as provided in subsection (6) a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed prior to the lapse...

(3) A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in subsection (2). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective.... Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files along with the index thereto and destroy it immediately if he has retained a microfilm or other photographic record, magnetic tape or security record, or in other cases after one year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement shall be retained.

(4) A filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

Section 17-78 is the general statute requiring that certain indexes be maintained by circuit court clerks and provides, in part, that "[t]he clerk of every court shall have an index to each book he is required to keep, except those for which general indexes are required and kept, or permitted and kept, making convenient reference to every order, record or entry therein." Section 17-79(1) further provides:
There shall be kept in every clerk's office modern, family name or ledgerized alphabetical key-table general indexes to all deed books, miscellaneous liens, will books, judgment dockets and court order books. The clerk shall enter daily either in such general indexes or in the daily index to instruments admitted to record, all instruments admitted to record, indexing each instrument in the names of all parties appearing therein who are thereby shown to be affected by the instrument.

Section 17-79(9) further provides that "[t]he clerk may maintain his indices on computer, word processor, microfilm, microfiche or other micrographic process."

II. Indexing Method Used Depends on Whether Clerk's Office Has Manual or Computerized Operation

The statutes quoted above, when read together, merely require that circuit court clerks maintain a system of indices for records filed. Section 8.9-403(4) requires that a financing statement shall be indexed according to the name of the debtor, with a notation indicating the file number and the debtor's address. Continuation statements are to be attached to the original corresponding financing statements to avoid destruction of older financing statements. See § 8.9-403(3). These statutes are silent, however, concerning the specific indexing method to be used by circuit court clerks for continuation statements.

Circuit court clerks' offices in the Commonwealth serve jurisdictions with varied populations. The larger the jurisdiction served by the circuit court clerk, the more likely it is that the clerk's office will be a computerized, rather than a manual, operation. If a circuit court clerk's office uses a manual index book for financing statements, a clerk often will record the continuation statement on the same page of the index as the original financing statement was filed. In these jurisdictions, a title examiner simply would check the financing statement index for the year of the filing of the original financing statement and a complete history of the lien would be shown on that page.

Other jurisdictions utilize manual recordation systems, but are contemplating computerization and the microfilming process that accompanies computerization of these systems. These circuit court clerks often find it preferable to avoid updating their original indices and to file continuation statements chronologically, or by the date of their receipt.

In circuit court clerks' offices using a computerized recordation system, chronological indexing is preferable, although not required by statute, given the practical inability of the clerk to update the indexing notation on the original financing statement. Assuming the alphabetical index of financing statement debtors, the title examiner would locate the debtor's name in the index and complete a six-year search under the debtor's name to find any applicable financing statements, continuation statements, or other entries.

III. Chronological Filing by Date of Receipt Is Preferable Indexing Method, But Not Required by Statute

The varied methods used by circuit court clerks to index financing and continuation statements place different burdens on title examiners. As noted in the Official Comment to § 8.9-403, the purpose of this statute is to allow for "self-clearing" files. The clerk automatically may discard each financing statement after a period of five years, plus an additional year of lapse required in § 8.9-403(3), unless a continuation statement is filed or unless the financing statement remains effective under § 8.9-403(6), which deals with real estate mortgages that are treated as fixture filings. The Comment further notes
that, if the indices are arranged by years, the title examiner will have a limited and
defined search of six years. This implies a legislative preference for chronological index-
ing. As long as the clerk follows the requirements of the statute by referencing the origi-
nal financing statement and attaching the copy of the original financing statements to
the continuation statements, a manual system organized by alphabetic debtor indices also
should allow for a manageable search process.

Because of the diversity of circuit court clerks' offices in the Commonwealth, both
in terms of the varied sizes of the jurisdictions served and their degrees of computeriza-
tion, it is my opinion that, in the absence of a specific statutory requirement for the
chronological indexing of financing statements and continuation statements, clerks may
use either of the indexing methods described above. Although statewide consistency in
the indexing of these statements may be preferable, a single method of recordation has
not been required by the General Assembly.

CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.
COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Where county approved and bonded subdivision plats and developer completed all im-
provements prior to effective date of Act, developer has vested right to build single fam-
ily house on each approved lot provided he complies with Act's requirements. Vested
rights transferable, must be exercised within reasonable period of time.

October 19, 1989

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

You ask two questions concerning the vested rights of a landowner (the "owner")
whose real property may be affected by regulations adopted on September 20, 1989, by
the Chesapeake Bay Local Assistance Board (the "Board") pursuant to the Chesapeake
Bay Preservation Act, §§10.1-2100 through 10.1-2115 of the Code of Virginia (the
"Act"). With respect to a detailed fact situation, you ask (1) whether the owner has a
vested right under existing law to construct a single family home on each lot he has
developed even if the requirements in the Board's regulations otherwise would preclude
such development, and (2) whether a purchaser for value of a developed lot succeeds to
whatever vested property rights the owner may have.

I. Facts

The owner acquired approximately 235 acres of unimproved land on December 30,
1986. This property was rezoned by the county board of supervisors on January 15, 1987,
from an agricultural zoning classification to a conditional residential classification for
townhouses and single family residences. The owner, by proffer, limited the density of
the development to 290 single family residences and 50 townhouses.

The owner received a number of county approvals and permits, as well as some
state and federal permits, for the development, which was designed as a planned residen-
tial community. The owner recorded a series of ten subdivision plats between May 14,
1988 and May 23, 1988. The plats were recorded pursuant to the county's subdivision
ordinance, after approval by the county's subdivision agent, as required by §§15.1-473(b)
and 15.1-475. The recorded plats divided the property into 267 single family residential
lots, with additional recreational and open spaces.
On June 9, 1988, the owner and the county entered into a subdivision agreement pursuant to which the owner agreed to locate and construct all physical improvements in accordance with the county's subdivision ordinance and with plans approved by the county. The owner posted a $1,900,000 performance bond to secure the completion of the designated improvements.

The owner and the county entered into a water agreement on September 28, 1988, pursuant to which the county agreed to provide water to the development at the owner's expense, and the owner agreed to construct the necessary facilities to provide water in reliance upon the county's agreement to assume responsibility for the operation and maintenance of such facilities. On January 28, 1988, the county granted the owner a land disturbing permit bonded at $74,000. In addition, on February 18, 1988, the county granted the owner a conditional use permit to locate a yacht club, marina and miscellaneous recreational uses and facilities within the development.

On October 14, 1987, the owner borrowed $6,400,000 to finance this entire development and, on April 27, 1989, borrowed an additional $1,500,000. During the spring of 1989, the owner substantially completed the development's infrastructure so that all lots were ready for sale and subsequent construction. You state that the owner has spent more than $8 million preparing the development for the construction of single family residences and related amenities, including roads, water and sewer systems, and recreational facilities.

Since late in 1987, the owner has sold 180 lots, an additional 20 lots are under contract, and 67 lots remain unsold. The owner believes that 26 of the sold or contracted lots, and 41 of the lots that remain to be sold, are within the probable boundaries of the Chesapeake Bay Preservation Areas which the Board's regulations require the county to designate. The owner also believes that, if the vegetated buffer requirements contained in the Board's regulations apply to these 67 lots, many will no longer contain a viable building site, and some may contain no building site at all.

II. Applicable Statutes and Regulations

The Act was passed by the 1988 Session of the General Assembly and became effective on July 1, 1988. The Act itself effects no zoning change, but it does require the Board to adopt regulations that (1) establish criteria for use by local governments to designate Chesapeake Bay Preservation Areas and (2) establish criteria for local governments to use in deciding requests to rezone, subdivide, or to use and develop land in such areas. See § 10.1-2107. The Act also provides, in § 10.1-2115, that its provisions "shall not affect vested rights of any landowner under existing law."

On September 20, 1989, the Board completed its adoption of the Chesapeake Bay Preservation Area Designation and Management Regulations, VR 173-02-01 (the "Regulations"). See 6:1 Va. Regs. Reg. 11-24 (Oct. 9, 1989). Pursuant to § 2.2 of these Regulations, Tidewater localities will have until September 20, 1990, to designate Chesapeake Bay Preservation Areas and to adopt performance criteria for these areas that satisfy the requirements of Part IV of the Regulations. Id. at 14. The change of zoning required by the Act, therefore, is not yet in force and is not required to be in force before September 20, 1990.

The Regulations also require that Chesapeake Bay Preservation Areas normally include a buffer 100 feet landward of tidal shores and certain other sensitive land features. Id. § 3.2(B)(5), at 15. In small lots, or in lots with an unusual configuration, it may not be possible to preserve the 100 foot buffer and still have a viable building lot.
The Regulations further provide for special or hardship exceptions. Section 4.3(B)(2) permits a reduction in the buffer width to not less than 50 feet, when necessary, to prevent the loss of a buildable area on a lot recorded before October 1, 1989, the effective date of the Regulations, provided the modifications are the minimum needed to achieve a reasonable buildable area, and, if possible, an equivalent area on the lot is established to maximize water quality protection. Id. at 18. Section 4.5(A)(1) of the Regulations authorizes local governments to establish an administrative procedure to waive or modify the criteria for structures on legal nonconforming lots, provided there will be no net increase in nonpoint source pollutants and the erosion and sediment control requirements are satisfied. Id. at 19. Section 4.6 authorizes exceptions to the criteria, provided that the exceptions are the minimum necessary to afford relief and that they are reasonably and appropriately conditioned in light of the purpose and intent of the Act. Id. at 20.

III. Vested Rights Determination Requires Government Approval and Substantial Expense in Reliance on Approval

Any determination of vested rights of a landowner depends upon the facts of each particular case. The doctrine of vested rights, sometimes referred to as "equitable estoppel," operates to reconcile the conflict between legislation enacted to provide for society's changing needs and the stability a developer or owner needs to plan and complete a project successfully. In addition to § 10.1-2115 of the Act, § 15.1-492 also recognizes the vested rights of property owners by limiting the application of local zoning ordinances to existing uses. There is no specific statutory language, however, that establishes at what point in the development process a developer acquires a vested right to complete a project, despite an intervening zoning or other legislative change.


If other conditions in the permit process have been met, obtaining a valid building permit usually entitles the permittee to complete a building pursuant to the permit within a specified time without having to comply with subsequent zoning changes. See Fairfax County v. Medical Structures, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972); Chapel Creek, Ltd. v. Mathews County, 12 Va. Cir. 350, 353-54 (1988); Avco, supra.

These general rules have been modified in Virginia by two cases that place more emphasis on good faith expenditures to complete government approved projects, even though no permit for the construction has yet been issued. The Supreme Court of Virginia has recognized that

in many urban localities, the site plan has virtually replaced the building permit as the most vital document in the development process. Every site plan submitted under the Fairfax County Zoning Ordinance (Chapter 30, Code of Fairfax County) must contain, among other things, topographical maps, surveys, engineering studies and proof of notice to landowners in the
vicinity. The filing of such a plan creates a monument to the developer's intention, and when the plan is approved, the building permit, except in rare situations, will be issued.

_Fairfax County v. Medical Structures_, 213 Va. at 357-58, 192 S.E.2d at 801. In the _Medical Structures_ case, the owner had obtained a special use permit under an existing zoning classification, filed and diligently pursued a bona fide site plan, and incurred substantial expense in good faith before a change in the local zoning ordinance. The Supreme Court held under these facts that the permittee had "a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation." Id. at 358, 192 S.E.2d at 801.

The Supreme Court also has held that a vested right existed when an oil company, after the issuance of a special use permit under existing zoning, purchased certain property based upon its value for the permitted use. _Fairfax County v. Cities Service_, 213 Va. 359, 193 S.E.2d 1 (1972). The company had filed a preliminary site plan after a zoning amendment that would have restricted the development had been advertised, but before it was adopted. The Supreme Court held "that [the company's] right to the land use described in the use permit vested upon the filing of the site plan." Id. at 362, 193 S.E.2d at 3.

The question presented by your inquiry, therefore, is whether the owner has obtained the requisite government approvals for his project, and has incurred sufficient expense in good faith reliance on those approvals, to acquire a vested right to complete the development as approved.

IV. Owner Has Vested Rights in Facts Presented

As discussed above, the existence of a vested right depends upon the specific facts in each case. See 1 R. Anderson, _supra_ § 6.23; _Russell v. Town of Stephens City_, 12 Va. Cir. 180, 183 (1988). In determining when vested rights accrue, it is important to note that different localities control their land use and development in different ways throughout the Commonwealth, within the scope of zoning and subdivision enabling statutes. No attempt has been made to analyze the facts you present under the requirements of any specific local ordinance.

In this instance, the owner has no building permit, no special use permit and no site plan. Nonetheless, the county rezoned the property to authorize the project for a maximum of 290 single family residences and 50 townhouses. The subdivision of the property by ten separate plats was approved by the county presumably in accordance with applicable subdivision requirements. Furthermore, the owner entered into a subdivision agreement with the county that provided that the location and construction of all improvements would be in accordance with plans approved by the county. The subdivision agreement was backed by a $1,900,000 performance bond. Prior to the effective date of the Act, the owner expended virtually all the funds necessary to develop the property for sale as single family lots in accordance with the conditional rezoning and plats approved by the county.

The facts in this case can be compared to those in _Medical Structures_. In the facts you present, rather than a special use permit for a commercial project, the owner has secured a conditional rezoning of the property for a projected maximum of 290 single family and 50 townhouse units and a bonded subdivision agreement to construct extensive improvements in accordance with plans approved by the county. The bonded plans are certainly a monument to the owner's intention irrevocably to commit the property to the development. In fact, the actual construction of extensive infrastructure and other improvements has been completed. In _Medical Structures_, the developer expended funds
to prepare a site plan. In this case, the owner has had the property rezoned and its sub-

division approved, and has constructed extensive improvements. The facts you present are
distinguishable from the facts considered in *Medical Structure* because of the numerous
residential lots involved rather than the construction of a single commercial project.

Nevertheless, significant authority supports the application of the vested rights doctrine
in the facts you present.

In general,

[the mere filing of an approved subdivision plat does not stake out a noncon-

forming use of the platted land which insulates it from subsequent zoning

changes. However, if the developer has proceeded and made expenditures to

a substantial extent in reliance on the existing zoning and before the zoning

change, he may be deemed to have established and be entitled to a non-

conforming use.


Corp. v. Clackamas County*, 59 Or. App. 177, 650 P.2d 963, 966 (1982), the court found "a

vested right in a non-conforming use" when a developer, after his planned unit develop-
ment was approved by the county, "substantially commenced the project, made substan-
tial expenditures, acted in good faith and cannot use the development that has taken
place for conforming alternative uses from which plaintiff can obtain a reasonable eco-
nomic return."

In the facts you present, the owner, pursuant to county approved plans, expended
substantial funds in preparing subdivided lots for single family residential use, including
building the roads and installing the water and sewer lines. These improvements were
completed as approved before the Act became effective and more than two years before
any regulations adopted pursuant to the Act take effect. It is my opinion, therefore, that
the owner has established a vested right to use the land for the purpose approved by the
county, subject to the requirement that he comply with the new requirements to the
greatest extent possible. Because nonconforming uses are contrary to public policy, "they
are protected only to avoid injustice and that is the limit of their protection against con-
formity." 8A E. McQuillin, supra § 25.182, at 18; see id. § 25.183. A lot large enough to
contain a vegetated buffer, therefore, must have such a buffer area reserved, even
though the owner has a vested right to use the parcel if the buffer requirements could
not have been met.

V. Vested Rights Are Transferable

The right to maintain an existing use attaches to the real property itself, and "pur-
chasers of property constituting a non-conforming use who had knowledge of the ordi-
nance are entitled to the same use under the ordinance as their grantors." *Sanderson v.
DeKalb County Zoning Board of Appeals*, 24 Ill. App. 3d 107, 110, 320 N.E.2d 54, 57
(1974). The owner in the facts you present developed his land with the intention of selling
residential lots. A vested right that he could not transfer to his purchaser would lose a
substantial portion of its value. For the purposes of the Act, there is no difference be-
tween whether the developer or an individual owner builds a house on a particular lot. It
is my opinion, therefore, that a purchaser of a developed lot from the owner generally
succeeds to whatever vested property rights the owner may have. The vested rights,
whether in the present owner or in a subsequent purchaser, however, do not continue
indefinitely, but must be exercised within a reasonable period of time. While the rights of
the locality to change its zoning powers can be suspended for a reasonable time to allow
the diligent, good faith completion of an approved development, these rights cannot be
suspended indefinitely. Absent this diligent, good faith completion of the approved devel-

dopment within a reasonable time, the vested rights of the owner or subsequent purchaser
will be lost, and the lot will become subject to the current zoning requirements. See

CONSERVATION: FOREST RESOURCES AND THE DEPARTMENT OF FORESTRY -
FORESTRY SERVICES FOR LANDOWNERS.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS — LEGISLATURE.

Rational basis exists for State Forester to reallocate state resources available to land-
owners who execute cooperative forestry management agreement with private forestry
company; no unreasonable discrimination.

November 2, 1989

The Honorable Harvey B. Morgan
Member, House of Delegates

You ask whether the decision of the State Forester to limit the state resources
available to landowners who have executed a Cooperative Forestry Management ("CFM")
Agreement with a private forestry company unreasonably discriminates against CFM
landowners.

I. Two Programs Provided for Forestry Services

Virginia landowners with standing timber have access to two different programs for
forestry services. First, the Virginia Department of Forestry (the "Department") is
authorized to assist private landowners in managing their forest resources and provides
its services to private landowners pursuant to Article 5, Chapter 11 of Title 10.1,
§§ 10.1-1131 through 10.1-1134 of the Code of Virginia. In the second program, several
private forestry companies in the Commonwealth, including Westvaco, Stone Container,
Union Camp and Chesapeake Corporation, sign agreements with private landowners to
provide services which are similar in kind, degree and cost to the services available from
the Department.

Your question concerns the availability of Department personnel and material to
undertake controlled or prescribed burns. The Department’s program provides burning
services pursuant to a standard form agreement (Department Form 11) in which the land-
owner promises, among other things, to furnish the personnel required to ignite and moni-
tor the burn. The agreement establishes a charge for these services using a sliding scale
based on the size of the tract involved and the number of Department personnel required.
A separate charge is made for equipment, fire line construction and safety standby dur-
ing the burn. These charges are collected by the Department regardless of the landown-
er’s participation in a private industry-sponsored services program.

A review of one CFM agreement indicates that ongoing forestry management serv-
ices are provided to the landowner by the private company at no charge. The private
company, in return, acquires the right to submit a bid for forest products produced on the
land. Although the agreement does not expressly require it, the landowner apparently
would pay the charges for labor and equipment required for additional services, such as
prescribed burning.
In the summer of 1988 the State Forester, pursuant to a proposal approved by the Virginia Board of Forestry, decided that landowners having access to a private CFM agreement should receive limited personnel and equipment support from the Department for burning services. This decision was motivated, in part, by the State Forester's obligation to allocate existing resources to assist the Commonwealth in its interstate cooperative program for the Chesapeake Bay. Letter from J.W. Garner to Elmer J. Coche (July 22, 1989).

II. Equal Protection Standard Requires Rational Basis to Support Decision of State Forester

More often than not, a decision made by a governmental agency or official affects some group at the expense of another, and creates one or more classifications. In the facts you present, the State Forester's decision to provide reduced forestry management services to landowners who have CFM agreements, while continuing to make those services available to landowners who do not, creates a "classification" between these groups.

The Supreme Court of the United States and the Supreme Court of Virginia have established judicial standards for gauging the proper limits on governmental established classifications, and have recognized that these standards must grant the wide latitude needed for the daily management of effective government while prohibiting discrimination, the effects of which fall too heavily on individuals or identifiable groups of individuals. 2


The principles governing this area of the law are well-summarized in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

The Supreme Court of Virginia has found that constitutional prohibitions against special legislation do not prohibit classifications as long as the classification is not purely arbitrary. "It must be natural and reasonable, and appropriate to the occasion. There must be some such difference in the situation of the subjects of the different classes as to reasonably justify some variety of rule in respect to thereto." Martin's Ex'es v. Commonwealth, 126 Va. 603, 612, 102 S.E. 77, 80, reh'g denied, 102 S.E. 724 (1920).

When government acts either on the basis of a "suspect" classification, or to affect a "fundamental" interest, the traditional standard of equal protection review, discussed above, is replaced by a "strict scrutiny" test. The presumption that a classification is to
be accepted if there is a rational basis for it in these circumstances yields to a require-
ment that the government be able to demonstrate that the classification "promotes a
compelling state interest." Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (emphasis in
original).

"Suspect" classifications include race and, in modified forms requiring "intermedi-
ate" scrutiny, discrimination on the bases of sex, alienage and wealth. See Brown v.
Board of Education, 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214
(1944).9

"Fundamental" classifications concern basic civil rights, including the right to vote
and the right of procreation. Dunn v. Blumstein, 405 U.S. 330 (1972); Skinner v. Okla-

III. Decision of State Forester Is Supported by Rational Basis

The decision of the State Forester to reallocate staff and equipment for prescribed
burns draws no distinction that involves a "suspect" classification or a "fundamental"
right. The decision, therefore, is subject to review under the rational basis test--that is,
the decision of the State Forester will be upheld under an equal protection analysis if
facts reasonably may be conceived to support the decision. In authorizing the Depart-
ment to undertake these activities, the General Assembly enacted statutes that were
permissive, rather than mandatory. See § 10.1-1132. The State Forester is given wide
discretion in implementing the Department's program for forestry services. Compare Op.
to Hon. David V. Williams, Commw. Att'y, Henry County (Jan. 4, 1989); 1987-1988 Att'y

The long-term policy of the Department is to promote "the development of private
terprise (Forest Industry, Forest Consultants and Forest Contractors) to provide
needed services on a business basis." Va. Div. Forestry Pol'y # 268 (Sept. 1, 1977). Fur-
ther, the policy decision of the Forester was consistent with the Governor's Executive
Memoranda 1-88 and 2-88, each effective January 15, 1988, directing state executive
officials to promote private sector development and reduce the costs of state govern-
ment operations.

The State Forester has as his mandate the "care, management and preservation of
the forest reserves of the Commonwealth." Section 10.1-1106. The Department's services
to landowners are supported, in part, by the fees generated from the provision of these
services. See §§ 10.1-1133, 10.1-1134. I am advised that, in recent years, these services
have been financed by the general fund (79%) and by service fees (21%). Reallocation of
departmental resources from landowner services to water protection has reduced the
funds available to the State Forester. Water quality services are not reimbursed.

The State Forester, in furtherance of his statutory mandate, has reduced personnel
and equipment on all prescribed burns. No services have been terminated; they have been
reduced only to those landowners who are already receiving a significant level of services
from the private sector.

Based on the above, it is my opinion that a rational basis exists to support the deci-
sion of the State Forester to reallocate resources from the landowner services. It is fur-
ther my opinion, therefore, that no unreasonable discrimination has taken place against
CFM landowners in the facts you present.

1For example, § 10.1-1132 provides, in part: "The State Forester, or his authorized
agent, upon receipt of a request from a forest landowner for technical forestry assis-
tance or service, may (i) designate forest trees for removal for lumber, veneer, poles, piling, pulpwod, cordwood, ties, or other forest products, by blazing, spotting with paint, or otherwise designating in an approved manner; (ii) measure or estimate the commercial volume contained in the trees designated; (iii) furnish the forest landowner with a statement of the volume of the trees so designated and estimated; and (iv) offer general forestry advice concerning the management of the landowner's forest."


The Supreme Court of Virginia has followed this standard, holding that Art. I, § 11, which includes explicit prohibitions on discrimination based on religious conviction, race, color, sex, or national origin, prohibits invidious, arbitrary discrimination upon the basis of sex. Archer and Johnson, 213 Va. 633, 194 S.E.2d 707; cf. 1977-1978 Att'y Gen. Ann. Rep. 158.

CONSERVATION: VIRGINIA WASTE MANAGEMENT ACT — SOLID WASTE MANAGEMENT.

COUNTIES, CITIES AND TOWNS: GENERAL — GENERAL PROVISIONS; CERTAIN POWERS — PLANNING, SUBDIVISION OF LAND AND ZONING.

Solid waste management facility permit application complete under prior law subject to continuing review by Department of Waste Management. New statutory requirement for certification from locality that location and operation of proposed facility consistent with applicable ordinances applies to pending applications.

August 8, 1989

Ms. Cynthia V. Bailey
Executive Director, Department of Waste Management

You ask two questions concerning § 10.1-1408.1 of the Code of Virginia, which was amended by the 1989 Session of the General Assembly, effective July 1, 1989.

I. Statutory Amendment Requires Local Certification as Part of Application for Permit for Solid Waste Disposal Facility

Prior to July 1, 1989, § 10.1-1408.1(B) required the Director of the Department of Waste Management (the "Director"), upon receiving an application for a permit for a sanitary landfill or other facility for the disposal, treatment or storage of nonhazardous solid waste (a "facility" or "solid waste facility"), to notify the governing body of the county, city or town in which the facility was to be located. No permit could be issued until the Director had received notification from the locality that the location of the proposed facility was "consistent with all ordinances adopted pursuant to Chapter 11 (§ 15.1-427 et seq.) of Title 15.1." Chapter 11 of Title 15.1 authorizes the adoption of ordinances governing the use of land, including zoning ordinances. The locality was required to provide this notification to the Director within thirty days of receiving notice from the Director of the pending application. The failure of the locality to provide noti-
fication within this thirty-day period constituted a waiver of any objection the local governing body may have had to the issuance of the permit on the basis of a conflict with a local land use ordinance.

Section 10.1-1408.1 was amended by the 1989 Session of the General Assembly, effective July 1, 1989, to require applicants for solid waste management facility permits to obtain certification from the appropriate locality that the location and operation of the proposed solid waste facility are consistent with all applicable ordinances. See Ch. 623, 1989 Va. Acts 972 (Reg. Sess.) ("Chapter 623"). No application for a facility permit is complete unless the applicant provides this certification to the Director. See § 10.1-1408.1(B). The 1989 legislation also enacted new § 15.1-11.02, which authorizes localities to enact ordinances regulating the siting of facilities within a locality's boundaries even if the locality has not adopted a land use ordinance pursuant to Chapter 11 of Title 15.1.

II. Permit Applications Complete at Time of Submission but Subject to Continuing Departmental Review

Your questions focus upon whether a facility permit application is complete under two fact situations. In both cases, the application was submitted prior to July 1, 1989, and the Director notified the appropriate local governing body, as required by former § 10.1-1408.1(B).

In the first situation presented, the locality had not adopted any ordinance pursuant to Chapter 11 of Title 15.1 prior to July 1, 1989. The locality, therefore, advised the Director prior to July 1, 1989, that it had not adopted any such ordinance. In the second situation, the locality failed to advise the Director of its objections within the thirty-day period required by former § 10.1-1408.1(B). You ask whether either applicant now must supplement its pending application with a certification from the appropriate locality that the proposed use is consistent with all ordinances.

In each of the two cases you present, the applicant had complied with all existing requirements of former § 10.1-1408.1(B) when its application was submitted. The local government's response or failure to respond was in accordance with former § 10.1-1408.1(B). In each case, the application was being reviewed by the Department of Waste Management and was subject to further staff and public comment.

III. Local Certification Required for Applications Pending After July 1, 1989

Chapter 623 amended § 10.1-1408.1(B) and enacted new § 15.1-11.02. Section 10.1-1408.1(B), as amended, expressly provides that no application for a facility permit shall be complete unless the applicant has provided the Director with local certification that the location and operation of the proposed facility are consistent with all applicable ordinances. This certification requirement is broader than the previous notice requirement covering only land use ordinances that was in place prior to July 1, 1989.

Section 10.1-1408.1(B), as amended, does not exempt pending applications from the new certification requirement. Chapter 623 provides, however, that the enactment shall not affect "any pending litigation." Id. cl. 2, at 973 (emphasis added). The questions you pose do not involve pending litigation, so this limited exemption does not apply. On its face, therefore, the new requirement of certification applies to pending permit applications.

The General Assembly, however, did carve out an exemption from the application of a solid waste facility siting ordinance adopted pursuant to new § 15.1-11.02(C):
Any person who has already been issued a permit to operate a solid waste management facility by the Department of Waste Management or has received zoning or other land use approval for the siting of the facility, prior to the effective date of this section shall not be required to obtain siting approval for such solid waste management facility pursuant to the provisions of this section.\[1\]

It is an accepted principle of statutory construction that the mention of one thing in a statute implies the exclusion of another. A statute, limiting things to be done in a particular manner, implies that they shall not be done otherwise. See Att'y Gen. Ann. Rep.: 1985-1986 at 19, 20; 1976-1977 at 199, 201. The creation of specific exemptions in Chapter 623, in my opinion, implies that no other exemptions were intended and that none should be inferred.

Section 15.1-11.02(C) exempts facility operators or permit applicants who have received zoning or other land use approval from the siting approval requirements of § 15.1-11.02 only, not from the requirement of amended § 10.1-1408.1 to obtain certification from a locality in order to complete a permit application. It is my opinion, therefore, that the permit applications in the fact situations you present are subject to the new requirement of § 10.1-1408.1 after July 1, 1989.

While there is a presumption against the retrospective effect of legislation, "[l]egislative intent that a statute apply retroactively will control unless to do so would impair vested rights." Booth v. Booth, 7 Va. App. 22, 26, 371 S.E.2d 569, 572 (1988) (citing Shoosmith v. Scott, 217 Va. 789, 793, 232 S.E.2d 787, 789 (1977)). "[A vested right is] a right, so fixed that it is not dependent on any future act, contingency or decision to make it more secure." Kennedy Coal v. Buck'n Coal, 140 Va. 37, 45, 124 S.E. 482, 484 (1924). Mere acceptance and processing of an application, of course, does not necessarily mean that the permit will be issued or that additional information will not be necessary. In fact, you note that the review process for the applications was still taking place on July 1, 1989. It is my opinion, therefore, that the mere expectancy that the law in effect at the time of the submission of an application will apply to the application does not rise to the level of a vested right.

This conclusion is consistent with general principles governing the effects of changes in the law to pending administrative matters. In Ziffrin, Inc. v. United States, 318 U.S. 73 (1943), the Supreme Court of the United States considered this question. Ziffrin concerned an application before the Interstate Commerce Commission ("I.C.C.") for a permit to operate as a "contract carrier." Under the law at the time the application was submitted, a person could not hold both a permit as a "contract carrier" and a certificate as a "common carrier" unless the I.C.C. found that such certificate and permit could be held by one person consistently with the public interest. Before the I.C.C. acted upon the application, the law was broadened to apply to persons under common control. The Supreme Court held that the I.C.C. was required to act under the law in effect at the time it made its decision, not the law in effect at the time the application was submitted.

A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law. A fortiori, a change in law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation.

*Id.* at 78 (citations omitted). The Supreme Court of Virginia has reached the same conclusion in the area of zoning applications. See Civic Assoc. v. Chesterfield County, 215 Va. 399, 209 S.E.2d 925 (1974) (county board of zoning appeals had no power to act on pend-
III. Conclusion

In summary, the new statutory requirement for a certification from the locality on its face applies to pending applications. Unlike § 15.1-11.02, Chapter 623 contains no applicable exemption from the certification requirements of § 10.1-1408.1(B). It is my opinion, therefore, that applicants whose applications were submitted prior to July 1, 1989, but were still pending after that date, must provide a certification from the appropriate locality that the location and operation of the proposed facility are consistent with all applicable ordinances in order to complete their applications.

1Without such an exemption, the application of a newly adopted solid waste facility siting ordinance under some circumstances could operate to impair vested rights in an established use of lands. See, e.g., Fairfax County v. Cities Service, 213 Va. 359, 193 S.E.2d 1 (1972); Fairfax County v. Medical Structures, 213 Va. 355, 192 S.E.2d 799 (1972).

CONSTITUTION OF THE UNITED STATES: FIRST AMENDMENT.

Policy requiring employees of local department of social services to follow certain procedure to voice complaints with threat that violation of department's standards of conduct may constitute second group offense overbroad, constitutionally defective.

October 10, 1989

The Honorable Donald A. McGlothlin Sr.
Member, House of Delegates

You ask whether the procedure established by the Buchanan County Board of Social Services (the "board") to address complaints raised by employees of the local department of social services (the "department") violates the rights of these employees under the First Amendment of the Constitution of the United States. 1

I. Facts

You state that a number of department employees have been bypassing their immediate supervisors with respect to various complaints, some of which concern the conditions of their employment. As a result, the director of the department was directed by the board to establish a procedure for employee complaints. A memorandum to employees from the director described this procedure and indicated that it was established for situations involving "dissatisfaction or [complaints] about conditions of . . . employment." Memorandum from Thomas J. Holland Jr. to all department employees (July 27, 1989).

A later memorandum issued by the director at the request of the board added the following language to the initial procedure:

any staff member who makes a complaint or expresses dissatisfaction about any social services related matter to a board member; a member of the board of supervisors; a member of the state staff; or the public in general, without first exercising their right to complain or express dissatisfaction
through proper channels ... is subject to being brought before the board ... for disciplinary action.


The procedure adopted by the department's board requires that an employee first address the complaint or request to the employee's immediate supervisor and, if the complaint or request is not satisfactorily resolved by the supervisor, then to the department's director. If the complaint or request is not resolved at this level, the procedure authorizes the employee to address the complaint or request at any regularly scheduled meeting with the full board. The final step of the procedure provides that, if the problem is not resolved satisfactorily, the employee may file a grievance under the local department's grievance procedures. The board has indicated that the failure by an employee to abide by the procedure described above would constitute a direct violation of the department's standards of conduct, possibly resulting in a "second group" offense.

II. Applicable Constitutional Provision

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

III. Public Employees Do Not Give Up First Amendment Rights As Condition Of Employment


The initial inquiry in the facts you present is whether the speech in question touches upon a matter of public concern.

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency in reaction to the employee's behavior. . . .

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . .

IV. Balancing Test Must Be Applied to Determine Constitutional Validity of Procedures

When the employee's communication touches upon a matter of public concern, a balancing test is utilized to determine whether restrictions upon an employee are justified. "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568.

The United States Court of Appeals for the Fourth Circuit has discussed the proper application of this balancing test:

Although the Board's action interferes with the exercise of the Association's and also of its members' speech, association and petition rights, the Board might still prevail if it could demonstrate a compelling justification for burdening those First Amendment interests. The Supreme Court has held that a public employer may have interests in regulating the speech of its employees that differ from its interests in regulation of speech of the citizenry at large. Nonetheless, any infringement on employees' First Amendment rights must be carefully tailored to achieve legitimate state objectives and no more.

Henrico Professional Firefighters v. Bd. of Sup'rs, 649 F.2d 237, 243 (4th Cir. 1981) (citation omitted).

In justifying sanctions against an employee in this context, therefore, an employer may present evidence concerning how the communication "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing Pickering, 391 U.S. at 570-73). It must be noted, however, that the governmental agency bears the burden of justifying sanctions against the employee. Connick, 461 U.S. at 150.

V. Board's Current Policy Is Overbroad

Your inquiry does not provide a factual basis or explanation for the board's procedures. In prohibiting any expression of dissatisfaction about any local agency matter without first following "proper channels," however, the procedure would encompass all statements of public concern without regard to whether such communication interferes with the regular and efficient operation of the agency. It is my opinion, therefore, that the policy is overbroad and is constitutionally defective in its present form. The policy and procedure contained in the board's initial memorandum restricting the procedure to situations involving "dissatisfaction or [complaints] about conditions of . . . employment," however, would appear to allow employees to discuss matters of public concern without violation of their First Amendment rights. July 27, 1989 memorandum, supra. The utilization of this initial policy and procedure, therefore, together with the balancing test described in Part IV, should provide the appropriate guidance and framework for the development of a new department policy that meets the objectives of the board within the limitations of the First Amendment.

You also ask whether the board's procedure violates any statutory rights of these employees. All relevant case law involving factual situations similar to those you present contains a First Amendment analysis. I am not aware of any statutes concerning the issue you raise.
This offense would be a failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy. If a violation is found, the employee may be suspended for up to ten workdays without pay.

Va. Const. Art. I, § 12 (1971) provides in part, that "any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right." Although the Supreme Court of Virginia has not decided a case under this constitutional provision with facts similar to those you present, there is no indication that this Court would vary from the rationale used by the Supreme Court of the United States in deciding similar cases under a First Amendment analysis. See 4A M.J. Constitutional Law § 78 (Repl. Vol. 1983 & Cum. Supp. 1988).

CONSTITUTION OF VIRGINIA: EDUCATION — LEGISLATURE.

EDUCATION: TEACHERS, OFFICERS AND EMPLOYEES — GRIEVANCES; DISMISSAL, ETC., OF TEACHERS.

ADMINISTRATION OF GOVERNMENT GENERALLY: PERSONNEL ADMINISTRATION.

Scope of grievance procedure available to local school board employees under proposed constitutional amendment limited by supervisory powers vested in school boards; Constitution authorizes General Assembly to enact grievance procedure for state employees allowing binding arbitration for certain disputes.

December 29, 1989

The Honorable S. Vance Wilkins Jr.
Member, House of Delegates

You ask several questions concerning the scope of certain grievance procedures that may be available to local school board employees and to employees of state agencies.

I. Scope of Grievance Procedure Under Proposed Constitutional Amendment Limited by Supervisory Powers of School Board

You first ask whether the General Assembly would have the authority pursuant to a proposed amendment to Article VIII, § 7 of the Constitution of Virginia (1971) to enact a grievance procedure for public school teachers that would allow binding arbitration of anything other than the fairness and equity of the application of personnel policies in individual cases. Specifically, you ask whether such a grievance procedure could authorize the binding arbitration of disputes concerning salary, working conditions, policy, or the selection of instructional material. You indicate that in the 1989 Session of the General Assembly you voted for House Joint Resolution No. 178, which proposed the constitutional amendment in question, with the understanding that the amendment would authorize the General Assembly to enact a grievance procedure for school board employees that would be directed only at the fairness and equity of the application of personnel policies in individual cases, and not the formulation of those policies.

A. Proposed Amendment to Article VIII, § 7; Applicable Constitutional and Statutory Provisions

The text of the proposed amendment to Article VIII, § 7 is detailed in House Joint Resolution No. 178, which provides:
The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law. The General Assembly may provide by general law for a personnel grievance procedure for school board employees which permits grievances to be resolved by a body other than the school board.


The general supervision of the public school system is vested in the State Board of Education ("State Board"). See Art. VIII, §§ 4, 5(e). Article VIII, § 2 provides that standards of quality for local school divisions shall be determined and prescribed by the State Board, subject to revision by the General Assembly.

The existing provisions establishing a grievance procedure for public school teachers are detailed in Article 3, Chapter 15 of Title 22.1, §§ 22.1-306 through 22.1-314 of the Code of Virginia.

B. Scope of Grievance Procedure Binding Arbitration Provision

Determined by Implementing Legislation; Scope of Binding Arbitration

Provision Limited by Supervisory Powers Vested in School Boards

The supervision of a local school division is vested in the local school board pursuant to Article VIII, § 7, which does not, however, specify the scope of this supervisory power. The Supreme Court of Virginia has held that, while a school board may not exercise this supervisory power unfettered by legislative restriction, a statute may not divest a school board of functions essential and indispensable to the exercise of the supervisory power vested by Article VIII, § 7. See School Board v. Parham, 218 Va. 950, 957-58, 243 S.E.2d 468, 472-73 (1978); Commonwealth v. Arlington County Bd., 217 Va. 558, 576, 232 S.E.2d 30, 41 (1977). See also Att'y Gen. Ann. Rep.: 1984-1985 at 269 (General Assembly may mandate opening day for public schools); 1982-1983 at 444 (General Assembly may mandate average salary increases for instructional personnel); 1980-1981 at 311 (General Assembly may provide for mandatory tie-breaker procedure for school boards).

In School Board v. Parham, the Supreme Court of Virginia held that, under the existing provisions of Article VIII, § 7, a grievance procedure for school board employees mandated by the State Board unconstitutionally divested school boards of the essential supervisory function of applying local policies, rules, and regulations adopted for the day-to-day management of a teaching staff. 218 Va. at 957-58, 243 S.E.2d at 472-73. The grievance procedure invalidated in Parham provided for the binding arbitration of employment disputes by an impartial panel. The procedure defined "grievance" as a dispute concerning the application of school board policies, rules and regulations as they affect the work activity of nonsupervisory employees. The procedure expressly reserved specific prerogatives of the local school boards, including the formulation of policy. Id. at 952, 243 S.E.2d at 469.1 In Russell County School Bd. v. Anderson, 233 Va. 372, 383, 384 S.E.2d 598, 604 (1989), the Supreme Court restated with approval its analysis and conclusion in Parham.

The proposed amendment to Article VIII, § 7 would authorize the resolution of school board employee grievances by a grievance panel pursuant to appropriate implementing legislation. The proposed amendment, however, does not define the term "grievance," and the General Assembly would retain the authority to define that term in any implementing legislation subsequently adopted. The types of disputes amenable to resolution through a grievance procedure, however, would be limited, not only by the provisions
of any implementing legislation, but also by the original provisions of Article VIII, § 7, which vest supervisory powers in the school board.

The proposed amendment to Article VIII, § 7 must be read and harmonized in conjunction with existing constitutional provisions, if possible. See Pierce v. Dennis, 205 Va. 478, 481-82, 138 S.E.2d 6, 9 (1964); 1987-1988 Att'y Gen. Ann. Rep. 93, 94. The existing provisions of Article VIII, § 7 vest the supervision of local school districts in local school boards. The amendatory language would provide an exception to this constitutional grant of supervisory powers with respect to the resolution of school board employee grievances. Since the existing language of Article VIII, § 7, vesting supervisory powers in local school boards, still would remain, however, it is my opinion that the "essential function" test articulated by the Supreme Court of Virginia in Parham and earlier cases would continue as a viable analytical tool in determining the scope of the supervisory powers that would remain reserved to local school boards and could not be delegated to a grievance panel or other third party.

Pursuant to existing statutes, the definition of a "grievance" and the scope of a grievance procedure is limited to disputes concerning the application of personnel policies and other specified matters. The actual formulation of policy is reserved to the governmental agency. See §§ 2.1-114.5:1(A)-(B), 22.1-306(1). The definition of the term "grievance" in the procedure reviewed in Parham was similarly limited to the application of personnel policies and excluded the formulation of these policies. 218 Va. at 952, 243 S.E.2d at 469.

The proposed amendment to Article VIII, § 7 does not expressly limit the term "grievance" to matters concerning the application of personnel policies in individual cases. It is my opinion, however, that the ability to formulate policy is an essential supervisory function vested in a school board that may not be delegated to a third party, such as a grievance panel, even if the proposed amendment is adopted. To authorize a grievance panel to invalidate or alter personnel policies or other policies duly adopted by a school board, in my opinion, effectively would eliminate the ability of a school board to supervise its personnel, to formulate personnel policies or to enforce those policies that have been duly adopted. Based on the above, it is my opinion that, if the proposed amendment to Article VIII, § 7 is adopted, the power to formulate and alter personnel or other policies within statutory guidelines would remain an essential supervisory function of a school board that could not be delegated to a grievance panel. The scope of any grievance procedure enacted pursuant to the amendatory language would, of course, necessarily be determined by the implementing legislation. Furthermore, there may be factual situations presented under the proposed amendment where the distinction between matters involving the formulation of policy and other matters will be difficult to determine. This difficulty, however, already exists under current grievance statutes, although it currently is subject to resolution by a school board rather than a grievance panel. See § 22.1-306(1). Nonetheless, it is my opinion that, under the proposed constitutional amendment, the power to formulate and alter personnel or other policies within statutory guidelines could not be delegated to a grievance panel or other third party, and that any legislation authorizing a grievance panel or other third party to invalidate or alter duly adopted and authorized policies of a school board under the guise of a grievance procedure would be unconstitutional.

The potential application of a grievance procedure adopted pursuant to the proposed amendment to disputes concerning salary, working conditions and the selection of instructional materials would necessarily depend on the implementing legislation, if any, enacted by the General Assembly. None of these types of disputes lends itself to a categorical designation as either the formulation of policy or the application of policy. I cannot, therefore, definitively respond to this part of your inquiry in the absence of the implementing legislation.
II. Constitution Permits General Assembly to Enact Grievance Procedure for State Employees Allowing Binding Arbitration for Disputes Other Than Those Concerning Application of Personnel Policies

You next ask whether the present Constitution of Virginia allows the General Assembly to enact a grievance procedure for employees of state agencies permitting the binding arbitration of matters, in addition to the fairness and equity of the application of personnel policies in individual cases.

A. Applicable Constitutional and Statutory Provisions

Article IV, § 1 of the Virginia Constitution vests the legislative power of the Commonwealth in the General Assembly. Article IV, § 14 provides that this legislative power shall extend to all subjects of legislation not forbidden or restricted by the Constitution.

Section 2.1-114.5:1 provides for the grievance procedure applicable to most employees of state agencies. Section 2.1-114.5:1(A) defines the term "grievance" and § 2.1-114.5:1(B) reserves certain rights and responsibilities for management. Section 2.1-114.5:1(D)(4)(b) provides for the resolution of qualifying grievances by an impartial panel.

B. Constitution Authorizes General Assembly to Enact Grievance Procedure Allowing Binding Arbitration for Certain Disputes


No constitutional provision vests supervisory authority over state agency employees in state agency managers as does Article VIII, § 7 with respect to a school board and its employees. See 1977-1978 Att'y Gen. Ann. Rep., supra. Similarly, no constitutional provision directly limits the scope of those disputes involving state agency employees that may be submitted to binding arbitration if the General Assembly enacts the necessary legislation. It is my opinion, therefore, that the Constitution of Virginia permits the General Assembly to enact a grievance procedure for employees of state agencies allowing the binding arbitration of matters, in addition to the fairness and equity of the application of personnel policies in individual cases.

1Prior to the Court's decision in Parham, Opinions of this Office had concluded that the basic elements of the grievance procedure mandated by the State Board were permissible and did not unlawfully delegate to grievance panels essential supervisory functions reserved to school boards by Art. VIII, § 7. See Att'y Gen. Ann. Rep.: 1975-1976 at 151; 1972-1973 at 337.
ELECTIONS: THE ELECTION - SPECIAL ELECTIONS.

Constitutional provision authorizing merger of functions and duties of constitutional offices pursuant to appropriate enabling legislation; approval of voters by referendum. Local governing body may conduct administrative audit of school board administrative operations with school board's cooperation; scope of audit restricted if school board declines to cooperate.

December 29, 1989

The Honorable Madison E. Marye
Member, Senate of Virginia

You ask two questions concerning the City of Galax (the "City").

I. City Council May Conduct "Administrative Audit" of School System's Administrative Operations with School Board's Cooperation; Scope of Administrative Audit Limited if School Board Declines Cooperation

You first ask whether the City Council may hire a private firm to conduct an "administrative audit" of the school system's administrative operation, with or without the permission of the City's School Board (the "Board"). You state that the City Council is concerned that the Board may be paying more than it should for administrative positions. You do not describe the nature of the proposed administrative audit of the school system's administrative operations.

A. Applicable Constitutional Provision and Statutes

Article VIII, § 7 of the Constitution of Virginia (1971) provides that "[t]he supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law." See also Va. Code Ann. § 22.1-28 (parallel statutory provision).

Section 22.1-79 of the Code of Virginia details the general authority of a school board. A school board appoints administrative personnel and generally controls their employment activities. See §§ 22.1-60, 22.1-293, 22.1-297.

Chapter 8 of Title 22.1, §§ 22.1-88 through 22.1-124, provides for the development of the annual school budget for school divisions. The local governing body must make its school appropriations either by lump sum or by the major classifications of expenses specified in § 22.1-115. See § 22.1-94. Administrative expenses are one of the major classifications of expenditures specified in § 22.1-115.

B. City Council May Conduct "Administrative Audit" of School System's Administrative Operations, Provided Audit Does Not Interfere with Day-to-Day Operations of School System or School Board's Supervision of Those Operations; City Council May Not Directly Implement Changes in Administrative Operations of School System or School Board's Supervision of Those Operations

The general supervisory authority over the operations of a school system is vested in the local school board. See Art. VIII, § 7; § 22.1-28. This supervisory authority extends to the appointment, employment activities and compensation of a school division's administrative personnel. See §§ 22.1-60, 22.1-253.13:2(C), 22.1-293, 22.1-296, 22.1-297. See also School Board v. Parham, 218 Va. 950, 957, 243 S.E.2d 468, 472 (1978) (general supervisory authority of school board extends to day-to-day management of school staff).
The local governing body has a limited oversight role in the operation of a school division and school expenditures through the budget and appropriations process. See Att'y Gen. Ann. Rep.: 1983-1984 at 302; 1982-1983 at 409; 1981-1982 at 323; 1980-1981 at 9, 33; 1978-1979 at 29. As discussed above, the local governing body is obligated to make appropriations for the operation of the school division, and these appropriations must be made either by lump sum or pursuant to the major classifications in § 22.1-115. See § 22.1-94. In the situation you present, there is a significant relationship between the local governing body's oversight role in the budget and appropriations process and the proposed study of the administrative costs of the school division. It is my opinion, therefore, that the City Council may undertake the proposed administrative audit of the Board's operations with the cooperation of the Board.

If the Board declines to cooperate in the conduct of the proposed administrative audit, however, the statutorily permissible scope of the audit will be limited. Section 15.1-163 provides that a local governing body may require local boards, including the school board, to furnish such information as may be deemed advisable and in such form as may be required in connection with the budget process. See 1982-1983 Att'y Gen. Ann. Rep., supra. In addition, many of the records required for an independent review of a school system's administrative operation are available for public inspection as a matter of law. See § 2.1-342(A), (C).


The conduct of an administrative audit, depending on its nature, may interfere impermissibly with a school board's authority and duty to supervise the operation of a school division. It is my opinion, therefore, that the City Council may conduct an administrative audit of a school system's administrative operations, provided that the conduct of the audit does not interfere with the day-to-day operations of the school system or the Board's supervision of those operations. I find no statutory requirement beyond that provided in § 15.1-163 for the Board to cooperate actively in the conduct of the proposed administrative audit. It is further my opinion, therefore, that the City Council would have no authority to implement directly any changes in the school system's administrative operations or the Board's supervision of those operations.

II. City May Combine Constitutional Offices Pursuant to Appropriate Enabling Legislation and After Approval of Voters by Referendum

You also ask whether the City may combine the constitutional offices of commissioner of the revenue and treasurer into a single office and what procedure is required to combine the duties of the two offices.

A. Facts

The incumbent commissioner of the revenue and treasurer of the City have been elected for a four-year term to begin January 1, 1990. Both of the incumbent officers plan to retire after completing their upcoming terms. The City may wish to combine the functions and duties of the two officers upon the completion of the incumbents' current terms.

Article VII, § 4 of the Virginia Constitution provides for the election of a treasurer and commissioner of revenue by the voters of each county and city. The duties of these officers are to be prescribed by general law or special act. Id. See also § 15.1-40.1 (parallel statutory provisions to Art. VII, § 4). Article VII, § 4 further provides:

The General Assembly may provide for county or city officers or methods of their selection, including permission for two or more units of government to share the offices required by this section, without regard to the provisions of this section, either (1) by general law to become effective in any county or city when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon in each such county or city, or (2) by special act upon the request, made after such an election, of each county or city affected. No such law shall reduce the term of any person holding an office at the time the election is held. A county or city not required to have or to elect such officers prior to the effective date of this Constitution shall not be so required by this section.

Chapter 17 of Title 15.1, §§ 15.1-833 through 15.1-836.3, provides for a procedure, which may include a referendum, for the amendment of city charters. See § 15.1-834. Section 15.1-836.1, however, provides that the charter amendment procedure shall not be used to authorize the abolition of a constitutional office unless the abolition of the constitutional office or offices has been provided for by a general law or special act on such question alone and approved in a referendum. Section 15.1-836.1:1 provides that no bill to amend a charter which has the effect of abolishing a constitutional office shall be considered unless a referendum, elsewhere authorized by law, has been conducted in accordance with § 24.1-165.1 and a majority of the voters has approved the request for the charter amendment. Section 24.1-165.1 provides a procedure for the conduct of a referendum, elsewhere authorized by law, on the abolition of a constitutional office prior to a request for a special act of the General Assembly to abolish such an office. Neither § 15.1-836.1:1 nor § 24.1-165.1, however, authorizes the conduct of a referendum to abolish a constitutional office. See § 15.1-836.1.

Chapter 15 of the Charter for the City provides for the offices of commissioner of revenue and the treasurer. See Ch. 562, 1954 Va. Acts 655, 671. The City is also served by a director of finance with duties specified in Chapter 16 of the Charter. Id. at 671-72.

C. Article VII, § 4 Authorizes Merger of Constitutional Offices Pursuant to Enabling Legislation and Referendum Approval

Prior Opinions of this Office conclude that Article VII, § 4 and statutes of the General Assembly authorize the abolition of constitutional offices pursuant to a general or special act of the General Assembly and the approval of the voters in a referendum. See Att'y Gen. Ann. Rep.: 1983-1984 at 70; 1982-1983 at 129; 1976-1977 at 44; 1974-1975 at 50, 97. Several of these prior Opinions specifically approve the merger of the functions and duties of the offices of the commissioner of the revenue and treasurer. See Att'y Gen. Ann. Rep.: 1976-1977, supra; 1974-1975 at 97.1 Consistent with the prior Opinions of this Office discussed above, it is my opinion that the City may combine the constitutional offices of commissioner of the revenue and treasurer into a single office upon the expiration of the terms of the incumbent officers.

To accomplish the merger of these two offices, the City should petition the General Assembly to authorize a referendum on the abolition of one of the two offices and the transfer of the powers and duties of the abolished office to the remaining constitutional office. See 1983-1984 Att'y Gen. Ann. Rep., supra. Upon receiving this legislative author-
The referendum would be conducted pursuant to § 24.1-165.1. If the qualified voters of the City approve the merger of the functions and duties of the two constitutional offices, the City then would request the General Assembly to amend the City's Charter to implement the change. See §§ 15.1-836.1:1, 24.1-165.1(E). The conduct of the referendum and the abolition of the elected office also would be subject to the submission and preclearance requirements of § 5 of the Voting Rights Act of 1965, as amended. See 42 U.S.C.A. § 1973(c) (West 1981); 28 C.F.R. §§ 51.1, 51.13(i), 51.15, 51.17 (1988).

The General Assembly also has provided for optional forms of county government, subject to adoption after referendum, that combine the functions and duties of the offices of commissioner of the revenue and treasurer into a single appointed office designated as the director of finance. See §§ 15.1-605 (county executive form); 15.1-640 (county manager form); 15.1-766 (urban county executive form).

CONSTITUTION OF VIRGINIA: LEGISLATURE.

ADMINISTRATION OF GOVERNMENT GENERALLY: DISABILITIES TO HOLD OFFICE.

Member's acceptance of position on federal advisory board and per diem allowance vacates seat in General Assembly; waiver of per diem allowance would permit member to serve on board.

January 11, 1989

The Honorable Robert K. Cunningham
Member, House of Delegates

You ask whether a member of the General Assembly may serve as a member of the federal President's Foreign Intelligence Advisory Board (the "Board") during his tenure with the legislature.

I. Applicable State Constitutional and Statutory Provisions and Federal Executive Orders

Like the United States Constitution and the constitutions of nearly all the states,1 Article IV, § 4 of the Constitution of Virginia (1971) limits the capacity of a member of the legislature to hold other offices and provides, in part, that "[n]o person holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, shall be eligible to either house [of the General Assembly]."

Complementing this constitutional limitation, § 2.1-30 of the Code of Virginia provides:

No person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city, or town thereof.
The provisions of this statute, however, are not to be construed "[t]o prevent any elected state or local official from serving, without compensation, on an advisory board of the federal government; however, this provision shall not be construed to prohibit reimbursement for actual expenses." Section 2.1-33(21).

The Board has been established within the White House Office of the Executive Office of the President to "assess the quality, quantity, and adequacy of intelligence collection, of analysis and estimates, of counterintelligence, and other intelligence activities." Executive Order No. 12,537, 50 Fed. Reg. 45,083 (1985), reprinted in 50 U.S.C.A. § 403 app. at 119 (West Supp. 1988). "Members of the Board shall serve without compensation, but may receive transportation, expenses, and per diem allowance as authorized by law." Id. at 120.

The question presented by your inquiry, therefore, is whether the "transportation, expenses, and per diem" allowances for members of the Board constitute an "emolument," as that term is used in Article IV, § 4 of the Virginia Constitution and in § 2.1-30, or "compensation," as that term is used in § 2.1-33(21).

II. Constitutional and Statutory Provisions Ensure Loyalty and Fidelity to Commonwealth; Per Diem Allowance Constitutes Emolument of Office

The Supreme Court of Virginia has held that the object sought to be accomplished by former § 2-27, the substantively identical predecessor statute to § 2.1-30, was, and is, to safeguard and protect the state's independent sovereignty by requiring strict and undivided allegiance to the duties and obligations of a public office by its incumbent. Its justification and the need for its enactment is traceable to and based on the principle that complete and unimpaired loyalty and fidelity are owed by a public officer to his trust and to the sovereign that created the office and made it available to the electee. Recognition of and adherence to that age-old truth are as important today as when the legislation was first adopted.


The phrase "profit or emolument of office" is a term broader than salary, and generally is defined as any pecuniary gain derived from an office in addition to reimbursement for expenses. See Att'y Gen. Ann. Rep.: 1982-1983 at 236, 237; 1981-1982 at 301, 304 n.9. A prior Opinion of this Office concludes that the mere reimbursement of actual expenses, without further compensation, does not constitute an emolument of office. See 1961-1962 Att'y Gen. Ann. Rep. 122. Another prior Opinion, however, concludes that the acceptance by a member of the Senate of Virginia of a presidential appointment to the federal Advisory Board of the National Capital Transportation Agency would vacate the office of State Senator. See 1961-1962 Att'y Gen. Ann. Rep. 205, 206. This Opinion notes that the federal act in question provided for per diem compensation and that, even if the federal position were not a federal "office," the appointment still would be incompatible with the Constitution of Virginia since it carried with it "certain emoluments." Id.; see also 1 A. Howard, infra note 1, at 483 n.35.

III. Acceptance of Position on Board and Per Diem Allowance Vacates Seat in General Assembly; Statute Permits Waiver of Per Diem Allowance

I am in agreement with these prior Opinions. It is my opinion, therefore, that the acceptance of membership on the Board and the per diem allowance authorized by fed-
eral Executive Order No. 12,537, as quoted above, would result in the holding of a "post of profit or emolument under the United States government," as that phrase is used in Article IV, § 4 of the Virginia Constitution and § 2.1-30. It is further my opinion that the acceptance by a member of the General Assembly of a position on the Board and the per diem allowance authorized by Executive Order No. 12,537, by operation of Article IV, § 4 and § 2.1-30, would operate to vacate the member's seat in the General Assembly.

The remaining issue in the facts you present, therefore, is whether a waiver of the per diem allowance by a member of the General Assembly would permit the member to serve on the Board.

Lacking a definitive body of law on [Article IV, § 4], common sense suggests that it not be applied harshly or given sweeping and unrealistic interpretations. The Commission on Constitutional Revision, for example, understood that section 4 would not operate to exclude from the General Assembly a citizen of Virginia who was called upon to serve on an . . . advisory commission of the Federal Government.

1 A. Howard, infra note 1, at 483. Accord The Constitution of Virginia: Report of the Commission on Constitutional Revision 129-30 (1969). Based on the above, it is my opinion that the acceptance by a member of the General Assembly of a position on the Board and a waiver of the per diem allowance for members of the Board would not constitute the holding of a "post of profit or emolument under the United States government," as that phrase is used in Article IV, § 4 and in § 2.1-30 and, therefore, would permit the member of the General Assembly to serve on the Board. See also § 2.1-33(21) (§ 2.1-30 shall not be construed to prevent members of the General Assembly "from serving, without compensation, on an advisory board of the federal government").

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(1) NVTC will issue revenue bonds in an amount exceeding $300 million for certain road improvements located in Fairfax County (the "County");

(2) NVTC will assume the limited obligation to pay its bonds solely from a special fund of payments received from the county;

(3) The County will agree to establish a Transportation Improvements Fund (the "Fund"), from which payments to NVTC will be made;

(4) The County will designate all or a portion of the business, profession, and occupation license tax imposed pursuant to Chapter 37 of Title 58.1 of the Code of Virginia as the initial funding source for the Fund. The County will reserve the right to substitute other sources of revenue for the Fund;

(5) The County will be obligated by its agreement with NVTC to make payments equal to the debt service on NVTC's bonds only if and to the extent the County's Board of Supervisors (the "Board") has made an annual appropriation for that purpose; and

(6) In the event the Board declines to appropriate the necessary money to the Fund, the holders of NVTC's bonds would have no legal recourse against the County to compel such an appropriation.

You ask whether the Board is authorized to enter into this type of agreement with NVTC and whether the obligation incurred by the County must be approved by the voters of the County by referendum.

II. Applicable Constitutional and Statutory Provisions

The ability of a local government to contract debt and otherwise incur financial obligations is limited by Article VII, § 10 of the Constitution of Virginia (1971). Article VII, § 10(b), which applies to counties, provides, in part:

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

Article VII, § 10(b) expressly excepts from its debt limitations those obligations of the types specified in Article VII, § 10(a)(1) and (3).

NVTC operates pursuant to the Transportation District Act of 1964, Chapter 32 of Title 15.1, §§ 15.1-1342 through 15.1-1372 (the "Act"). Section 15.1-1358.2 authorizes NVTC to issue bonds and to designate its bonds as payable from specified revenue sources. See § 15.1-1358.2(a)(1), (b)(1). Section 15.1-1359(a) authorizes agreements between local governments and NVTC for the provision of transportation facilities or services. Section 15.1-1359(b)(1) provides that any "bonded debt" contracted by a county to
finance an obligation from a contract pursuant to § 15.1-1359(a) must be approved by voter referendum. Section 15.1-1362 authorizes local governments to appropriate funds for "purposes as may be specified in a law creating a transportation district."

The obligations and indebtedness of NVTC are not "debts" or "liabilities" of the participating localities. See §§ 15.1-1358.2(a)(2), 15.1-1364(b).

III. Proposed Agreement Between County and NVTC Authorized by § 15.1-1359

As discussed above, § 15.1-1359 authorizes contracts or agreements between local governments and NVTC for the provision of transportation facilities and services. In the facts you present, NVTC will agree to undertake the construction of specific transportation improvements in the County. The County, in return, will agree to make payments from the Fund to NVTC to provide revenue to pay NVTC's bonds, subject to the appropriation of such payments by the Board to the Fund. It is my opinion that the proposed agreement is authorized by § 15.1-1359(a) to the extent the general elements of the agreements are detailed above. Compare Armstrong v. Henrico County, 212 Va. 66, 73-76, 182 S.E.2d 35, 40-43 (1971) (contract between county and sanitary district concerning operation of water and sewerage systems authorized); Farquhar v. Board of Supervisors, 196 Va. 54, 67, 82 S.E.2d 577, 585 (1954) (contract between sanitary district and water and sewer authority authorized by statute); Att'y Gen. Ann. Rep.: 1986-1987 at 141, 143 (contract between local governments and transportation district authorized); 1977-1978 at 500, 502 (contract for county to guarantee repayment of bonds of water and sewer authority authorized subject to referendum requirement).

IV. County's Obligation Under Proposed Agreement Does Not Create Debt Subject to Constitutional Limitations Because Obligations Conditioned on Annual Appropriations

The primary issue raised by your questions is whether the County's obligations under the proposed agreement create debt subject to the limitations imposed by Article VII, § 10(b) and § 15.1-1359(b)(1).

The bonds in this instance will be issued by NVTC and not by the County. As a result, NVTC's bonded indebtedness is not a debt of the County. See §§ 15.1-1358.2(a)(2), 15.1-1364(b). See also Farquhar, 196 Va. at 68, 82 S.E.2d at 588 (bonds of water and sewer authority not bonds of city). Pursuant to the proposed agreement, the County will agree to make payments to the Fund which will, in turn, make payments to NVTC. The County's obligation, however, is conditioned upon the appropriation of the necessary funds each year by the Board. The agreement does not obligate the Board to make any appropriations or to impose any taxes.

As discussed above, Article VII, § 10(b) expressly excepts certain types of obligations specified in Article VII, § 10(a)(1) and (3) from its debt limitations. See Att'y Gen. Ann. Rep. 1987-1988 at 325, 327-28; 1985-1986 at 59; 1983-1984 at 76, 77; 1974-1975 at 241, 242 (Opinions interpreting scope of Art. VII, § 10(a)(1)); 2 A. Howard, supra 869-70 (application of Art. VII, § 10(a)(3) to except "pure revenue bonds"). In addition to the express exceptions provided in Article VII, § 10(b), there are implicit exceptions to the debt limitations, including certain types of service contracts, involuntary obligations, obligations to be paid from a "special fund," and obligations conditioned on annual appropriations was an essential ingredient in the negotiations underlying the transaction. See Fairfax-Falls Church v. Herren, 230 Va. 390, 337 S.E.2d 741 (1985) (service contract exception applied in employment context); Fairfax County v. County Executive, 210 Va. 580, 173 S.E.2d 869 (1970) (service contract exception applied in mass transit context); Farquhar, 196 Va. at 54, 82 S.E.2d at 577 (special fund doctrine applied in revenue bond context prior to adoption of 1971 Constitution); Att'y Gen. Ann. Rep.: 1987-1988 at 87, 89, 110, 111 (exception for involuntary obligations imposed by statute applicable); 1986-1987, supra (special fund doctrine inapplicable to economic development project); 1984-1985 at 96, 98 (special fund doctrine inapplicable to annexation agreement).

Prior Opinions of this Office consistently conclude that contracts entered into in one fiscal year and requiring payments in future years do not establish a constitutionally restricted debt if these contracts are conditioned upon annual appropriations because no revenues beyond the current fiscal year are obligated. See Att'y Gen. Ann. Rep.: 1986-1987, supra, at 109 (economic development project), 141, 145 (mass transit/commuter rail agreement); 1985-1986 at 70, 73, 86-87 (lease purchase agreements); 1984-1985 at 95 (lease); 1982-1983 at 149 (water facilities); 1974-1975 at 28 (lease); 1972-1973 at 34 (maintenance of building), 37 (lease), 120 (water facilities); 1970-1971 at 378 (contract for professional services). An obligation conditioned upon annual appropriations does not obligate a locality to make the appropriations or to impose taxes, creates no legal obligation that may be enforced against the locality's general fund, and does not involve the locality's full faith and credit. The exception, however, does not apply if the local governing body's failure to make the necessary annual appropriation would result in the forfeiture of valuable property in which the local government has made a significant investment. See 1986-1987 Att'y Gen. Ann. Rep., supra.

In the context of constitutional limitations on debts of the Commonwealth, the Supreme Court of Virginia has held that obligations secured by discretionary appropriations do not pledge or commit the full faith and credit of the Commonwealth and, therefore, are within the exception to such limitations provided in Article X, § 9(d) of the Virginia Constitution. See Baliles v. Mazur, 224 Va. 462, 297 S.E.2d 695 (1982). In Baliles, the Court noted that no debt was created even though the expectation of continued appropriations was an essential ingredient in the negotiations underlying the transaction. Id. at 469, 297 S.E.2d at 698-99. See also Harrison v. Day, 202 Va. 967, 975, 127 S.E.2d 615, 620-21 (1961). Compare Terry v. Mazur, 234 Va. 442, 362 S.E.2d 904 (1987) (unconditional obligation to impose specific taxes and to make appropriations of resulting revenues created debt subject to Art. X, § 9 limitations). In Fairfax-Falls Church v. Herren, the Supreme Court noted that the application of the service contract exception to the limitations imposed by Article VII, § 10(b) requires that a true service contract must be severable into annual segments. 230 Va. at 395, 337 S.E.2d at 744.

In the facts you present, the County is not legally obligated by the proposed agreement to impose any taxes or to make appropriations to the Fund. There will be, of course, the continuing expectation that the Board will make the annual appropriation to the Fund. If the Board declines to make an annual appropriation, however, neither NVTC or its bondholders will have any direct recourse against the County. On the other hand, if the Board declines to make an annual appropriation, the County's ability to obtain future credit may be jeopardized because of the size of the moral obligation involved. In at
least this limited sense, therefore, the County's assumption of the proposed moral obligation would be inconsistent with the policy underlying the constitutional debt limitations because the County's ability to obtain credit could be endangered if the County defaults on the moral obligation.

The key legal element in establishing a debt subject to the constitutional limitations discussed above, however, is the unconditional obligation of the County to pay money to discharge the debt. Absent such an unconditional obligation, it is my opinion that the mere expectation that an appropriation will be made does not establish a debt subject to the limitations in Article VII, § 10. It is further my opinion, therefore, that the County's obligations under the proposed agreement with NVTC do not create a debt subject to the limitations imposed by Article VII, § 10(b) and § 15.1-1359(b)(1) or require submission to County voters in a referendum.

COUNTIES, CITIES AND TOWNS.

County officials may organize committee of private citizens to make known local governing body's views on public issue; county administration building may be made available to committee as long as facility available on same terms to opposing groups.

June 29, 1989

The Honorable William J. Howell
Member, House of Delegates

You ask whether certain actions of the County Administrator for Stafford County (the "County Administrator" and the "County") and the Public Information Officer for the County (the "Information Officer") are in "violation of the guidelines" detailed in a prior Opinion of this Office concerning the use of public funds and public facilities to lobby in favor of a local referendum. Specifically, you ask whether the County Administrator and the Information Officer may organize a committee to lobby in favor of a meals tax referendum and permit that committee to meet in the County's administration building.

I. Facts

You state that the County Administrator and the Information Officer organized a committee of County citizens to lobby for the passage of a County meals tax referendum, which ultimately was adopted by County voters on April 11, 1989, after a similar proposal had been rejected in November 1988. You further state that several meetings of this committee were held in the County's administration building, and that the Information Officer has told you that he would have permitted groups opposing the meals tax referendum to use County facilities for their meetings if such a request had been made.

II. Prior Opinion Establishes Guidelines for Use of County Funds, Facilities

A prior Opinion of this Office does set guidelines for the use of public funds and facilities to communicate the position of a local government or agency on a proposed referendum question. See 1979-1980 Att'y Gen. Ann. Rep. 76. This Opinion notes that the views of a local governing body are an essential element in the debate of a public issue and concludes that it is "proper" for the governing body or agency to make "appropriate comment" on the effects of a proposed referendum and the impact of the vote on the local government's or agency's operation. Id. at 77.

This prior Opinion continues, however, that
[1] It is important to distinguish between providing information and evaluation, and conducting an intense or overly dramatic campaign about the issue. Although there is authority upholding the right of a government body to inform on such issues, there clearly are limits beyond which the use of public funds would be improper. . . .

***

It is . . . fair to conclude that public funds may be expended to educate and inform the electorate on issues, and to 'get out the vote'; provided that the effort is not an emotional and unreasoned presentation of a controversial issue.

Id. at 78-79. Accord Citizens to Protect Pub. Funds v. Board of Education, 13 N.J. 172, 98 A.2d 673 (1953) (local board of education may make reasonable expenditures to provide relevant facts to voters on school bond proposal). The prior Opinion also concludes that it is proper for a local governing body to make its facilities available to such committees and groups, as long as the facilities are available on the same terms to opposing groups. 1979-1980 Att'y Gen. Ann. Rep., supra, at 79.

III. Actions of County Administrator and Information Officer Not Improper

If, as the prior Opinion of this Office concludes, the local governing body's views are an "essential element" of the debate on a public issue, it is not improper for officials of the local governing body to organize a committee of private citizens to make these views known. You present no facts that would support a conclusion that public funds were being used to further "an emotional and unreasoned presentation" of the meals tax issue in the County. Indeed, you state that, although the County's administration building was provided to the committee favoring the meals tax proposal for several of its meetings, the building also would have been made available to groups opposing the meals tax if a request had been made. Based on the above, it is my opinion that the facts you present do not constitute an improper use of County funds or facilities by the County Administrator or the Information Officer.

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COUNTIES, CITIES AND TOWNS: BOUNDARY CHANGES OF TOWNS AND CITIES - ANNEXATION - VOLUNTARY SETTLEMENT OF ANNEXATION.

Special council election not required after town annexation by voluntary agreement with county.

March 24, 1989

Mr. Bruce D. Jones Jr.
County Attorney for Accomack County

You ask whether § 15.1-1054 of the Code of Virginia requires that a special election be conducted in a town that has entered into an annexation agreement with a county pursuant to § 15.1-1167.1.

I. Facts

The Town of Chincoteague (the "Town") and Accomack County (the "County") have entered into a proposed annexation agreement (the "Agreement"). Among other provisions, the Agreement provides for a significant extension of the Town's boundaries and
for the sharing of certain revenues. The Town's population will more than double on July 1, 1989, the effective date of the Agreement.

The Town Council is elected on an at-large basis. Members of the Town Council and the Mayor serve staggered four-year terms, and elections are conducted every other year. Elections for the Mayor and three members of the Town Council were held in May 1988 for terms ending July 1, 1992. These officials, therefore, will have three years remaining in their terms after the proposed effective date of the Agreement. An election will be held for the remaining Town Council seats in May 1990.

II. Applicable Statutes

Chapter 26.1:1 of Title 15.1, §§ 15.1-1167.1 through 15.1-1167.2 ("Chapter 26.1:1"), provides for the voluntary settlement of annexation, transition and immunity issues involving local governments. Section 15.1-1167.1 provides, in part:

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

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

Section 15.1-1167.1 also provides for the authorized terms of such agreements, review of settlement agreements by the Commission on Local Government, the postreview approval of settlement agreements by the local governments involved after a public hearing, and, finally, for the limited judicial review of the terms of settlement agreements. A settlement agreement entered into pursuant to § 15.1-1167.1 is binding on future local governing bodies. See § 15.1-1167.1(6).

Article 1, Chapter 25 of Title 15.1, §§ 15.1-1032 through 15.1-1058 ("Article 1"), provides for contested annexations by cities and towns. Section 15.1-1054, a portion of Article 1, provides that, whenever territory is annexed to a city or town, thereby extending its territorial limits,

[n]otwithstanding any provision of law to the contrary there shall be an election for members of council on the first Tuesday in May following the effective date of annexation. If council members are chosen on an at large basis the election shall be held for the unexpired portion of the term of each council member whose term extends beyond the July first or September first, whichever date by law applies to such council terms, immediately following the effective date of annexation. If council members are chosen on a ward basis, the election shall be held for each ward affected by the annexation; provided, however, such election shall not be held as a result of an annexation instituted under § 15.1-1034, or unless the city or town instituting annexation under § 15.1-1033 shall increase its population by more than five percent of its population existing at the time of the passage of the ordinance referred to in § 15.1-1033.
Ill. Special Council Election Is Not Required By § 15.1-1054 After Annexation by Voluntary Agreement Pursuant to § 15.1-1167.1

A prior Opinion of this Office directly addresses the question you present and concludes that the requirements of § 15.1-1054 apply only to annexations completed pursuant to Article 1, and that a special council election is not required to be held in a city or town as a result of an annexation effected by voluntary agreement pursuant to Chapter 26.1.1. See 1985-1986 Att'y Gen. Ann. Rep. 60. The conclusion reached in that Opinion was based on a review of the relevant statutes, the legislative history of the statutes (including § 15.1-1054), and applicable rules of statutory construction. The conclusion reached in that Opinion has not been changed by any subsequent act of the General Assembly. It remains my opinion, therefore, that § 15.1-1054 does not require that a special election be conducted in a city or town that has entered into an annexation agreement pursuant to § 15.1-1167.1.

You suggest that constitutional considerations may require that a special election be conducted in the facts you present because of the scope of the annexation involved and the three-year delay between the proposed effective date of the annexation and the opportunity of annexation area residents to participate in the election of the entire Town Council. I share your concerns about this delay but, in the absence of statutory authority or some provision in an annexation agreement subsequently approved by a court pursuant to § 15.1-1167.1, no special election may be conducted or the terms of the sitting members of Town Council shortened.

After the effective date of the proposed annexation, all residents of the Town, including those in the annexation area, will be equally eligible to participate in the political affairs of the Town. The existing members of Town Council will have the duty to represent the interests of all the Town's residents, including those residents in the annexed area. In analogous circumstances, when differences in representation on a local governing body result in a one-time event, such as an annexation, federal courts have declined to intervene in the orderly processes of government to correct such temporary, unintentional and self-correcting inequalities in representation. See Citizens Com. to Op. Annex. v. City of Lynchburg, Va., 400 F. Supp. 68 (W.D. Va.), aff'd in part and vacated in part, 928 F.2d 816 (4th Cir. 1975), appeal denied, 423 U.S. 1043 (1976); Duncan v. Town of Blackburg, Virginia, 364 F. Supp. 643 (W.D. Va. 1973); Avens v. Wright, 320 F. Supp. 677 (W.D. Va. 1970). Compare Att'y Gen. Ann. Rep.: 1986-1987 at 70, 72; 1976-1977 at 70.

COUNTIES, CITIES AND TOWNS: BUILDINGS, MONUMENTS AND LANDS GENERALLY.

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS.

Obligation of local governing body to provide clerk's office with adequate facilities may be enforced by mandamus. Statutory procedure available to review sufficiency of facilities, to authorize issuance of writ when warranted.

December 14, 1989

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

You ask whether mandamus is available to enforce the obligation of a local governing body pursuant to § 15.1-257 of the Code of Virginia concerning the provision of suitable space and facilities for the courts and court officials, including a clerk's office.
I. Applicable Statutes

Section 15.1-257 provides, in part:

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

Section 15.1-267(A) provides for the issuance of a writ of mandamus against a local governing body to order necessary work or improvements upon a finding that the court facilities are insecure or out of repair, or otherwise insufficient. See also § 15.1-267(C). Section 15.1-267(B) provides a procedure for the review of the court facilities in question by a specially appointed panel of five members. Among the matters considered as part of this review is the "provision of administrative and service areas." Section 15.1-267(B)(c).

II. Obligation of Local Governing Body to Provide Sufficient Facilities for Clerk

Enforceable by Mandamus; Procedure Provided in § 15.1-267 Also Is Available

A prior Opinion of this Office concludes that the obligation imposed by § 15.1-257 to provide adequate facilities for a clerk's office is mandatory, but that the local governing body has a range of discretion as to the adequacy of the facilities provided. See 1986-1987 Att'y Gen. Ann. Rep. 94. A difference of opinion between the clerk and the governing body concerning the adequacy of the facilities provided, standing alone, does not establish the basis for compelling the governing body to act. Id. at 95. The appropriateness of the space and facilities provided for the clerk's office is properly the subject of compromise between the clerk and the local governing body. See 1984-1985 Att'y Gen. Ann. Rep. 16, 18. If a compromise cannot be reached, the General Assembly has provided for a review procedure in § 15.1-267(B) and a judicial process in § 15.1-267(A) to resolve the matter.

In an analogous context, a prior Opinion concludes that the obligation of the local governing body to provide certain supplies and equipment for a clerk's office pursuant to § 15.1-19 may be properly enforced by the remedy of mandamus in the appropriate factual context. See 1984-1985 Att'y Gen. Ann. Rep. 39 (county governing body must furnish supplies and equipment to circuit court clerk's office). See also 1974-1975 Att'y Gen. Ann. Rep. 66, 87. Prior Opinions also have concluded that the local governing body's obligations imposed by § 15.1-257 may be enforced by mandamus in the appropriate factual situation. See Att'y Gen. Ann. Rep: 1971-1972 at 110, 111 (mandamus is appropriate remedy to enforce statutory duty of county to provide suitable space for courts; not appropriate remedy to construct building to house other county offices); 1970-1971 at 32 (mandamus is appropriate remedy to enforce statutory duty of county to maintain buildings and grounds of courthouse).

Section 15.1-267(B) provides for the review of the sufficiency of court facilities, including administrative and service areas. The clerk's office is an integral part of the administrative operations of the circuit court and provides numerous services to judicial and other public officials, as well as to the public. See, e.g., §§ 17-43, 17-44 (maintenance of records generally); 17-50 (delivery of process to officer for execution); 17-59 (recordation of writings and maintenance of index); 17-64 (maintenance of judgment docket).
Based on the above, it is my opinion that, pursuant to § 15.1-267, the General Assembly has provided that the obligation of the local governing body to provide suitable space and facilities for the circuit court and its officials, including a clerk's office, imposed by § 15.1-257 may be enforced by mandamus in the appropriate circumstances. It is further my opinion that the procedure established in § 15.1-267(B) is available to review the sufficiency of facilities provided for the clerk's office and to provide the basis for the court's issuance of a writ of mandamus when warranted.

COUNTRIES, CITIES AND TOWNS: COUNTIES GENERALLY.

HOTELS, RESTAURANTS, SUMMER CAMPS, ETC.: GENERAL PROVISIONS—REGULATIONS.

HEALTH: ADMINISTRATION GENERALLY—ENVIRONMENTAL HEALTH SERVICES.

County may not require permit and payment of fee for construction or operation of hotels, restaurants, and campgrounds; may require permit and fee for installation of septic tank for sewage disposal in connection with construction or operation of hotels, restaurants, and campgrounds.

August 8, 1989

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

You ask whether a county may adopt an ordinance that requires a health permit and the payment of a fee for the construction or operation of restaurants and tourist establishments.

I. Facts

Accomack County (the "County") has enacted an ordinance that adopts certain environmental health laws and health regulations of the State Board of Health (the "Board") as ordinances of the County insofar as these statutes and regulations apply to sewage disposal, water wells, migrant labor camps, restaurants, and tourist establishments. The term "tourist establishment," as defined in the ordinance, includes buildings, campsites, and compounds intended for use and occupancy on a transient basis. The ordinance provides that no restaurant or tourist establishment shall be constructed or operated except pursuant to a permit issued by the County Health Department. The ordinance also provides for a schedule of fees that must be paid to obtain the required permits.

The preamble to the ordinance cites §§ 15.1-510, 15.1-510.1, 15.1-520 and 32.1-34 of the Code of Virginia as authority for enactment of the ordinance.

II. Applicable Statutes

Title 35.1 provides for the regulation of hotels, restaurants, summer camps, and campgrounds by the Board. Sections 35.1-13, 35.1-14 and 35.1-17 direct the Board to promulgate regulations establishing minimum standards governing the operation of hotels, restaurants, and campgrounds. Among the subjects of regulation in §§ 35.1-13, 35.1-14 and 35.1-17 are requirements for approved water supply and sewage disposal systems.

Section 35.1-9 provides:
This title and the regulations of the Board shall supersede all local ordinances regulating hotels, restaurants, summer camps, and campgrounds other than those adopted pursuant to the provisions of § 35.1-26, except that any locality may adopt ordinances regarding (i) the sale, preparation, and handling of food; (ii) swimming pools, saunas and other similar facilities; (iii) the keepiing of guest registers by hotels; and (iv) the display of signs alongside or in plain view of any public roadway to preclude false or misleading advertising thereon to the extent prohibited by § 18.2-217, provided such ordinances are equivalent to or more stringent than the provisions of this title or Title 18.2 in the case of the display of signs alongside or in plain view of any public roadway to preclude false or misleading advertising thereon to the extent prohibited by § 18.2-217, and the regulations of the Board. Nothing in this section shall be construed to limit or affect in any way the powers given to localities under Title 15.1 of the Code of Virginia, or under any city charter, or under any other general or special act. [Emphasis added.]

Section 15.1-510 is a general grant of the police power to counties. Section 15.1-520 provides:

Any county may regulate the installation of septic tanks on property located therein, and may require any person desiring to install a septic tank to secure a permit to do so and may prescribe reasonable fees for the issuance of such permits.[1]

III. County May Not Require Permit and Fee for Construction or Operation of Hotels, Restaurants, and Campgrounds; County May Require Fee and Permit for Installation of Septic Tanks

The responsibility and authority to regulate the operation of hotels, restaurants, and campgrounds generally is vested in the Board. See §§ 35.1-13, 35.1-14, 35.1-17. All permanent buildings and structures for hotels, restaurants, and campgrounds are subject to the Uniform Statewide Building Code. See § 35.1-8. Subject to exceptions not applicable to the facts you present, § 35.1-9 expressly provides that local ordinances regulating hotels, restaurants, and campgrounds shall be superseded by Title 35.1 and the Board's regulations. The last sentence of § 35.1-9, however, limits the scope of this supersession provision and preserves the powers given to localities under Title 15.1 or by other legislative acts.

Given the specific provisions of §§ 35.1-13, 35.1-14, and 35.1-17 governing the regulation of hotels, restaurants, and campgrounds, and the supersession provision of § 35.1-9, it is my opinion that a county may not require a permit and the payment of a fee for the construction or operation of hotels, restaurants, or campgrounds. The provision of § 35.1-9 preserving local powers, in my opinion, was intended to apply to specific grants of power made in Title 15.1 or by other statutes. Compare Resource Conserv. Mgmt. v. Bd. of Sup., 238 Va. 15, 21-23, 380 S.E.2d 879, 883-84 (1989) (Virginia Waste Management Act does not preempt local zoning authority over solid waste disposal sites); City of Va. Beach v. Va. Restaurant Assoc., 231 Va. 130, 341 S.E.2d 198 (1986) (alcoholic beverage control laws do not preempt local power of taxation for sale of alcoholic beverages); City of Norfolk v. Tiny House, 222 Va. 414, 281 S.E.2d 856 (1981) (alcoholic beverage control laws do not preempt local zoning power). I am unaware of any statute that expressly authorizes a county to impose a permit and fee requirement for the construction and operation of hotels, restaurants, and campgrounds. It is further my opinion that the general grant of the police power in § 15.1-510 does not provide sufficiently specific authority to fall within the savings provision of § 35.1-9. Compare 1981-1982 Att'y Gen. Ann. Rep., supra note 1, at 108 (state regulation of water wells complete; § 15.1-510 is insufficient authority for county to enforce its own regulation).
Section 15.1-520, however, specifically authorizes a county to regulate the installation of septic tanks and to require a permit and fee for the installation of septic tanks. Pursuant to the savings provision of § 35.1-9, therefore, it is my opinion that a county may require a permit and fee for the installation of a septic tank for sewage disposal in connection with the construction or operation of hotels, restaurants, and campgrounds.  

1 The ordinance in question addresses a number of matters beyond the scope of your inquiry. I express no opinion as to the validity of provisions of the ordinance other than those provisions establishing a permit requirement for the construction or operation of restaurants and tourist establishments. Other statutes, however, address other matters also addressed by the ordinance. See, e.g., §§ 15.1-510.1 (authorizing permit and inspection fees in some circumstances); 32.1-164(C) (state permit fee for onsite sewage disposal system); 32.1-176.5 (state permit requirement for water wells; certain counties authorized to impose testing requirements). See also 1981-1982 Att'y Gen. Ann. Rep. 106 (county may not enact comprehensive well ordinance).  

2 Legislation concerning this subject has been introduced in prior sessions of the General Assembly but has failed to pass. See, e.g., S.B. No. 654 (1989 Reg. Sess.); H.B. No. 888 (1984).
II. Applicable Statutes

Section 15.1-571.1(B) of the Code of Virginia 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.

See also Va. Const. Art. VII, § 5 (1971) (representation on local governing body should be, as nearly as practicable, in proportion to population of district); §§ 15.1-37.5 (requiring ten-year reapportionment); 15.1-571.1(A) (parallel statute to constitutional provision).

Section 24.1-17 provides, in part:

Elections for members of the governing bodies of counties, except as may be provided in § 24.1-88 (b) (iii), following reapportionment or redistricting required as a result of annexation, shall be at the general election held next preceding the expiration of the term of the office of the members of the governing bodies of counties who hold such office at the time of such reapportionment or redistricting; however, vacancies in the office of a member of a county governing body occurring after December 31, 1984, and following such reapportionment or redistricting, shall be filled from the districts so established.

Compare § 24.1-88(b)(iii) (parallel provision applicable to counties that elect supervisors on staggered-term basis).

III. Redistricting Plan, if Adopted, Will Have No Effect on Terms of Incumbent Supervisors

Section 24.1-17 governs the timing of an election following a reapportionment resulting from an annexation. Such elections are held at the general election next preceding the expiration of the term of the office of the members of a board of supervisors who hold office at the time of the redistricting. This language has been interpreted to require that the election to select new supervisors from the new districts also be held at the general election date immediately preceding the expiration of the incumbent supervisors' term. See 1986-1987 Att'y Gen. Ann. Rep. 70 (addressing several questions relating to the Danville annexation and redistricting process); see also Att'y Gen. Ann. Rep.: 1981-1982 at 150, 151; 1976-1977 at 70.

In this instance, the incumbent supervisors were elected in November 1987, and began their terms on January 1, 1988. The election next preceding the expiration of the incumbent supervisors' terms, therefore, will be conducted in November 1991. The supervisors elected in November 1991 will begin their terms January 1, 1992. It is my opinion, therefore, that the proposed redistricting plan, if adopted, would have no effect on the incumbent supervisors and their terms of office. I note, however, that § 15.1-571.1(B) requires that a redistricting plan be adopted and that § 24.1-17 requires that vacancies occurring in the office of supervisor following the redistricting must be filled from the new districts.
CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT - ETHICS IN PUBLIC CONTRACTING.

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

County may not restrict by ordinance postemployment activities of its officers and employees absent express enabling legislation.

December 7, 1989

The Honorable Harry J. Parrish
Member, House of Delegates

You ask whether Prince William County (the "County") may adopt an ordinance prohibiting former officers and employees from assisting for remuneration a party, other than a governmental agency, in any matter if that matter is one in which the former officer or employee participated through decision, approval or recommendation while an officer or employee of the County.

I. Applicable Statutes

Chapter 15 of Title 15.1, §§ 15.1-722 through 15.1-791.15 of the Code of Virginia ("Chapter 15"), provides for the urban county executive form of government. Section 15.1-736.1 provides, in part:

The urban county board of supervisors, by ordinance, may prohibit former officers and employees, for one year after their terms of office have ended or employment ceased, from assisting for remuneration a party, other than a governmental agency, in connection with any proceeding, application, case, contract, or other particular matter involving the urban county or an agency thereof, if that matter is one in which the former officer or employee participated personally and substantially as an urban county officer or employee through decision, approval, or recommendation.

Chapter 13 of Title 15.1, §§ 15.1-582 through 15.1-668 ("Chapter 13"), provides for the county executive and county manager forms of government. Article 2 of Chapter 13 specifically provides for the urban county executive form of government. Chapter 13 contains no provision similar to § 15.1-736.1, which is included in Chapter 15 and is quoted above.

II. Absent Express Enabling Legislation, County May Not Restrict Postemployment Activities of Its Officers and Employees

The County has adopted the county executive form of government provided in Article 2 of Chapter 13. The County Board of Supervisors (the "Board") has general supervisory powers over the affairs of the County, including the employment and activities of the County's officers and employees. See §§ 15.1-589, 15.1-590, 15.1-594, 15.1-595, 15.1-598, 15.1-599. After reviewing the relevant statutes and Chapter 13, I find no provision of general law that expressly authorizes the Board to restrict the postemployment activities of former officers or employees. Compare §§ 11-74(4), 11-76 (statutes imposing certain postemployment restrictions on government officers and employees with respect to procurement transactions) and 2.1-639.4 (provision of the State and Local Government Conflict of Interests Act prohibiting certain types of conduct). By its express language, § 15.1-736.1, which authorizes such postemployment restrictions, applies
only to a county that has adopted the urban county executive form of government pro-
vided for in Chapter 15. It is my opinion, therefore, that § 15.1-736.1 does not authorize
the County to adopt an ordinance restricting the postemployment activities of its offi-
cers and employees.

It is further my opinion that the relevant statutes do not implicitly authorize the
County to restrict the postemployment activities of its officers and employees as an
exercise of the police power. Pursuant to the "Dillon Rule," the powers of county boards
of supervisors are fixed by statutes and are limited to those powers conferred expressly
or by necessary implication. See Stallings v. Wall, 235 Va. 313, 315-16, 367 S.E.2d 496,
above, no statute expressly authorizes the County to adopt an ordinance restricting the
postemployment activities of its officers or employees. Compare 18 U.S.C.A. § 207 (West
Supp. 1989); Annotation, Limitation, Under 18 USCS § 207, on Participation of Former
Federal Government Officers and Employees in Proceedings Involving Federal Govern-
ment, 71 A.L.R. Fed. 360 (1985). Questions concerning the implied powers of local gov-
ernments typically are resolved by analyzing the legislative intent of the General Assem-
bly. Key factors considered include the purposes and objects of the statutes in question
and whether the power asserted is necessary to accomplish that object. See 1987-1988

In this instance, the statutes establishing the Board's authority to control the activi-
ties of its officers and employees include no language indicating an intent to authorize
postemployment restrictions. In addition, the relevant statutes are directed primarily at
ensuring the Board's ability to accomplish efficiently the governmental activities of the
County. Restricting the postemployment activities of governmental employees, in my
opinion, is not inherently necessary or ancillary to promoting this purpose. For the rea-
sons stated above, therefore, it is my opinion that, in the absence of express enabling
legislation such as § 15.1-736.1, the County may not adopt an ordinance prohibiting for-
ermer officers and employees from assisting for remuneration a party, other than a gov-
ernmental agency, in any matter if that matter is one in which the former officer or
employee participated through decision, approval or recommendation while an employee.

1Va. Const. Art. VII, § 2 (1971) authorizes the General Assembly to provide for op-
tional plans of government for counties, cities and towns by general law. The county
executive plan provided for in Ch. 13 and adopted by the County is one such optional
plan. The urban county executive plan provided for in Ch. 15 and adopted by Fairfax
County is another. Most Virginia counties operate under the "traditional" form of county
government, which 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. See 1986-1987 Att'y Gen.

COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY.

ELECTIONS: APPORTIONMENT OF REPRESENTATIVES.

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS - QUALIFICATIONS TO
HOLD ELECTIVE OFFICE.

Town council member must maintain actual place of abode within incorporated bounda-
ries of jurisdiction.
The Honorable Daniel W. Bird Jr.
Member, Senate of Virginia

You ask whether a member of a town council may continue to serve on the council when he has moved to a home bordering, but outside of, the corporate limits of the town.

I. Facts

Subsequent to his election and qualification, a member of the Council of the Town of Wytheville (the "Council" and the "Town") sold his home in the Town and purchased real estate where he now permanently resides. A portion of this real estate, including the dwelling house, is not within the corporate limits of the Town. A portion of the property with outbuildings is within the Town's corporate limits. The portion of the real estate within the corporate limits and outbuildings thereon are taxed by the Town but the portion of the real estate with the dwelling house is not taxed by the Town.

A recent survey has confirmed that the Council member's dwelling house is not situated within the corporate limits of the Town, but the only existing access to the house is by a private driveway to a Town street.

You ask whether the Council member may continue to serve on the Council in these circumstances.

II. Applicable Constitutional Provision and Statutes

Article II, § 5 of the Constitution of Virginia (1971) provides that a person holding an elective office must be qualified to vote for that office.

Section 2 of the Charter for the Town (the "Charter") requires that members of the Council must be residents and qualified voters of the Town. See Ch. 122, 1983 Va. Acts 139. Section 15.1-51(A) of the Code of Virginia additionally requires that town officers, at the time of their election, shall be residents of the town. Section 15.1-52 provides that an elected office shall be deemed vacant if an officer required by § 15.1-51 to be a resident of the town for which he is elected at the time of his election removes himself from the town.

Section 24.1-1(13) provides:

'Qualified voter in a town' shall mean a person who has domicile and a place of abode within the boundaries of the incorporated town in which he offers to vote, is duly registered in the county of his residence, and who has the other qualifications required by the Constitution and Code of Virginia.

See also § 24.1-1(11) (definition of "residence").

III. Qualification to Hold Elected Town Office Requires Actual Place of Abode Within Incorporated Boundaries of Town; De Facto Officer Doctrine Validates Member's Actions Until Notice Received of Inability to Hold Office

A prior Opinion of this Office concludes that a citizen did not qualify as a candidate for the office of town mayor when the citizen's "living quarters" were outside of the town's corporate limits but a portion of the citizen's lawn and property were located within the corporate limits. See 1955-1956 Att'y Gen. Ann. Rep. 39, 40. Accord Roche v. Jones, Sergeant, 87 Va. 484, 12 S.E. 965 (1891) (town councilman who moved outside town boundaries vacates office but continues to serve as de facto councilman). Like the facts in the prior Opinion, the Council member's dwelling house in the facts you present is located outside of the Town's incorporated boundaries. Section 2 of the Charter and § 15.1-51(A) require that members of the Council be residents of the Town. Section 15.1-52 provides that residency is a continuing qualification to hold elective office. Section 24.1-1(11) and (13) defines the term "residence" for purposes of determining the qualified voters of a town as a place of abode within the boundaries of the incorporated town. It is my opinion, therefore, that residence for the purpose of holding an elective office in a town requires a physical place of abode within the incorporated boundaries of the town. In this instance, the Council member's place of abode is located outside the incorporated boundaries of the Town. It is my opinion, therefore, that the Council member may not continue to serve on the Council. It is further my opinion that the Council member's position on Council was vacated by operation of law when he moved his place of abode outside the boundaries of the Town. See § 15.1-52. The Council member's actions on Council that took place after he moved his residence outside the boundaries of the Town remain valid, however, under the "de facto officer" doctrine until the Council member has notice of his inability to serve on Council. Roche v. Jones, Sergeant, 87 Va. at 486-87, 12 S.E. at 966. See also Owen v. Reynolds, 172 Va. 304, 1 S.E.2d 316 (1939).

1A de facto officer is one who assumes office by the power of an election or appointment, but in consequence of some informality, or want of qualification, or by reason of the expiration of his term of service, cannot maintain his position when called upon by the government to show by what title he holds his office. Griffin's ex'or v. Cunningham, 61 Va. (20 Gratt.) 31, 43 (1870).
equipment and funding of constitutional offices is the subject of a comprehensive statutory plan detailed in Chapter 1 of Title 14. Numerous statutes specifically address the equipment needs and funding of a sheriff's office. See §§ 14.1-50, 14.1-51, 14.1-68 through 14.1-84.7, 15.1-137.3.

Section 15.1-127 authorizes any county having an executive secretary (commonly referred to as a county administrator) to establish a centralized purchasing system for all departments, officers and employees of the county. See also § 15.1-117(12). Section 2.1-454.1 authorizes various public bodies, including counties, to purchase items through the Division of Purchases and Supply of the Department of General Services.

II. Constitutional Officer Must Comply with Centralized Purchasing Requirements But Remains Sole Judge of Equipment Needs and Specifications Within Available Resources


Prior Opinions of this Office also conclude that, even when a constitutional officer is subject to a county's centralized purchasing system, the constitutional officer retains the exclusive power, within available resources, to determine the equipment needs and the specifications of such equipment for his office. See Att'y Gen. Ann. Rep.: 1982-1983 at 635, 637 n.4; 1981-1982 at 96; 1978-1979 at 56, 57; 1975-1976 at 62.

III. County Purchasing Department Is Not Required to Purchase Through State Contract; May Seek Additional Bids for Items Requisitioned by Constitutional Officer

You first ask whether the county's purchasing department or the board of supervisors may seek additional quotes or bids when a constitutional officer has requisitioned certain items through the central purchasing department and has specifically instructed that department to purchase the items from a preexisting state contract. The application of centralized purchasing requirements to constitutional officers recognizes the cost savings that can be realized by single source purchasing. Local government access to purchasing through the Division of Purchases and Supply (the "Division") is manifestly intended to permit local governments to realize cost savings by purchasing through existing state contracts. A local government, however, is not required to purchase items through the Division and may be able to realize greater savings through direct purchasing. It is my opinion, therefore, that a county's purchasing department may seek additional quotes or bids for items requisitioned by a constitutional officer even when the same item is available through an existing state contract.

IV. Board of Supervisors Has No Authority to Approve or Deny Purchases of Constitutional Officer When Necessary Funds Have Been Appropriated

You next ask whether the board of supervisors has the authority to review purchases of a constitutional officer, and either approve or deny those purchases, when,
through the normal budgetary process, funds have been appropriated to the constitutional officer by line item, proper procurement procedures have been followed, there are sufficient funds in that line item to cover the purchase, and the purchase is clearly within the purpose for which the line item was intended.

As reviewed above, prior Opinions of this Office consistently conclude that a constitutional officer has the exclusive authority to determine the equipment needs and specifications of his office within available resources. See Att'y Gen. Ann. Rep.: 1982-1983, supra; 1981-1982, supra; 1978-1979, supra; 1975-1976, supra. It is my opinion, therefore, consistent with the prior Opinions of this Office, that a board of supervisors does not have the authority to approve or deny purchases by a constitutional officer when the necessary funds have been duly appropriated and are available to the constitutional officer for the purchase.

V. Board of Supervisors Has No Authority to Change Specifications of Equipment Identified for Purchase by Constitutional Officer

Your final question is whether the board of supervisors has the authority to change the specifications of equipment requisitioned by a constitutional officer when the constitutional officer has funds available pursuant to a particular line item appropriation to purchase the equipment.

It is my opinion, based on the prior Opinions of this Office cited above, that a board of supervisors does not have the authority to change the specifications of equipment that have been identified for purchase by a constitutional officer in the circumstances you present.

COUNTIES, CITIES AND TOWNS: GENERAL.

Rescue squad workers may serve on voluntary basis for volunteer rescue squads; workers not considered employees pursuant to Fair Labor Standards Act when doing so.

October 31, 1989

The Honorable William J. Howell  
Member, House of Delegates

You ask whether the federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §§ 201-219 (the "FLSA") prohibits rescue workers, who are paid by a county to augment existing volunteer rescue companies in the county, from serving as volunteers in these companies during their off-duty hours.

I. Facts

You state that five independently chartered volunteer rescue squads are located within the boundaries of the county. Each of these volunteer rescue units is chartered by the State Corporation Commission and elects their own officers and directors from their membership, without interference from the county government. Each of these units owns its own buildings, vehicles and equipment. The control of the rescue buildings and equipment rests with each rescue unit, although the county does donate some equipment to each unit.

Although the county contributes approximately $60,000 annually to each rescue unit, this contribution is not earmarked for specific budget items and the county board of
supervisors exercises no authority over how the contribution is to be used. The contribution is made because the county has entered into a mutual aid agreement with each of the rescue units, by which the units agree that they will be available for 24-hour service in the county seven days a week. You also state that the establishment, or location, of any future rescue squad is subject to approval of the board of supervisors. The county provides central dispatching services for all rescue units and, additionally, by contract, the county establishes those areas for which the squads are mainly responsible.

II. Applicable Federal Statutes

The FLSA requires that all covered and nonexempt employees be paid a minimum wage of $3.35 an hour. 29 U.S.C.A. § 206 (West 1978). The FLSA also provides that employers compensate their employees "not less than one and one-half times the regular rate at which he is employed" for all hours worked over 40 in a workweek. 29 U.S.C.A. § 207(a)(2) (West Supp. 1989).

The term 'employee' does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.


The term "public agency" is defined as "the Government of the United States; the government of a State ... or a political subdivision of a State; or any interstate governmental agency." 29 U.S.C.A. § 203(x) (West 1978).

III. Employee's Volunteer Services for Public Agency May Not Be Same Services As Those For Which Employee Is Paid By Same Public Agency

Under the FLSA, a person is not considered a "volunteer" if the person is otherwise employed by the same public agency to perform the same type of services as those for which the person proposes to volunteer. See 29 U.S.C.A. § 203(e)(4)(A)(i); 29 C.F.R. §§ 553.101(d), 553.102(a) (1988). Based upon this standard, the rescue squad workers in the facts you present may not serve as "volunteers" if (1) their "volunteer" work is the same as the duties for which they are paid by the county and (2) this work is performed for the same public agency. Ginsburg, Abrahams & Boyd, Fair Labor Standards Handbook for States, Local Governments and Schools app. III 126, 126-27 (1989). In both these conditions exist, the rescue workers will be considered "employees" and may not be considered "volunteers" when they serve the volunteer rescue squad on their own time. If either of the conditions does not exist, however, the rescue squad workers you describe may be considered "volunteers." Id. at 127, 213-14; 29 C.F.R. § 553.105 (1988). Because the workers in this instance are performing rescue operations in both their paid and volunteer capacities, it is clear that when they volunteer, they are performing the same duties for which they are paid. See 29 C.F.R. § 553.103 (1988). The issue in the facts you present, therefore, is whether the rescue squads you describe are "public agencies" within the meaning of the FLSA.
IV. Whether Volunteer Squad Is "Public Agency" Requires Case-by-Case Determination

Any determination whether a volunteer rescue company constitutes a "public agency" within the meaning of the FLSA and, if so, whether all of the volunteer rescue companies in a county constitute the same public agency or employer, rather than separate public agencies, must be determined on a case-by-case basis. One important factor in this determination is how the companies are treated for statistical purposes by the Census of Governments issued by the Bureau of the Census, United States Department of Commerce. See 29 C.F.R. § 553.102(b) (1988). Other factors to be considered include (1) how the rescue companies' boards of directors are elected or, if these boards are not elected, how they are appointed and whether they are subject to removal by the governing body of the county; (2) whether the companies own their own equipment; and (3) whether the companies' organizational structure and physical location are subject to county approval. See Ginsburg, Abrahams & Boyd, supra 127.

V. Volunteer Rescue Squad in Facts Presented Is Not Public Agency

The facts you present demonstrate that:

1. Five independently chartered volunteer rescue squads are located within the boundaries of the county.

2. Each of these volunteer rescue units is chartered by the State Corporation Commission and elects their own officers and directors from their membership, without interference from the county government.

3. Each of these units owns its own buildings, vehicles and equipment. The control of the rescue buildings and equipment rests with each rescue unit, although the county does donate some equipment to each unit.

4. Although the county contributes approximately $60,000 annually to each rescue unit, this contribution is not earmarked for specific budget items and the county board of supervisors exercises no authority over how the contribution is to be used. The contribution is made because the county has entered into a mutual aid agreement with each of the rescue units, by which the units agree that they will be available for 24-hour service in the county seven days a week.

5. The establishment, or location, of any future rescue squad is subject to approval of the board of supervisors. This is not true of the rescue squads which already are established in the county.

6. The county provides central dispatching services for all rescue units.

7. The county, by contract, establishes those areas for which the squads are mainly responsible.

Considering the facts discussed above, there are some indicia of county control over the rescue units because of the county's donation of equipment, provision of central dispatching services, and the establishment of areas of responsibility. This relationship between the county and rescue squad units might indicate that the rescue squad units may be agencies of the county for purposes of the FLSA. Ginsburg, Abrahams & Boyd, supra 80.

The federal Department of Labor, the agency responsible for enforcing the FLSA, however, has concluded that an entity satisfying many of the foregoing facts was not a "public agency," when the entity concerned operated independently of a city and gov-
erned its own internal affairs without any input from the city. Ginsburg, Abrahams & Boyd, supra 127. It also has been determined that the most important factor in the determination whether an entity constitutes a "public agency" for purposes of the FLSA is the control of the appointment, and termination, of the entity's boards of directors. Ginsburg, Abrahams & Boyd, supra 80; cf. Conway v. Takoma Park Volunteer Fire Dept., Inc., 666 F. Supp. 786 (D. Md. 1987). From the information you provide, it appears that the rescue squad units elect their own officers and directors. Based on the above, it is my opinion that the volunteer rescue units are not "public agencies" within the meaning of the FLSA. It is further my opinion, therefore, that the paid rescue squad workers you describe are not the "employees" of the volunteer rescue squads for the purposes of the FLSA when they are serving as volunteers in these squads during their off-duty hours.

In light of the foregoing, it is my opinion that, on their off-duty hours, the rescue squad workers you describe may serve on a voluntary basis for volunteer rescue squads, and not be considered "employees" pursuant to the FLSA when doing so.

You should be aware, however, that this Office is not authorized to issue binding rulings under the FLSA. Although the administrative letter ruling cited in Part II of this Opinion is persuasive, due to the subtle factual distinctions drawn in that ruling, it cannot be relied on as a definitive expression of the Department of Labor's position on these issues. Ginsburg, Abrahams & Boyd, supra 126. Given the factual specificity of rulings on this subject, I recommend that the county seek an interpretation from the Department of Labor pursuant to 29 U.S.C.A. § 259 (West 1985). See also 29 C.F.R. § 790.13 (1988).


COUNTIES, CITIES AND TOWNS: GENERAL.

Statutory authorization for county to limit number of cable television companies licensed or enfranchised to one cable television company; immunity from federal antitrust laws; limitation not violative of First Amendment rights of cable operators; no state or federal standards to be used by county to license or enfranchise cable television company.

November 27, 1989

Mr. James W. Hopper
County Attorney for Powhatan County

You ask several questions concerning the application of § 15.1-23.1 of the Code of Virginia to the licensing or enfranchisement of a cable television company by Powhatan County (the "County"). You first ask whether the County may restrict the number of cable television companies providing cable service in the County to one company, or whether such a restriction would violate state or federal law. You also ask whether § 15.1-23.1 requires the County to select a cable television company on the basis of any particular standards and, if so, what standards must be used.
I. Facts

You state that no ordinance or regulation has been enacted by the County pursuant to § 15.1-23.1 to authorize the licensing or enfranchisement of cable television companies. You further state that the County Board of Supervisors (the "Board") has not authorized any cable television company to transmit and sell its cable services to County residents, although it is considering authorizing one company to do so. Although several companies have expressed an interest in providing cable service to the County, the Board would like to limit the provision of cable television service in the County to one company.

II. Statutes

Section 15.1-23.1 concerns the regulation and licensing of cable television systems in the Commonwealth and provides, in part:

The governing body of any county, city or town may grant a license or franchise, or issue a certificate of public convenience and necessity to no more than one cable television system, and impose a fee thereon. The governing body shall have the authority to award additional licenses, franchises or certificates of public convenience as it deems appropriate, if such governing body finds that the public welfare will be enhanced by such awards after a public hearing at which testimony is heard concerning the economic consideration, the impact on private property rights, the impact on public convenience, the public need and potential benefit, and such other factors as are relevant.

***

The grant of authority by this section to counties, cities and towns to regulate cable television systems, including regulations that displace or limit competition by or among persons owning or operating such systems, has been and continues to be based on the policy of the Commonwealth to provide for the adequate, economical, and efficient delivery of such systems to the consuming public, to protect the public from excessive prices and unfair competition, and to prevent the owners and operators of such systems from obtaining an unfair competitive advantage by reason of the license, franchise or certificate of convenience over businesses that sell, lease, rent or repair television receivers or repair video cassette and disc recorders and players. No county, city or town may regulate cable television systems by regulations inconsistent with either laws of the Commonwealth or federal law relating to cable television operations. [Emphasis added.]

The federal Cable Communications Policy Act of 1984, 47 U.S.C.A. §§ 521 through 559 (West Supp. 1989) (the "Cable Act"), provides that "[a] franchising authority may award, in accordance with the provisions of this subchapter 1 or more franchises within its jurisdiction." 47 U.S.C.A. § 541(a)(1).

A "franchising authority" is defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C.A. § 522(9).

The term "franchise" is defined as

an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 546 of this title), issued by a franchising authority, whether such authorization is designated as
a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system.


III. Section 15.1-23.1 Authorizes Local Governing Bodies to Limit to One the Number of Cable Television Companies Licensed or Enfranchised

Prior to 1982, § 15.1-23.1 authorized the governing bodies of counties, cities and towns to license or enfranchise "one or more" community antenna television systems (designated "cable television system[s]" in the current statute). The 1982 Session of the General Assembly amended § 15.1-23.1 to limit the authority of governing bodies of counties, cities and towns to license or enfranchise "no more than one" community antenna television system. Chapter 614, 1982 Va. Acts 1039 (Reg. Sess.).

Section 15.1-23.1 currently provides, in part, that "[t]he governing body of any county, city or town may grant a license or franchise, or issue a certificate of public convenience and necessity to no more than one cable television system." (Emphasis added.) Section 15.1-23.1 further provides that a local governing body may award additional licenses or franchises only after holding a public hearing and making a finding that the public welfare will be enhanced by awarding additional licenses or franchises.

In view of the 1982 amendment to § 15.1-23.1, it is clear that the General Assembly intended to limit the general licensing and franchising authority of local governing bodies to one cable television system. It is my opinion, therefore, that § 15.1-23.1 authorizes the County to limit the number of cable television companies licensed or enfranchised to one cable television company.

IV. County Is Immune from Federal Antitrust Laws When Acting in Furtherance of Clearly Articulated and Affirmatively Expressed State Policy

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court of the United States refused to apply the Sherman Act to anticompetitive conduct of a state acting in its capacity as sovereign. Id. at 350-51. Instead, the Court reasoned that the Sherman Act was intended to prohibit only private restraints on trade, and it refused to infer an intent to "nullify a state's control over its officers and agents" in activities directed by the legislature. Id. at 351.

In Community Communications Co. v. Boulder, 455 U.S. 40 (1982), the Supreme Court of the United States held that municipal activities will be exempt from federal antitrust liability only as long as the activities are authorized and directed by the state. According to the Court, the "state policy" relied on must be "clearly articulated and affirmatively expressed." Id. at 52.

In Hallie v. Eau Claire, 471 U.S. 34 (1985), the Supreme Court addressed the issue whether a municipality's anticompetitive activities are protected by the state exemption established by Parker v. Brown, when the activities are authorized, but not compelled, by the state, and when the state does not actively supervise the anticompetitive conduct.
The Court held that a statute evidences a "clearly articulated and affirmatively expressed state policy to displace competition" when the statutory provisions plainly show that "the legislature contemplated the kind of action complained of." 471 U.S. at 44 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)). Additionally, the Court held that the state need not compel a local government to act as a prerequisite to finding that a municipality acted pursuant to a clearly articulated state policy. 471 U.S. at 46. Finally, the Court stated that "active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party." *id.* at 47.

In October 1984, Congress amended the Clayton Act to bar the recovery of monetary damages against local governments or their employees when they are acting in their official capacities. The amendment is known as the Local Government Antitrust Act of 1984, and became effective on October 1, 1984. See 15 U.S.C.A. §§ 34–36 (West Supp. 1989).

Based on the above, it is my opinion that § 15.1-23.1 constitutes a clearly articulated and affirmatively expressed state policy authorizing the County to limit to one the number of cable television companies licensed or enfranchised to provide cable services to the County, and, therefore, that the County is immune from the federal antitrust laws when exercising its authority pursuant to § 15.1-23.1. It is further my opinion that the Board is authorized to license or enfranchise only one cable television company to provide cable services to the County.

V. Proposed Limitation Does Not Violate First Amendment Rights of Cable Operators

First Amendment constitutional challenges to local franchise ordinances have resulted in a split of authority among courts on the issue you raise. Courts have differed in their conclusions on whether cable television companies should be treated as newspapers or as broadcasters, whether the traditional First Amendment balancing test should apply, and, if so, whether the interests of local governments are so substantial as to justify various franchising regulations.

Several federal appellate courts have held that governing bodies may limit the number of cable television companies to only one in a locality. See *Central Telecommunications v. TCI Cablevision*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications v. City of Boulder, Colo.*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982). The decisions in these cases are based upon the rationale that such a limitation on the number of cable television companies in a particular jurisdiction will prevent a duplication of facilities and higher prices for consumers.

The cost of the cable grid appears to be the biggest cost of a cable television system and to be largely invariant to the number of subscribers the system has. We said earlier that once the grid is in place—once every major street has a cable running above or below it that can be hooked up to the individual residences along the street—the cost of adding another subscriber probably is small. If so, the average cost of cable television would be minimized by having a single company in any given geographical area; for if there is more than one company and therefore more than one grid, the cost of each grid will be spread over a smaller number of subscribers, and the average cost per subscriber, and hence price, will be higher.

... An alternative procedure is to pick the most efficient competitor at the outset, give him a monopoly, and extract from him in exchange a commitment to provide reasonable service at reasonable rates.
Other federal courts, however, have rejected this reasoning and have struck down limitations on the number of franchises awarded. See Pref. Communications v. City of Los Angeles, Cal., 754 F.2d 1396, 1406 (9th Cir. 1985), aff'd and remanded on other grounds, 476 U.S. 488 (1986); Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434 (D.C. Cir. 1985); Tele-Communications of Key West v. United States, 757 F.2d 1330 (D.C. Cir. 1985); Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987); Century Federal, Inc. v. City of Palo Alto, Cal., 648 F. Supp. 1465 (N.D. Cal. 1986).

The Cable Act authorizes local governments to grant cable television franchises to one cable television company, providing, in part, that "[a] franchising authority may award, in accordance with the provisions of this subchapter 1 or more franchises within its jurisdiction." 47 U.S.C.A § 541(a)(1) (emphasis added). The legislative history of this section of the Cable Act indicates that "[s]ubsection 612(a) [now § 541(a)(1)] grants a franchising authority the authority to award one or more franchises within its jurisdiction. This grant of authority to a franchising authority to award a franchise establishes the basis for state and local regulation of cable systems." Act of Oct. 30, 1984, Pub. L. No. 98-549, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 4655, 4696.

"[C]ourts should construe statutes to avoid decision as to their constitutionality." United States v. Monsanto, 491 U.S. _, _, 105 L. Ed. 2d 512, 524, 109 S. Ct. 2657, 2664 (1989). "The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute." Public Citizen v. Dept. of Justice, 491 U.S. _, _, 105 L. Ed. 2d. 377, 409, 109 S. Ct. 2558, 2580 (1989). Both Va. Code Ann. § 15.1-23.1 and 47 U.S.C.A. § 541(a)(1) expressly authorize local governing bodies to limit to one the number of cable television companies licensed or enfranchised. Based on the above and what I consider to be the better-reasoned court decisions on this issue, it is my opinion that the County's proposed limitation does not violate the First Amendment rights of cable operators.

VI. Section 15.1-23.1 Does Not Specify Standards to Be Used by County in Selecting One Cable Television Company

Your final question is whether § 15.1-23.1 requires the County to select a cable television company on the basis of any particular standards and, if so, what standards must be used. Section 15.1-23.1 contains no standards which must be used by a local governing body to license or enfranchise "no more than one cable television system."

The Cable Television Rules promulgated by the FCC on February 3, 1972,2 included minimum standards for franchises awarded by local authorities. These standards, which were mandatory, related to the selection process, length of franchise terms and fees, construction timetables, and procedures for regulating rates and for subscriber complaint handling. The FCC deleted the local rate regulation procedures in 1976, and amended its remaining franchise standards in 1977. Except for the requirement concerning the limitation on franchise fees, the standards were no longer mandatory, but merely guidelines.

Based on the above, it is my opinion that neither § 15.1-23.1 nor the FCC specifies standards which are required to be used by a local government in licensing or enfranchising a cable television company.

1Different types of news media have received different degrees of First Amendment protection. Newspapers and other printed media enjoy broad protection from government interference. "The crucial role the press serves in safeguarding democratic government justifies its heightened First Amendment protection. . . .
"The broadcast media—i.e. television and radio—also enjoy First Amendment rights, but, unlike the print media, have been subject to a range of affirmative programming requirements by Congress and the Federal Communications Commission (FCC). These intrusions into editorial functions have been justified on the basis of the physical scarcity of the broadcast spectrum." Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954, 960 (N.D. Cal. 1987).

236 F.C.C.2d 143 (1972).

COUNTIES, CITIES AND TOWNS: GENERAL.

ADMINISTRATION OF GOVERNMENT GENERALLY: PERSONNEL ADMINISTRATION.

Local grievance procedures to conform to state procedure; statutory coverages and exemptions generally apply to local procedures. Local government grievance procedure exempts department heads; may not exempt managerial employees below level of department heads.

February 17, 1989

The Honorable Elliot S. Schewel
Member, Senate of Virginia

You ask whether a local government may exempt department heads and managerial employees from its local employee grievance procedure.

I. Applicable Statutes

Section 15.1-7.1 of the Code of Virginia provides, in part, that

the governing body of every county, city and town which has more than fifteen employees shall have a grievance procedure for its employees that affords an immediate and fair method for the resolution of disputes which may arise between the public employer and its employees and a personnel system including a classification plan for service and uniform pay plan for all employees excluding employees and deputies of division superintendents of schools....

Every grievance procedure shall conform to like procedures established pursuant to § 2.1-114.5:1 and shall be submitted to the Director of the Department of Employee Relations Counselors for approval.... Failure to comply with any provision of this section shall cause the grievance procedures adopted by the Commonwealth to be applicable, including the appointment of an administrative hearing officer in employee termination cases.

Section 2.1-114.5:1 details the basic provisions governing the operation and scope of the state grievance procedure. This statute contains discrete subsections providing for the definition of a grievance, management responsibilities, coverage of personnel, specific steps in the grievance procedure, and how issues qualifying for a panel hearing are determined. Section 2.1-114.5:1(C), which pertains to the coverage of personnel, provides, in part, that

[all permanent state governmental personnel, excluding probationary employees, are eligible to file grievances as provided in [Chapter 10 of Title 2.1] with the following exceptions:}
1. Appointees of elected groups or individuals;

2. Agency heads or chief executive officers of government operations and institutions of higher education appointed by boards and commissions;

3. Law-enforcement officers as defined in Chapter 10.1 (§ 2.1-116.1 et seq.) of this title whose grievance is subject to the provisions of Chapter 10.1 of this title and who have elected to proceed pursuant to Chapter 10.1 of this title in the resolution of their grievance or any other employee electing to proceed pursuant to any other existing procedure in the resolution of his grievance; and


Section 2.1-114.5:1(C) also contains provisions specifically addressing certain classes of local government employees, including employees of local social service departments and local social service boards, employees of constitutional officers, and employees of regional housing authorities.

Section 2.1-116 specifically describes sixteen categories of officers and employers who are exempt from the grievance procedure. Section 2.1-116(A)(16) states that the grievance procedure shall not apply to

[the following officers and employees of executive branch agencies: those who report directly to the agency head; additionally, those at the level immediately below those who report directly to the agency head and are at a salary grade of sixteen or higher. However, in agencies with fewer than fifty employees, only the immediate advisor or advisors or deputy or deputies of the agency head shall be exempt. In implementing this exemption, personnel actions shall be taken without regard to race, sex, color, national origin, religion, age, handicap or political affiliation. Recruitment and selection of individuals covered by this exemption shall be handled in a manner consistent with policies applicable to classified positions. Notwithstanding the above, all superintendents and wardens in the Department of Corrections shall be exempt from [Chapter 10 of Title 2.1]. Additionally, all persons responsible for the internal audit and personnel and employee relations functions for each agency shall be included in this chapter. Each Governor's Secretary shall have a final authority in determining on an ongoing basis the officers and employees exempted by this subdivision and pursuant to its provisions. Such officers or employees shall thereafter serve at the pleasure and will of their appointing authority. The Department of Personnel and Training shall advise and assist each Governor's Secretary in making these determinations and shall be responsible for maintaining an ongoing and up-to-date list of the affected positions . . . .

II. Local Grievance Procedures Required to Conform to State Procedure; Statutory Coverages and Exemptions Generally Apply to Local Procedures

Section 15.1-7.1 requires that every county, city and town with more than fifteen employees have a grievance procedure conforming to the procedures in § 2.1-114.5:1. Section 2.1-114.5:1 details the various steps in the state grievance procedure and also describes the personnel in state government who are ineligible to file a grievance. Section 15.1-7.1 further provides that the failure by a local government to comply with any provision of § 2.1-114.5:1 shall cause the grievance procedures adopted by the Commonwealth to apply to the local government.
Section 15.1-7.1, however, does not specifically address the scope of coverage of local personnel or permitted exceptions to the coverage of personnel under a local grievance procedure. Section 2.1-114.5:1(C), on the other hand, does contain explicit references to specific classes of local government employees with respect to grievance procedure coverage. It is my opinion, therefore, that the provisions of § 2.1-114.5:1(C) do not apply only to state government employees.

Additional language in § 2.1-114.5:1(C) further supports this conclusion. Section 2.1-114.5:1(C)(1), for example, refers to "elected groups" rather than only to the General Assembly. Section 2.1-114.5:1(C)(3) refers to "[l]aw-enforcement officers as defined in Chapter 10.1 (§ 2.1-116.1 et seq.)" of Title 2.1. Section 2.1-116.1 defines the phrase "law-enforcement officer" to include members of the police department, bureau or force of any political subdivision when such police department, bureau or force has ten or more officers. These provisions of § 2.1-114.5:1(C), in my opinion, demonstrate the intent of the General Assembly that the coverage provisions of § 2.1-114.5:1(C) generally are applicable to local government grievance procedures developed pursuant to § 15.1-7.1. It is further my opinion, therefore, that the conformity requirement of § 15.1-7.1 includes the authority to provide for the coverage, and exceptions to coverage, of local officers and employees within the scope of coverage and available exceptions in § 2.1-114.5:1(C).

III. Department Heads Exempted from Local Government Grievance Procedure

Section 2.1-114.5:1(C)(2) exempts "agency heads" from the coverage of the state grievance procedure. The scope of the term "agency head" with respect to a local government grievance procedure is ambiguous. With respect to agency heads at the state level of government, however, the manifest intent underlying this provision is to exempt from coverage the chief administrative officer of a state agency, thereby contributing to government efficiency and the ability of the appointing authority to implement changes in policy. It is my opinion, therefore, that the "agency head" provision of § 2.1-114.5:1(C)(2) is intended to exempt from the local grievance procedure any official who is the chief administrative officer of a local government department that is analogous to an executive branch agency of state government. It is further my opinion that pertinent indicia for determining whether an official is an agency or department head excepted from the local grievance procedure include the official's responsibility for the management and operation of a department of local government, for the development of the department's budget, and for the hiring and termination of department employees. Additional factors include whether the official is hired directly by the chief executive officer of the locality (county administrator, city manager, etc.) or the local governing body and whether the official reports directly to the chief executive officer or local governing body.

To summarize, it is my opinion that the conformity provision of § 15.1-7.1 requires a local government grievance procedure to include provisions for the coverage of personnel within the limits specified by § 2.1-114.5:1(C). In most forms of local government, the chief administrative officer of each local government department would be sufficiently analogous to an "agency head" to be excepted pursuant to § 2.1-114.5:1(C)(2). In other forms of local government, the chief administrative official of a local government department may be appointed directly by the elected governing body and, therefore, be excepted pursuant to § 2.1-114.5:1(C)(1).

IV. Local Government Grievance Procedure Exemptions May Not Extend to Managerial Employees Below Level of Department Heads

The legislative history of § 2.1-114.5:1(C)(4), however, demonstrates that the General Assembly did not intend to include the employee positions described in
§ 2.1-116(A)(16) in those positions which are exempted from local grievance procedures. Prior to 1985, § 2.1-114.5:1(C)(4) contained an exemption from the grievance procedure for "[m]anagerial employees who are engaged in agency-wide policy determinations, or directors of major state facilities or geographic units as defined by regulation, except that such managerial employees below the agency head level may file grievances regarding disciplinary actions limited to dismissals." This exemption arguably could have applied to certain local, as well as state, government managerial employees.

The language in § 2.1-114.5:1(C)(4), quoted above, was deleted by the 1985 Session of the General Assembly, and this prior exemption for managerial employees was replaced by the reference to "[e]mployees in positions designated in paragraph (16) of § 2.1-116." Chapter 596, 1985 Va. Acts 1087, 1088. This same legislation added § 2.1-116(A)(16), quoted in Part I of this Opinion. Id. at 1091.

By its own language, the provisions of § 2.1-116(A)(16) apply only to certain officers and employees "of executive branch agencies." (Emphasis added.) Since traditional forms of local government do not operate within the legislative, executive and judicial branch framework of state government, it is clear that § 2.1-116(A)(16) was intended to apply only to certain executive branch officers and employees of state government. This conclusion is further supported by the reference in this statute to officers and employees "at a salary grade of sixteen or higher" which, in turn, refers to the grades detailed in the classification and compensation plan for state employees developed by the State Department of Personnel and Training. See § 2.1-114.5(1)-(2); Dep't Personnel & Training Policies & Proc. Manual Pol'y No. 3.02 (July 1, 1980).

To summarize, § 15.1-7.1 requires that local governments with more than fifteen employees develop a grievance procedure for the resolution of employment disputes. Local government employees are covered by their jurisdiction's grievance procedure unless an exception applies to limit that coverage. It is my opinion that § 2.1-114.5:1(C) generally applies to local grievance procedures and provides for exceptions to the coverage of a local grievance procedure. Section 2.1-114.5:1(C)(1) and (2) would require the exemption of department heads from the coverage of a local grievance procedure. On the other hand, no provision of § 2.1-114.5:1(C), § 2.1-116, or § 15.1-7.1 authorizes the exemption of managerial employees below the level of department heads from coverage under a local grievance procedure. It is my opinion, therefore, that a local government may not exempt managerial employees below the level of department heads from coverage under the local grievance procedure.

1The provisions of § 2.1-114.5:1(C) do not specifically parallel the terminology used in many local governments. It is my opinion, however, that the language used in § 2.1-114.5:1(C) was intended to take into account the wide variety of local forms of government in the Commonwealth and is sufficiently broad to adapt to these different terminologies.

COUNTIES, CITIES AND TOWNS: GENERAL.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - DEBT.

Criminal justice training academy operating pursuant to § 15.1-21 agreement has no authority under its charter to borrow money to build new facility.
You ask whether the Board of Directors of the Rappahannock Regional Criminal Justice Academy (the "Board" and the "Academy") has the authority pursuant to the Charter Agreement for the Academy (the "Charter") to borrow the funds necessary to build a new facility and to secure that obligation by a deed of trust on the property without obtaining specific approval from the participating jurisdictions.

I. Facts

The Academy was organized pursuant to § 15.1-21 of the Code of Virginia. The jurisdictions participating in the Academy include 1 city, 11 towns, and 15 counties. A number of other public and private entities also participate in the operation of the Academy.

Section 4(B)(1) of the Charter authorizes the Board to expend such funds as may be available in any year's appropriation for the Academy's operation. Section 5(A)(1) of the Charter authorizes the Board to own or lease necessary real property and to contract for the Academy's location needs. Section 5(B) of the Charter provides for the preparation of the Academy's annual operating budget by the Board and the submission of the budget to the governing bodies of the participating localities and entities. The Board is authorized to make necessary adjustments in the proposed budget upon receipt of notice of the amount to be approved by each of the participants. Id.

II. Applicable Statute

Section 15.1-21 authorizes the joint exercise of powers by political subdivisions pursuant to multijurisdictional agreements. Among the provisions that may be included in such agreements are the manner of financing the joint undertaking and the manner of acquiring, holding and disposing of real and personal property used in the joint undertaking.

III. Charter Does Not Authorize Board to Borrow Money Without Obtaining Specific Approval from Participating Jurisdictions

A recent Opinion of this Office addresses questions that are closely related to your inquiry, and concludes that localities participating in a regional law enforcement training entity established pursuant to § 15.1-21 are responsible for the entity's contracts, agreements, and conditions entered into or breached only when: (1) the contractual or other obligation is within the power of the participating localities to enter into on their own accord; (2) the power to enter into the contractual or other obligations has been duly delegated to the entity in its charter; and (3) any financial obligation incurred by the entity has been approved by the participating localities if required under the entity's charter. See 1987-1988 Att'y Gen. Ann. Rep. 169, 172. This prior Opinion also notes that an entity created pursuant to § 15.1-21 has no inherent powers; it has only those powers delegated to it by the participating localities. Id. See also 1983-1984 Att'y Gen. Ann. Rep. 29.

In the facts you present, the Charter authorizes the Academy to own or lease real property. The Academy's budget also is subject to the review and approval of the participating localities and entities. The Charter does not expressly authorize the Academy to borrow funds for the purchase of real property or to obligate the participating localities and entities to repay such funds without specific approval through the budget process detailed in the Charter.
There is no language in the Charter from which the authority to borrow money and to obligate the participating localities to appropriate money in future years to satisfy that obligation may be implied. It is my opinion, therefore, that the Charter does not authorize the Board to borrow money to build a new facility and to secure that obligation by a deed of trust on the property without obtaining specific approval from the participating jurisdictions.

1 As noted above, 15 counties participate in the operation of the Academy. Virginia Const. Art. VII, § 10(b) (1971) restricts the ability of a county to incur debt without statutory authority and the approval of the county voters by referendum. Article VII, § 10(b) restricts the ability of counties to borrow money to purchase real estate. See 1986-1987 Att'y Gen. Ann. Rep. 106. To conclude that the Charter authorizes the Academy to borrow money to purchase real estate, and thereby obligate the participating counties to appropriate money in future years to satisfy that obligation, would be to endow the Academy with greater powers than its participating jurisdictions have.

COUNTIES, CITIES AND TOWNS: GENERAL.

TAXATION: LICENSE TAXES.

Cable operator may not provide cable service to county residents without franchise; grant of business license by county to cable television company does not constitute granting of franchise or license. Nonrefundable bid fee imposed by county on applicants for cable franchise not authorized; franchise fee may be imposed subsequent to award of franchise.

May 19, 1989

Mr. James W. Hopper
County Attorney for Powhatan County

You ask several questions concerning the application of § 15.1-23.1 of the Code of Virginia to Powhatan County (the "County"). You first ask whether the failure of the County to enact an ordinance pursuant to § 15.1-23.1 would permit a cable television company to transmit and sell its cable services to County residents without a license or franchise from the County. You next ask whether § 15.1-23.1 is preempted by 47 U.S.C.A. § 541(a)(1), a portion of the Cable Communications Policy Act of 1984, 47 U.S.C.A. §§ 521 through 559 (West Supp. 1989) (the "federal Act"). You also ask whether the granting of a business license to a cable television company by the County Commissioner of the Revenue constitutes the granting of a "license" or "franchise," as those terms are used in § 15.1-23.1, thereby authorizing the cable television company to transmit and sell cable service in the County. Your final question is whether the County may enact an ordinance to require a nonrefundable "bid fee" of $5,000, to be used to pay the cost of hiring a consultant to evaluate applicants for a cable television franchise, from any company interested in placing cable television service within the County.

I. Facts

You state that no ordinance or regulation has been enacted by the County pursuant to § 15.1-23.1 to authorize the licensing or enfranchisement of cable television companies. You further state that the County Board of Supervisors (the "Board") has not authorized any cable television company to transmit and sell its cable service to County residents.
Although it has not been authorized by the Board to transmit cable service in the County, a cable television company has informed County officials that it will transmit and sell its cable service to County residents. The company has been issued a business license by the County Commissioner of the Revenue pursuant to § 58.1-3703, and it also has secured an easement from Virginia Power to use existing power transmission poles to install its cable lines in the County.

I assume, for the purposes of this Opinion, that the utility and other easements held by Virginia Power, including easements to cross public rights-of-way, authorize Virginia Power to convey a secondary easement to the cable company for the purpose of installing and maintaining its cable lines. I also assume that the installation of the cable system proposed by the cable company involves the crossing of public rights-of-way.

II. Applicable State and Federal Statutes

Section 15.1-23.1 concerns the regulation and licensing of cable television systems in the Commonwealth and provides, in part:

The governing body of any county, city of town may grant a license or franchise, or issue a certificate of public convenience and necessity to no more than one cable television system, and impose a fee thereon. The governing body shall have the authority to award additional licenses, franchises or certificates of public convenience as it deems appropriate, if such governing body finds that the public welfare will be enhanced by such awards after a public hearing at which testimony is heard concerning the economic consideration, the impact on private property rights, the impact on public convenience, the public need and potential benefit, and such other factors as are relevant. It may regulate such systems, including the establishment of fees and rates . . . . [Emphasis added.]

The federal Act provides that "[a] franchising authority[1] may award, in accordance with the provisions of this subchapter 1 or more franchises within its jurisdiction." 47 U.S.C.A § 541(a)(1) (emphasis added).

The term "franchise" is defined by the federal Act as

an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 546 of this title), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system.


The federal Act further provides that "[e]xcept to the extent provided in paragraph (2),[2] a cable operator may not provide cable service without a franchise," 47 U.S.C.A. § 541(b)(1) (emphasis added).

The term "cable operator" is defined by the Act as

any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

The term "cable service" is defined as

(A) the one-way transmission to subscribers of (i) video programming, or
(ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection of such
video programming or other programming service.


Title 47 U.S.C.A. § 542 authorizes a franchising authority to require that a cable
operator pay a franchise fee not exceeding 5 percent of such cable operator's annual
gross revenues from the operation of the cable system. Title 47 U.S.C.A. § 556 generally
preserves the authority of state and local governments to exercise jurisdiction over cable
services consistent with the federal Act. In addition, § 556 provides that any provision of
state or local law that is inconsistent with the federal Act is preempted and superseded.

With respect to your question concerning the operation of the local business license
tax, § 58.1-3703 authorizes a local governing body to impose a license tax on businesses,
trades, professions, occupations and callings not specifically exempted by
§ 58.1-3703(B).

III. Cable Operator May Not Provide Cable
Service to County Residents Without Franchise

Among the purposes of the federal Act are the establishment of a national policy
concerning cable communications, the establishment of franchise procedures to encour-
age the growth of cable systems that are responsive to local needs, and the promotion of
cable service competition. See 47 U.S.C.A. § 521. As quoted above, the federal Act
clearly and without applicable exception provides that "a cable operator may not provide
cable service without a franchise"—that is, a license or similar authorization to operate from
the appropriate federal, state, or local government. Compare 47 U.S.C.A. § 541(b)(1) with 47 U.S.C.A. § 522(8)-(9). See also Channel One Systems v. Conn. Dept. of
Public Utility, 639 F. Supp. 188, 199 (D. Conn. 1986); Rollins Cablevue, Inc. v. Saiieri
Enterprises, 633 F. Supp. 1315, 1322 (D. Del. 1986). In this instance, the County has nei-
thor adopted an ordinance pursuant to § 15.1-23.1 nor issued a franchise to provide cable
service to the cable company in question. It is my opinion, therefore, that the failure of the
County to adopt an ordinance pursuant to § 15.1-23.1 does not authorize a cable tele-
vision company to transmit and sell cable services to County residents without a fran-
chise from the County, as required by § 541(b)(1) of the federal Act.

Because I conclude that the federal Act requires a local franchise for the operation of
cable service in the County, a response to your second question concerning the pre-
emption of § 15.1-23.1 by 47 U.S.C.A. § 541(a)(1) is unnecessary. I note, however, that
any question of preemption of a state statute by a federal statute contemplates portions of
state law that conflict or otherwise are contrary to federal statutory provisions. See,
e.g., Housatonic Cable Vision v. Dept. of Public Utility, 622 F. Supp. 798, 805-14
(D.C. Conn. 1985) (application of 47 U.S.C.A. § 556 preemption clause to state regulatory
Act's provisions concerning renewal of cable television franchise preempts inconsistent
Virginia statutory requirements). The state and federal provisions about which you in-
quire parallel, rather than conflict with, each other.
IV. Issuance of Business License by County
Does Not Authorize Cable Company to Operate

As discussed in Part II above, § 58.1-3703 authorizes a local governing body to impose a license tax on businesses, trades, professions, occupations and callings not specifically exempted by § 58.1-3703(B). A business license is issued pursuant to the County's statutory taxing authority. The object of Virginia's licensing tax statutes, including § 58.1-3703, is to obtain public revenue and not to regulate business. See Welles v. Revercomb, 189 Va. 777, 54 S.E.2d 878 (1949).

The grant of a franchise to operate a cable system, under both § 15.1-23.1 and the federal Act, imposes certain responsibilities upon a cable operator, and establishes specific rights for the cable operator. A cable operator who is granted a franchise, for example, may be granted specific rights concerning the use of public rights-of-way and is accorded both substantive and procedural protections concerning the renewal of a franchise. See 47 U.S.C.A. §§ 541(a)(2), 546. See also 1986-1987 Att'y Gen. Ann. Rep., supra, at 137-38. To conclude that a business license tax is a franchise to operate a cable system within the meaning of § 15.1-23.1 and the federal Act would be inconsistent with the provisions of both the state and federal statutes and the stated policies underlying the federal Act. It is my opinion, therefore, that the grant of a business license to a cable television company pursuant to § 58.1-3703 does not constitute the granting of a franchise or license, as those terms are used in § 15.1-23.1 or in 47 U.S.C.A. §§ 522(9) and 541.

V. Nonrefundable Bid Fee Not Authorized; Fee May Be Imposed Subsequent to Award of Franchise

Your final question is whether the County may require a nonrefundable "bid fee" of $5,000 from those companies interested in placing cable service within the County prior to hiring a consultant and considering all applicants for the franchise. Section 15.1-23.1 authorizes a county to impose a fee upon the grant of a cable franchise. The federal Act also authorizes the imposition of a franchise fee upon a cable operator, but limits this fee to no more than 5 percent of the cable operator's annual gross revenues from the operation of the cable system. See 47 U.S.C.A. § 542. Neither § 15.1-23.1 nor the federal Act expressly authorizes the imposition of fees for the submission of an application for a cable franchise. To the contrary, § 15.1-23.1 authorizes the imposition of a fee for the grant of a franchise rather than for the submission of a franchise application.

It is my understanding that the bid fee is intended to help the County offset the costs it may incur in identifying the needs of County residents and evaluating whether franchise applicants are able to satisfy those needs. In this instance, however, the proposed bid fee is unrelated to whether an applicant actually is awarded the franchise as authorized by § 15.1-23.1, but, instead, is imposed as a condition of having an application considered. It is my opinion, therefore, that § 15.1-23.1 does not authorize the County to impose a $5,000 bid fee on all applicants for a cable television franchise. The costs incurred by the County in identifying the service needs of its residents and evaluating the applications submitted, however, may be recouped by the imposition of a franchise fee on the grantee or grantees of the franchise up to the amount permitted by § 542(b) of the federal Act, and as authorized by § 15.1-23.1.

1 A "franchising authority" is defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C.A. § 522(9).

2 47 U.S.C.A. § 541(b)(2) does "not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires."
None of the exemptions in § 58.1-3703 applies to the facts you present.

I note that the refusal of a franchising authority to grant access to a market for the purpose of providing cable television services implicates the interests of potential cable operators under the First Amendment to the United States Constitution. See Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986); Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Calif. 1987); 12 E. McQuillin, The Law of Municipal Corporations § 34.23.10 (1986).

COUNTRIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Circumvention of prohibition against proffer of cash contribution as part of conditional zoning process by acceptance of cash gift violates zoning statute.

January 24, 1989

Mr. James P. Downey
County Attorney for Fauquier County

You ask whether cash contributions may be offered by developers and accepted by a county as part of the conditional zoning process in those counties having general conditional zoning authority under §§ 15.1-491.1 through 15.1-491.6 of the Code of Virginia.

I. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498. Section 15.1-486 authorizes a local governing body to enact a zoning ordinance classifying the territory under its jurisdiction into districts and regulating the use of land within such districts.

Sections 15.1-491.1 through 15.1-491.6 describe the conditional zoning process as it operates in most Virginia localities. Conditional zoning is intended to provide a flexible mechanism to permit differing land uses and to recognize the effects of changing land use patterns, while protecting the community by permitting zoning reclassifications subject to conditions proffered by a zoning applicant that generally are not applicable to land similarly zoned. See §§ 15.1-491.1, 15.1-430(q).

Section 15.1-491.2 provides:

A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) such conditions shall have a reasonable relation to the rezoning; (iii) such conditions shall not include a cash contribution to the county or municipality; (iv) such conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in subdivision A (f) of § 15.1-466; (v) such conditions shall not include payment for or construction of off-site improvements except those provided for in subdivision A (j) of § 15.1-466; (vi) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (vii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.1-446.1. Once proffered and accepted as part of an
amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. [Emphasis added.]

Sections 15.1-491.3 through 15.1-491.6 further provide for the administration and enforcement of the conditional zoning process.

II. County May Not Accept Cash Contributions as Part of Conditional Zoning Process; Circumvention of Prohibition by Acceptance of Cash as Gift Violates § 15.1-491.2

You state that the authority of counties to accept gifts has been interpreted in some jurisdictions as limiting the effect of the prohibition in § 15.1-491.2 against conditioning a rezoning on cash contributions by a zoning applicant. You suggest that the practice of accepting cash gifts in connection with the conditional rezoning of land is inconsistent with the express prohibition imposed by § 15.1-491.2.

Local governments in Virginia have the express statutory authority to accept gifts of real and personal property for a variety of purposes. See, e.g., §§ 15.1-262, 15.1-526.4, 15.1-897, 33.1-225.2. Local school boards similarly are authorized to accept gifts. See § 22.1-126. The acceptance of gifts under these statutes is manifestly independent from the legislative exercise of a locality's police power. A local governing body may not divest itself of its general police power by contract or otherwise. See Mumpower v. Housing Authority, 176 Va. 426, 452-53, 11 S.E.2d 732, 742 (1940). See also 1977-1978 Att'y Gen. Ann. Rep. 515, 517.

The zoning power is an element of the police power delegated to localities by the General Assembly to be exercised by the local governing body. See City of Manassas v. Rosson, 224 Va. 12, 17, 294 S.E.2d 799, 802 (1982), appeal dismissed, 459 U.S. 1166 (1983). Virginia's zoning enabling statutes reflect the legislative balancing of the frequently competing interests of individual property rights and the police power interests of the public as promoted by reasonable restrictions on individual property rights. See Bd. of Supervisors v. Horne, 216 Va. 113, 120, 215 S.E.2d 453, 458 (1975). The exercise of the zoning power in a particular manner must be duly authorized by appropriate enabling legislation. See Bd. Sup. James City County v. Rowe, 216 Va. 128, 138, 216 S.E.2d 199, 208 (1975) (enabling statutes do not authorize zoning requirement that property owner dedicate a portion of a parcel, as a condition to the right to develop the parcel, to meet needs that were not substantially generated by the proposed development). Compare Hylton v. Prince William Co., 220 Va. 435, 441, 258 S.E.2d 577, 581 (1979) (same rule applies concerning the regulation of subdivisions). In the context of subdivision regulations, however, the Supreme Court of Virginia has upheld the validity of a voluntary agreement between a developer and a county for the developer to construct certain off-site road improvements even when the county was without authority to require the developer to construct these improvements as a condition of approving the proposed subdivision. See Bd. of County Sup. v. Sie-Gray Dev., 230 Va. 24, 334 S.E.2d 542 (1985). The Court held that, in the facts of that case, the developer was estopped from asserting the ultra vires nature of the agreement to construct off-site road improvements. 230 Va. at 30, 334 S.E.2d at 546. Applying the Sie-Gray decision in the context of zoning, a court could enforce a proffer by a developer even in instances when the proffered condition was beyond the locality's power to impose or accept. On the other hand, a court may decline to apply the Sie-Gray estoppel theory to a cash contribution condition because of the express prohibition imposed by § 15.1-491.2.
In this instance, § 15.1-491.2 expressly prohibits the voluntary written proffer of cash contributions as part of the conditional zoning process. This prohibition clearly establishes the intent of the General Assembly that cash contributions are not to be considered as part of the conditional zoning process. Other statutes, however, establish the independent power of localities to accept gifts. It is my opinion that the prohibition of § 15.1-491.2 does not vitiate the independent power to accept bona fide gifts. It is further my opinion, however, that the attempt to avoid this prohibition, by accepting cash gifts as a condition of rezoning, violates § 15.1-491.2. In the appropriate circumstances, therefore, the acceptance of a cash contribution as a gift may call into question the validity of a conditional zoning action.

1A limited number of Virginia localities are authorized to enact conditional zoning provisions pursuant to § 15.1-491(a) rather than §§ 15.1-491.1 to 15.1-491.6. Conditional zoning under § 15.1-491(a) is independent and distinct from conditional zoning implemented under §§ 15.1-491.1 to 15.1-491.6.

2Sections 15.1-491.1 to 15.1-491.6 were enacted in Ch. 320, 1978 Va. Acts 473. Chapter 320 also provides that its provisions should not be construed to limit or restrict powers otherwise granted to any county, city or town. Id. at 476.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

County contiguous to three high-growth counties authorized to adopt conditional zoning provision pursuant to § 15.1-491.2:1.

May 9, 1989

Mr. James W. Hopper
County Attorney for Powhatan County

You ask several questions concerning the application of §§ 15.1-491(a) and 15.1-491.2:1 of the Code of Virginia to Powhatan County.

I. Facts

Powhatan County shares a common boundary with Amelia, Cumberland, Chesterfield, Goochland and Henrico Counties. The Appomattox River provides a common boundary between Powhatan and Amelia Counties. The James River provides a common boundary between Powhatan County and Goochland and Henrico Counties. You state that the Virginia Department of Transportation has informed you that the northern boundary of Powhatan County extends to the center of the James River.

None of the counties that border Powhatan County has adopted the urban county executive form of government.

According to the 1980 census, Powhatan County had a population of 13,062. The Center for Public Service of the University of Virginia estimates that the 1987 population of Powhatan County was 13,500. See Martin, Estimates of the Population of Virginia Counties and Cities: 1986 and 1987, Center for Pub. Serv., U. Va., at 10 (Sept. 1988) ("Estimates of the Population"). Powhatan County did not experience significant population growth between 1980 and 1987. Id. at 15. Chesterfield, Goochland and Henrico Counties all experienced population growth exceeding ten percent between 1980 and 1987. Id. at 9, 14-15.
II. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498. Section 15.1-491 provides:

A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

(a) For ... the adoption, in counties, or towns, therein which have planning commissions, wherein the urban county executive form of government is in effect ... or in a county contiguous to any such county ... and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment.

Section 15.1-491.2:1 was enacted in Chapter 697, 1989 Va. Acts 1619 (Reg. Sess.) ("Chapter 697"), and provides, in part:

Except for those localities to which § 15.1-491(a) is applicable, this section shall apply to (i) any county or city which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census, provided that until the 1990 census is reported, any county or city instead may qualify only if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia; (ii) any city adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county.

Id. at 1620 (emphasis added). Section 15.1-491.2:1 authorizes a zoning ordinance to provide for the voluntary proffer of reasonable conditions as part of a rezoning or amendment to a zoning map. The operation of the conditional zoning process pursuant to § 15.1-491.2:1 is subject to additional limitations provided for in the statute. The final paragraph of § 15.1-491.2:1 provides:

No proffer shall be accepted by a county, city, or town unless it has adopted a capital improvement program pursuant to § 15.1-464 or local charter. In the event proffered conditions include the dedication of real property or payment of cash, such property shall not transfer and such payment of cash shall not be made until the facilities for which such property is dedicated or cash is tendered are included in the capital improvement program, provided that nothing herein shall prevent a county, city, or town from accepting proffered conditions which are not normally included in such capital improvement program. If proffered conditions include the dedication of real property or the payment of cash, the proffered conditions shall provide for the disposition of such property or cash payment in the event the property or cash payment is not used for the purpose for which proffered.

III. Section 15.1-491(a) Authorizing Conditional Zoning in Certain Localities Does Not Apply to Powhatan County

You first ask whether § 15.1-491(a) applies to Powhatan County.
The provisions of § 15.1-491(a) authorizing a conditional zoning process apply to three classes of counties:

(1) counties that have adopted the urban county executive form of government;

(2) counties contiguous to a county that has adopted the urban county executive form of government; and

(3) counties east of the Chesapeake Bay.

Powhatan County is not included within any of these three classifications. It is my opinion, therefore, that the provisions of § 15.1-491(a) authorizing a conditional zoning process do not apply to Powhatan County.

IV. Powhatan County Is Contiguous to Three High-Growth Counties; § 15.1-491.2:1 Applies to Powhatan County

You next ask whether § 15.1-491.2:1 applies to Powhatan County.

The first paragraph of § 15.1-491.2:1, quoted above, provides for the application of the statute to certain counties. Until the 1990 census is reported, a county may qualify only if (1) it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia or (2) it is contiguous to at least three such high-growth counties.

Powhatan County has not had an estimated population growth of ten percent or more from 1980 until 1987. See Estimates of the Population, supra. It is my opinion, therefore, that Powhatan County is not a high-growth county within the population growth classification established in § 15.1-491.2:1.

Section 15.1-491.2:1 does apply to Powhatan County, however, if Powhatan County is "contiguous" to three high-growth counties. The term "contiguous" has been described as a geographical term which usually means "touching or in close physical proximity." 1984-1985 Att'y Gen. Ann. Rep. 128. In the appropriate context, it has been held that "territories not separated by intervening lands but only by water may be considered contiguous to each other." Id. In this instance, Powhatan County shares an extended land boundary with Chesterfield County and an extended river boundary with Goochland County. In addition, the boundaries of Powhatan County and Chesterfield and Henrico Counties meet at a small area in the James River. It is my opinion, therefore, that Powhatan County is contiguous to Chesterfield, Goochland and Henrico Counties within the meaning of § 15.1-491.2:1. Chesterfield, Goochland and Henrico Counties all are high-growth counties within the population growth classification established in § 15.1-491.2:1. It is my opinion, therefore, that § 15.1-491.2:1 applies to Powhatan County.

V. Section 15.1-491.2:1 Authorizes Proffered Conditions Including Dedication of Real Property or Payment of Cash

Your final question is whether the proffered conditions authorized by § 15.1-491.2:1 include the dedication of real property or the payment of cash as a part of the conditional zoning process.

Section 15.1-491.2:1 authorizes zoning ordinance provisions for the voluntary proffer of reasonable conditions as a part of a rezoning or an amendment to a zoning map subject to certain stated limitations. The last paragraph of § 15.1-491.2:1, quoted above,
expressly contemplates the proffer of conditions including the dedication of real property or the payment of cash. Specific additional requirements are imposed if proffered conditions include the dedication of real property or the payment of cash. It is my opinion, therefore, that § 15.1-491.2:1 authorizes proffered conditions including the dedication of real property or the payment of cash subject to the limitations provided for in the statute.

1Upon the effective date of Ch. 697 on July 1, 1989, there will be three distinct types of conditional zoning provided for by the zoning enabling statutes: (1) conditional zoning in certain localities pursuant to § 15.1-491(a); (2) conditional zoning pursuant to §§ 15.1-491.1 to 15.1-491.6; and (3) conditional zoning in certain localities pursuant to § 15.1-491.2:1.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

County may adopt definition of "subdivision" in ordinance that differs from statutory definition; test of reasonableness must be applied.

July 20, 1989
Mr. W. Carrington Thompson
County Attorney for Pittsylvania County

You ask whether a subdivision established in a county whose subdivision ordinance did not at that time incorporate the definition of the term "subdivision" in §§ 15.1-430 and 15.1-465 of the Code of Virginia must comply with the minimum lot size described in those statutes.

I. Facts

You state that, in 1965, a subdivision ordinance was enacted which, in part, defined the term "subdivide" as "[t]o divide any tract, parcel or lot of land into four or more parts." You further state that, while this ordinance was in conformity with state law as it existed in 1965, state law subsequently was amended in 1975 to require that the definition of "subdivision" in § 15.1-430 be incorporated in the local ordinance. The statutory definition provides, in part, that "subdivision" means "the division of a parcel of land into three or more lots or parcels of less than five acres each." Section 15.1-430(l). The local ordinance was not amended until 1987 to incorporate the statutory definition of "subdivision," including the requirement that each parcel of land be less than five acres each. Based upon those facts, you ask whether a lot of more than five acres may be part of a subdivision created after the 1975 amendment to § 15.1-430(l) and before the 1987 amendment to the subdivision ordinance.

II. Statutes

Section 15.1-430(l) provides, in part:

'Subdivision,' unless otherwise defined in a local ordinance adopted pursuant to § 15.1-465, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land.
Section 15.1-465, which requires counties and municipalities to adopt ordinances regulating the subdivision and development of land, provides:

The governing body of any county or municipality shall adopt an ordinance to assure the orderly subdivision of land and its development. Such ordinance shall be adopted by July 1, 1977. The word "subdivision" as used in any such ordinance shall have the meaning set forth in § 15.1-430(l) of this Code.

III. County May Adopt Definition of "Subdivision" That Differs from Definition in § 15.1-430(l)

In Board of Supervisors v. Land Company, 204 Va. 380, 131 S.E.2d 290 (1963), the Supreme Court of Virginia considered whether a county subdivision ordinance was "void and otherwise invalid" because it lacked a limit on the size of component parcels constituting a subdivision. In holding that the ordinance was not invalid on its face, the Court also held that the intent of the Virginia Land Subdivision Act was to reserve to each locality the right to define what would constitute a subdivision under the terms of its local ordinance. Id. at 383, 131 S.E.2d at 292. The Court further held that the test to be used to determine whether the county had properly used its authority and discretion to define what would be a "subdivision" within its ordinance was whether it acted reasonably. Id. at 384, 131 S.E.2d at 293.


Based on the above, it is my opinion that a county is authorized to adopt a definition of "subdivision" which differs from the statutory definition, as long as the definition is reasonable. It is further my opinion that a lot of more than five acres may be part of a subdivision in the facts you present, as long as the lot in question otherwise satisfies the requirements of the local subdivision ordinance.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Enforceability of conditions proffered and accepted as part of conditional zoning process but prohibited by statute.

February 16, 1989

Mr. H. Woodrow Crook Jr.
County Attorney for Isle of Wight County

You ask whether certain proffers made by a rezoning applicant as part of the conditional zoning process for off-site improvements and impact fees are legally enforceable by a county when the proffers were made voluntarily, the proffer document includes a promise not to contest the future enforcement of the proffers, and the proffers are supported by a surety bond.

I. Facts

A developer seeking rezoning from the Board of Supervisors of Isle of Wight County (the "Board" and the "County") for a parcel of land from agricultural use to residential
use applied for conditional zoning and proffered certain on-site and off-site improvements and impact fees to be paid to the County. Following approval of the conditional zoning, the County initiated rezoning of the property back to agricultural use from residential use, in part, because of a question concerning the legality and enforceability of the proffered conditions. This rezoning is presently under consideration by the Board.

The County has adopted a conditional zoning ordinance as authorized by § 15.1-491.2 of the Code of Virginia.

The proffers made by the zoning applicant include: (1) certain off-site road improvements; (2) the funding or construction of off-site water and sewer improvements; (3) the payment of impact fees to defray a portion of County expenses generated by the development; and (4) a promise not to contest the legal enforceability of any of these proffers in court or otherwise. The conditional zoning documents make no reference to the approval or review of the proposed development under the County's subdivision ordinance.

II. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498. Section 15.1-486 authorizes a local governing body to enact a zoning ordinance classifying the territory under its jurisdiction into districts and regulating the use of land within such districts.

Sections 15.1-491.1 through 15.1-491.6 describe the conditional zoning process as it operates in most Virginia localities. Conditional zoning is intended to provide a flexible mechanism to permit differing land uses and to recognize the effects of changing land use patterns, while protecting the community by permitting zoning reclassifications subject to conditions proffered by a zoning applicant that generally are not applicable to land similarly zoned. See §§ 15.1-491.1, 15.1-430(q).

Section 15.1-491.2 provides:

A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) such conditions shall have a reasonable relation to the rezoning; (iii) such conditions shall not include a cash contribution to the county or municipality; (iv) such conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in subdivision A (f) of § 15.1-466; (v) such conditions shall not include payment for or construction of off-site improvements except those provided for in subdivision A (j) of § 15.1-466; (vi) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (vii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.1-446.1. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance. [Emphasis added.]
Sections 15.1-491.3 through 15.1-491.6 further provide for the administration and enforcement of the conditional zoning process.\(^2\)

Section 15.1-466(A)(f) authorizes the acceptance of dedication for public use of on-site road and other improvements as part of the subdivision approval process. Section 15.1-466(A)(j) authorizes requirements related to the payment of off-site utility improvement costs by a subdivider in certain circumstances. Section 15.1-466(E) authorizes a subdivision ordinance to include provisions for the voluntary funding of off-site road improvements in certain circumstances.

Local governments in Virginia have the express statutory authority to accept gifts of real and personal property for a variety of purposes. See, e.g., §§ 15.1-262, 15.1-526.4, 15.1-897, 33.1-225.2.

III. Proffer to Pay for Off-Site Water and Sewer Improvements Permissible; Proffer to Pay for Off-Site Road Improvements and to Pay Impact Fees to County Prohibited by § 15.1-491.2 and Generally Unenforceable; Promise Not to Contest Unenforceable

Section 15.1-491.2 prohibits the conditioning of rezoning on cash contributions to the County or on payments for off-site improvements except as provided in § 15.1-466(A)(j). Section 15.1-466(A)(j) authorizes off-site improvements for water, sewage and drainage facilities when such improvements are necessitated or required, at least in part, by the proposed development. The off-site water and sewer improvements in this instance are expressly linked in the proffer document to the needs generated by the proposed development. It is my opinion, therefore, that the off-site water and sewer improvements proffered are authorized by § 15.1-491.2.\(^3\)

Section 15.1-466(A)(j) does not, however, authorize payments for impact fees or off-site road improvements as part of the conditional zoning process. It is my opinion, therefore, that the proffers of off-site road improvements and impact fees violate § 15.1-491.2. Compare Op. to James P. Downey, Fauquier Co. Atty (Jan. 24, 1989). The Downey Opinion concludes that the acceptance of cash gifts as a condition of rezoning violates § 15.1-491.2. In reaching this conclusion, the Downey Opinion reviews certain principles of Virginia zoning law:

The zoning power is an element of the police power delegated to localities by the General Assembly to be exercised by the local governing body. See City of Manassas v. Rosson, 224 Va. 12, 17, 294 S.E.2d 799, 802 (1982), appeal dismissed, 459 U.S. 1166 (1983). Virginia's zoning enabling statutes reflect the legislative balancing of the frequently competing interests of individual property rights and the police power interests of the public as promoted by reasonable restrictions on individual property rights. See Bd. of Supervisors v. Horne, 216 Va. 113, 120, 215 S.E.2d 453, 458 (1975). The exercise of the zoning power in a particular manner must be duly authorized by appropriate enabling legislation. See Bd. Sup. James City County v. Rowe, 216 Va. 128, 138, 216 S.E.2d 199, 208 (1975) (enabling statutes do not authorize zoning requirement that property owner dedicate a portion of a parcel, as a condition to the right to develop the parcel, to meet needs that were not substantially generated by the proposed development). Compare Hylton v. Prince William Co., 220 Va. 435, 441, 258 S.E.2d 577, 581 (1979) (same rule applies concerning the regulation of subdivisions). In the context of subdivision regulations, however, the Supreme Court of Virginia has upheld the validity of a voluntary agreement between a developer and a county for the developer to construct certain off-site road improvements even when the county was without authority to require the developer to construct these improvements as a condition of approving the proposed subdivi-
sion. See Bd. of County Sup. v. Sie-Gray Dev., 230 Va. 24, 334 S.E.2d 542 (1985). The Court held that, in the facts of that case, the developer was estopped from asserting the ultra vires nature of the agreement to construct off-site road improvements. 230 Va. at 30, 334 S.E.2d at 546. Applying the Sie-Gray decision in the context of zoning, a court could enforce a proffer by a developer even in instances when the proffered condition was beyond the locality's power to impose or accept. On the other hand, a court may decline to apply the Sie-Gray estoppel theory to a cash contribution condition because of the express prohibition imposed by § 15.1-491.2.

In this instance, the proffer document includes two proffers, for off-site road improvements and for cash impact fees, prohibited from consideration as part of the conditional zoning process. This situation is distinguishable from the facts considered by the Supreme Court of Virginia in Sie-Gray because of the express prohibition in § 15.1-491.2. The consideration of the prohibited proffers as part of the conditional rezoning process not only is ultra vires as was the case in Sie-Gray, but also is contrary to the express declaration of public policy in § 15.1-491.2. It is my opinion, therefore, that a court would decline to apply the Sie-Gray estoppel theory as an absolute bar to the raising of an ultra vires defense if the County seeks to enforce the off-site road improvement and impact fee proffers in the facts you present.4

The listing of unauthorized proffers in the proffer document, standing alone, is insufficient to render those proffers, or the proffers in general, unenforceable. Compare Blick v. Marks, Stokes and Harrison, 234 Va. 60, 360 S.E.2d 345 (1987) (contract case holding that enforceability of contract arising out of a bare violation of a statute requires review of purpose of the prohibition and whether, in the circumstances presented, the enforcement of the contract is contrary to the purpose of the statute in question). The express prohibitions in § 15.1-491.2, however, reflect a legislative intent that rezoning actions not be conditioned upon factors such as off-site road improvements and cash contributions. To enforce these proffers, therefore, would be inconsistent with the purpose underlying the limitations imposed on the conditional rezoning process by § 15.1-491.2. Based on the above, it is my opinion that promises to pay for off-site road improvements or to pay impact fees to the County are ultra vires even when voluntarily proffered as a part of the conditional rezoning process. It is further my opinion that the promise not to contest the future enforceability of prohibited proffers also would be unenforceable. To conclude otherwise would permit rezoning applicants and local governments to evade the express provisions of § 15.1-491.2 simply by including the waiver clause in proffer documents. Compare Thompson Associates v. Fairfax Supervisors, 12 Va. Cir. 318, 323 (1988) (coerced agreement between developer and county for developer to construct off-site road improvements unenforceable). Finally, defenses available to the rezoning applicant to contest the enforceability of proffered conditions also would be available to a surety. See Sie-Gray, 230 Va. at 30, 334 S.E.2d at 546.

1A limited number of Virginia localities are authorized to enact conditional zoning provisions pursuant to § 15.1-491(a) rather than §§ 15.1-491.1 to 15.1-491.6. Conditional zoning under § 15.1-491(a) is independent and distinct from conditional zoning implemented under §§ 15.1-491.1 to 15.1-491.6.

2Sections 15.1-491.1 to 15.1-491.6 were enacted in Ch. 320, 1978 Va. Acts 473. Chapter 320 also provides that its provisions should not be construed to limit or restrict powers otherwise granted to any county, city or town. Id. at 476.

3I note with some concern that the proffer document seems to impose obligations on the County with respect to sharing certain utility revenues with the developer in future years. I express no opinion concerning the enforceability of any obligations imposed upon a local government as part of the conditional zoning process. Compare Byrd v. Martin, Hopkins, Lemon and Carter, P.C., 564 F. Supp. 1425 (W.D. Va. 1983), aff'd, 740 F.2d 961
As noted above, no reference is made in the conditional zoning documents to the approval or review of the proposed development under the County's subdivision ordinance. Section 15.1-466(E) authorizes a subdivision ordinance to include provisions for the "voluntary funding of off-site road improvements."

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Period of time property owner holds title prior to family subdivision, as well as conveyance of subdivision by family member to third party, relevant factors in determining whether family subdivision for purpose of circumventing subdivision ordinance; subdivision may include single lot for each member of property owner's immediate family; property owner may not convey lot to sibling pursuant to family subdivision exception; lots subject to locality's zoning, and other land use, regulations; review and approval of proposed family subdivision; subdivision ordinance may not require specific period of time of ownership before or after family subdivision; equity proceedings for violations of § 15.1-466(A)(k).

October 6, 1989

Mr. William M. Hackworth
County Attorney for York County

You ask several questions concerning the "family subdivision" provision of § 15.1-466(A)(k) of the Code of Virginia.

I. Applicable Statutes

Virginia's subdivision enabling statutes are detailed in Article 7, Chapter 11 of Title 15.1, §§ 15.1-465 through 15.1-485. Section 15.1-465 requires that all counties, cities and towns adopt a subdivision ordinance. The purpose of a subdivision ordinance is to assure the orderly subdivision and development of land and to promote the public health, safety, convenience and welfare of citizens. See §§ 15.1-427, 15.1-465. Among the concerns addressed by subdivision ordinances are the coordination of existing and planned streets, the provision of adequate water, sewerage and drainage systems, the extent and manner in which streets shall be improved, and the dedication for public use of rights-of-way and other site-related improvements. See § 15.1-466.

Section 15.1-466(A) provides:

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 circumvent-
I. Family Subdivision Exception Intended to Promote Cohesiveness of Family by Permitting Division of Land for Family Use with Minimal Regulation

Subdivision ordinances are enacted pursuant to the delegation of the police power of the Commonwealth to the locality. See Nat. Realty Corp. v. Virginia Beach, 209 Va. 172, 163 S.E.2d 154 (1968). As noted above, the purpose of a subdivision ordinance is to assure the orderly subdivision and development of land. See § 15.1-465. The manifest intent of the General Assembly in enacting § 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 by a property owner to a family member without being subject to the formalities and expenses attendant to compliance with otherwise applicable provisions of the subdivision ordinance. See Att'y Gen. Ann. Rep.: 1986-1987 at 121, 123; 1985-1986 at 83, 84. The principal focus of the exception in § 15.1-466(A)(k) is to promote the values society places upon the disposition of family estates during the lifetime of the owner with a minimum of government regulation and to promote the cohesiveness of the family. See 1986-1987 Att'y Gen. Ann. Rep., supra. The family subdivision exception was not intended to authorize the subdivision of property for short-term investment purposes without compliance with otherwise applicable requirements of the subdivision ordinance. Id. As an exception to otherwise applicable subdivision requirements, § 15.1-466(A)(k) must be narrowly construed consistent with the purpose underlying the exception. See Att'y Gen. Ann. Rep.: 1986-1987, supra, at 124; 1985-1986, supra, at 86 n.1.

III. Period of Time Property Owner Has Held Title Prior to Family Subdivision Is Relevant Factor in Determining Whether Family Subdivision Is for Purpose of Circumventing Ordinance

You first ask whether there is a minimum period of time a person must own property before subdividing it pursuant to § 15.1-466(A)(k).

Section 15.1-466(A)(k) does not expressly impose any minimum ownership period on a property owner. The statute, however, does provide that a family subdivision shall not be for the purpose of circumventing the requirements of § 15.1-466(A). A prior Opinion of this Office concludes that § 15.1-466(A)(k) was not intended to apply to profit-motivated divisions for short-term investment purposes. See 1986-1987 Att'y Gen. Ann. Rep., supra, at 123. If a property owner seeks to divide a parcel pursuant to § 15.1-466(A)(k) when he has owned the parcel only for a short time, this short period of ownership, in my opinion, would be one relevant factor in determining whether the proposed division was for the purpose of circumventing otherwise applicable requirements of the subdivision ordinance.

IV. Family Subdivision May Include Single Lot for Each Member of Property Owner's Immediate Family

You next ask whether there is any limit on the number of lots that can be created pursuant to § 15.1-466(A)(k) in a single division other than the number of members of the property owner's immediate family.

Section 15.1-466(A)(k) permits a "single division" of a parcel "for the purpose of sale or gift to a member of the immediate family of the property owner" and provides that "only one such division shall be allowed per family member." 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 reference to a "single division" of a parcel in the first sentence of § 15.1-466(A)(k) could be interpreted as limiting a family subdivision to a single parcel or lot to one family member of the owner. This conclusion, however, would be inconsistent with the language of the second sentence providing for a single division per family member. The apparent inconsistency between the sentences in § 15.1-466(A)(k) renders the statute ambiguous on this point, but limiting a family subdivision to a single parcel or lot to one family member would negate the entire first clause of the second sentence. I recognize the rule of construction that requires § 15.1-466(A)(k) to be narrowly construed. In this instance, however, it is my opinion that a family subdivision created pursuant to the exception may include a single lot for each member of the property owner's immediate family, as defined in § 15.1-466(A)(k).

V. Family Subdivision Lots Are Subject to Locality's Zoning Regulations and Other Land Use Regulations

Your third question is whether lots created by a subdivision pursuant to § 15.1-466(A)(k) are subject to a locality's zoning regulations and other laws regulating land use.

In Crestar Bank v. Martin, Rec. No. 881074 (Sept. 22, 1989), the Supreme Court of Virginia held that subdivision lots created pursuant to § 15.1-466(A)(k) were subject to a zoning regulation limiting the placement of mobile homes. See also Leake v. Casati, 234 Va. 646, 651, 363 S.E.2d 924, 927 (1988). A prior Opinion of this Office also concludes that § 15.1-466(A)(k) does not exempt family subdivisions from the provisions of a county's zoning ordinance. See 1985-1986 Att'y Gen. Ann. Rep., supra, at 84. It continues to be my opinion, therefore, that lots created by a subdivision pursuant to § 15.1-466(A)(k) are subject to a locality's zoning regulations and other laws regulating land use.

VI. Conveyance of Family Subdivision Lot by Family Member Shortly After Subdivision Is Relevant Factor in Determining if Subdivision Was for Purpose of Circumventing Ordinance

Your fourth question is whether there is any minimum length of time a member of the immediate family must hold title to a lot or parcel created pursuant to § 15.1-466(A)(k) and sold or given to him before he can convey it to another.

Section 15.1-466(A)(k) does not specify a minimum period of time for which an immediate family member must hold title to a lot or parcel created by a family subdivision before the family member can convey the lot or parcel to another. As noted above, however, § 15.1-466(A)(k) does provide that such family subdivisions shall not be for the purpose of circumventing the requirements of the subdivision ordinance. It is my opinion, therefore, that the conveyance of a lot to a third party shortly after the family subdivision was made would be one relevant factor in determining whether the family subdivision was created for the purpose of circumventing the otherwise applicable requirements of the subdivision ordinance.

VII. Property Owner May Not Convey Lot to Sibling Pursuant to Family Subdivision Exception

You next ask whether § 15.1-466(A)(k) may be used to effect the subdivision of land owned jointly by several members of a family with each family member conveying his or her interest in all but one of the proposed parcels to another member of the family in such a fashion that each family member would have one parcel. By example, you describe land owned by a mother and her four adult children whose joint title was by inheritance from an intestate husband and father.
Section 15.1-466(A)(k) does not define the term "property owner," but it does restrict conveyances of lots or parcels to members of the owner's immediate family, as defined in the statute. The definition of "member of the immediate family," provided in § 15.1-466(A)(k), includes only the owner's offspring, spouse, or parent; the definition does not extend to the property owner's siblings. Thus, in the factual example you provide, the conveyances of joint interests in lots or parcels among siblings would not be within the terms of § 15.1-466(A)(k). In addition, joint interests in discrete lots or parcels subdivided from an original parcel could not be accomplished without the prior division of the original parcel into separate lots or parcels.

With respect to the example you present, you also ask whether the children could convey their interests in the parcel to the mother so that she could affect a family subdivision among her children pursuant to § 15.1-466(A)(k).

Section 15.1-466(A)(k) does not refer to the manner in which the property owner who wishes to affect a family subdivision acquires title to the property or to any minimum period of time the owner must hold title prior to subdividing the property. It is my opinion, therefore, that, in the example you provide, the mother could affect a family subdivision among her offspring after acquiring title to the property.

VIII. Subdivision Ordinance May Require Review of Proposed Family Subdivision; May Not Require Five-Year Ownership Period Before and After Family Subdivision

Your sixth question is whether a locality could include provisions in its subdivision ordinance restricting the availability of the family subdivision exception to protect against abuse of § 15.1-466(A)(k). The specific provisions you suggest are: (a) requiring that a property owner own the parcel for a minimum period of time (you suggest five years) before creating a family subdivision; (b) requiring that members of the immediate family to whom lots or parcels are conveyed as a result of a family subdivision retain title to it for a minimum period of time (you suggest five years) before conveying title to the parcel or lot unless the lot or parcel meets all requirements of the locality's subdivision and zoning regulations; and (c) prohibiting the issuance of a building permit for structures on lots that have been subdivided illegally.

Local governments have experienced frequent abuses of the family subdivision exception when the property owner divides the property among his family members for the purpose of subsequent sale to third parties without compliance with the otherwise applicable requirements of the subdivision ordinance. See 1986-1987 Att'y Gen. Ann. Rep., supra. As a result, the purchasers of these lots frequently complain to the local government of the poor condition of the roads leading to their lots, inadequate public services and utilities, drainage problems, and poor access for police, fire and rescue vehicles. Local governments have had only limited success preventing abuses of the family subdivision exception because of the limited enforcement procedures that are available.

Section 15.1-466(A)(k) authorizes and requires that local governments make reasonable regulations and provisions for family subdivisions. Section 15.1-466(A)(k), however, also provides that a family subdivision shall not be for the purpose of circumventing the requirements of the subdivision ordinance. A prior Opinion of this Office concludes that a "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." 1986-1987 Att'y Gen. Ann. Rep., supra, at 124.

It is my opinion that among the provisions that may be adopted to protect against the abuse of the family subdivision exception is a requirement that a proposed family subdivision be submitted to the local subdivision agent for review and approval. If the
circumstances underlying the proposed family subdivision indicate that the purpose is to circumvent the requirements of the subdivision ordinance, then approval could be denied pursuant to the subdivision ordinance. The period of time the property owner has held title to the parcel prior to initiating the proposed family subdivision would obviously be a relevant factor in making this determination. Many localities also require that a property owner and the immediate family member(s) execute an affidavit to the effect that the proposed family subdivision is not for the purpose of circumventing the requirements of the subdivision ordinance. It is my opinion that an affidavit requirement is another reasonable procedure to protect against abuse of the family subdivision exception.

On the other hand, it is my opinion that any restrictions adopted as part of the subdivision ordinance may not unreasonably restrict the availability of the exception to a property owner who wishes to establish a family subdivision in good faith and consistent with the purposes underlying § 15.1-466(A)(k). A requirement that a property owner must have held title to property for five years to be eligible to use § 15.1-466(A)(k), in my opinion, would unreasonably restrict the availability of the exception.

Similarly, a requirement that a family member retain title in a divided lot for five additional years, in my opinion, also would be unreasonably restrictive. In addition, such a postsubdivision limitation would present significant practical problems in its enforcement. Absent a change in the language of § 15.1-466(A)(k), it is my opinion that any absolute requirement that a property owner have held title, or that a family member retain title, for a specific period of time either before or after the subdivision would be of doubtful enforceability.

Building permits are frequently issued in conjunction with or as part of the zoning or building code regulatory process rather than the subdivision process. See, e.g., §§ 15.1-491(h), 36-105. The Supreme Court of Virginia has approved procedures requiring the denial of a building permit for the failure to comply with applicable zoning requirements. See City of Staunton v. Cash, 220 Va. 742, 745-46, 263 S.E.2d 45, 47-48 (1980). It is my opinion, therefore, that a local government, as part of its zoning or building code regulatory process, may prohibit the issuance of a building permit for structures on a lot or parcel that has been subdivided illegally.

IX. Remedies for Violations of § 15.1-466(A)(k) Include Equity Proceedings

Your final question is whether there are any remedies, other than those in § 15.1-473, for a violation of § 15.1-466(A)(k).

Section 15.1-473 prohibits the subdivision of land and the sale and transfer of any land of a subdivision unless a subdivision plat has been approved by the appropriate local officials and recorded in accord with the subdivision ordinance. See § 15.1-473(a), (c). See also 1987-1988 Att'y Gen. Ann. Rep. 208, 209. Section 15.1-473(c) also provides that "nothing herein contained shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument." Section 15.1-473(d) provides that any person who violates the provisions of § 15.1-473 shall be subject to a fine for each lot or parcel so subdivided, transferred or sold. Section 15.1-499 provides that any violation or attempted violation of Chapter 11 of Title 15.1 may be restrained, corrected, or abated by injunction or other appropriate proceeding.

Pursuant to § 15.1-473(c), the failure of a property owner to comply with the subdivision plat filing and approval requirements does not inhibit passage of title as between the parties. See Matney v. Cedar Land Farms, 216 Va. 932, 937, 224 S.E.2d 162, 165 (1976). An injunction obtained pursuant to § 15.1-499, therefore, would not be an effective remedy to prevent the transfer of title pursuant to a subdivision created in violation
of § 15.1-466(A)(k) and other provisions of the subdivision ordinance. Any future development of the divided property, however, could be restricted by injunction or otherwise based upon noncompliance with applicable requirements of the subdivision ordinance.

Section 15.1-466(A)(k1) provides a parallel family subdivision provision applicable to Fairfax County and differs from § 15.1-466(A)(k) in two ways. First, § 15.1-466(A)(k1) expressly authorizes an urban county board of supervisors to impose a requirement that lots of less than five acres have up to twenty feet of frontage on a public street; § 15.1-466(A)(k), on the other hand, authorizes a requirement that lots of less than five acres have a right-of-way of up to twenty feet providing access to a public street. Second, the definition of a property owner's immediate family member in § 15.1-466(A)(k1) includes only offspring and parents; the definition in § 15.1-466(A)(k) includes offspring, spouses, and parents.

COUNTRIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Right of developer to record approved final plat of subdivision section shown on approved preliminary plat limited to 5 years from recordation of first final plat.

March 17, 1989

The Honorable Robert W. Ackerman
Member, House of Delegates

You inquire about a developer who fails to record approved final plats for all sections of a subdivision shown on an approved preliminary plat within five years from the recordation date of the final plat of the first section of the subdivision. Specifically, you ask if the developer loses his right pursuant to § 15.1-466(A)(f) of the Code of Virginia to record the final plats of the remaining sections after the expiration of this five-year period.

I. Applicable Statutes

Virginia's subdivision enabling statutes are detailed in Article 7, Chapter 11 of Title 15.1, §§ 15.1-465 through 15.1-485. Section 15.1-465 requires that counties, cities and towns adopt a subdivision ordinance to assure the orderly subdivision of land and its development. Section 15.1-473 prohibits the subdivision of land, the recordation of a subdivision plat, or the sale of any land in a subdivision without compliance with the local subdivision ordinance. Section 15.1-475 requires that any person desiring to subdivide a tract of land must submit a plat of the proposed subdivision to the local subdivision agent for approval. See also § 15.1-473(b)-(e). Section 15.1-475 also authorizes the local governing body to provide in its ordinance for the submission of preliminary subdivision plats for tentative approval.

Section 15.1-466(A)(f) provides, in part:

If a developer records a final plat which may be a section of a subdivision as shown on an approved preliminary plat and furnishes to the governing body a certified check, cash escrow, bond, or letter of credit in the amount of the estimated cost of construction of the facilities to be dedicated within said section for public use and maintained by the locality, the Commonwealth, or other public agency, the developer shall have the right to record the remaining sections shown on the preliminary plat for a period of five years from the
recordation date of the first section, subject to the terms and conditions of this subsection and subject to engineering and construction standards and zoning requirements in effect at the time that each remaining section is recorded.1]

Section 15.1-466(A)(h) generally requires that a plat must be filed for recordation within six months after final approval or such approval shall be withdrawn.

II. Right to Record Approved Final Plats of Subdivision Sections Shown on Approved Preliminary Plat Limited to Five Years from Recordation Date of First Final Plat

Section 15.1-466(A)(f) applies to those jurisdictions that have adopted a subdivision ordinance providing for the preliminary review and approval of subdivision plats. The relevant portion of § 15.1-466(A)(f), quoted above, establishes a continuing right to record approved final plats of sections of a subdivision, subject to appropriate bonding, dedication, engineering and construction standards, and zoning requirements, based on an approved preliminary plat. The right to record successive approved final plats based on an approved preliminary plat, however, is limited to five years from the recordation date of the final plat of the first section of the subdivision. Section 15.1-466(A)(f), therefore, establishes a limited degree of protection for a developer from intervening changes to a jurisdiction's subdivision ordinance when developing a multisection subdivision over a period of years based on an approved preliminary plat. It is my opinion, however, based on the express language of § 15.1-466(A)(f), that the right of a developer to record approved final plats of sections of a subdivision based on the approval of a preliminary plat expires five years after the recordation date of the final plat of the first section of the subdivision. In these circumstances, it is further my opinion that the authority of a developer to record plats of the remaining sections of the subdivision is subject to the full review and approval process under the locality's appropriate subdivision ordinance without regard to the earlier approval of a preliminary plat.

1The relevant language of § 15.1-466(A)(f) was enacted in Ch. 422, 1985 Va. Acts 554, 555.
"Board") of the County to rezone his property to an apartment/townhouse classification, which permits the property owner to establish ten dwelling units per acre. The property owner's development proposal, however, called for the establishment of only five dwelling units per acre.

At a recent joint public hearing before the Planning Commission and the Board, the property owner, in response to concerns about the density of development permitted under the apartment/townhouse classification, proposed to limit his ability to develop the property if his rezoning application was approved. The property owner suggested that the public hearing be continued, that he be allowed to submit conditional zoning proffers, and that those proffers then be a part of the rezoning action or, in the alternative, that he would agree that the land would not be developed in excess of his current five-dwelling-unit-per-acre proposal.

II. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498 of the Code of Virginia. Sections 15.1-491.1 through 15.1-491.6 provide for conditional zoning as it operates in most Virginia localities.

Section 15.1-491 authorizes a zoning ordinance to include, among other things, reasonable regulations and provisions concerning the administration of the ordinance and for the amendment of the regulations included in the ordinance. See § 15.1-491(d), (g).

Section 15.1-493(C) provides:

Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15.1-431, after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment. However, no land may be zoned to a more intensive use classification than was contained in the public notice without an additional public hearing after notice required by § 15.1-431. Such ordinances shall be enacted in the same manner as all other ordinances.

Section 15.1-431 specifies the type of notice that is required prior to the amendment of a zoning ordinance.

Section 15.1-491.2 further provides:

A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map....

III. Limitations on Density of Development Permissible by Restrictive Covenants or Acquisition of Open-Space Easements by Local Government

You first ask whether a property owner may limit the development of his property, other than by a conditional zoning proffer, to a density less than that allowed by its current zoning where the limitation is enforceable by the local government.

Section 15.1-491.3 provides for the enforcement of conditional zoning proffers by the local zoning administrator. Section 15.1-491(d) provides generally for the enforcement of the local zoning ordinance. Prior to the enactment of conditional zoning enabling
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statutes, limitations on development were often accomplished by the property owner recording restrictive covenants. These restrictive covenants, however, were subject to private enforcement and a local government generally would not have standing to enforce the recorded development limitations. See F. Brown & S. Shilling, Conditional Zoning in Virginia, 16 U. Rich. L. Rev. 117, 134-35 (1981). Compare Vienna Council v. Kohler, 218 Va. 966, 989, 244 S.E.2d 542, 544 (1978).

One limitation on development that has been used in Virginia is the acquisition of open-space easements by local governments. See §§ 10.1-1701 to 10.1-1703. If a property owner chooses to donate or sell open-space easements to a local government, the resulting restrictions on the development of the property would be enforceable by the local government.

IV. Conditional Zoning Proffers May Not Be Submitted Initially During Public Hearing Before Local Governing Body; Proffers May Be Submitted in Writing Prior to Reconvening of Recessed Public Hearing if Properly Advertised

You next ask whether conditional zoning proffers may be submitted during a recess of a public hearing at which a rezoning application involving the property for which the proffers are submitted is being considered.

Section 15.1-491.2 requires that conditional zoning proffers be made in writing prior to a public hearing before the governing body. This requirement ensures that any conditions proffered are subject to adequate review by local government officials and other interested persons. See Op. to Paul S. McCulla, Fauquier Co. Att'y (Mar. 21, 1989). The public hearing requirement for all rezonings, whether with conditions or otherwise, is intended to afford property owners and other interested persons an opportunity to be heard by the local governing body. See Lawrence Trans. v. Bd. of Zoning, 229 Va. 568, 571, 331 S.E.2d 460, 462 (1985). A local governing body is authorized to make appropriate changes or corrections to a proposed zoning ordinance amendment after the public hearing. No land may be zoned to a more intensive use classification than was contained in the public notice unless an additional public hearing is held after appropriate notice. See § 15.1-493(C); Fairfax County v. Pyles, 224 Va. 629, 637, 300 S.E.2d 79, 83 (1983); Wilhelm v. Morgan, 208 Va. 398, 400, 157 S.E.2d 920, 922 (1967); Ciaffone v. Community Shopping Corp., 195 Va. 41, 49-50, 77 S.E.2d 817, 822 (1953); 1 R. Anderson, American Law of Zoning 3d § 4.15 (1986).

A prior Opinion of this Office concludes that § 15.1-493(C), authorizing changes to a proposed zoning ordinance amendment, applies to conditional rezoning amendments. The Opinion further concludes that, pursuant to the authority granted by § 15.1-493(C), a conditional rezoning applicant may amend proffered conditions to correct errors or to proffer a reduced level of density of development. See 1978-1979 Att'y Gen. Ann. Rep., supra. In Puffenbarger v. Goochland Supervisors, 3 Va. Cir. 321 (1985), the Circuit Court of Goochland County concluded that proffers were subject to amendment, without an additional public hearing, to conform to a reduction in the acreage subject to rezoning. In Puffenbarger, however, the court invalidated the rezoning action because oral proffers were incorporated into the zoning ordinance amendment. Id. at 322.

In this instance, the property owner had requested a rezoning to the apartment/townhouse classification without conditions. I assume that the public hearing was advertised on this basis. No conditions were in writing prior to the public hearing. This factual situation is distinguishable from circumstances where a conditional rezoning applicant seeks to amend existing proffers by making additional concessions. See 1978-1979 Att'y Gen. Ann. Rep., supra. In the facts you present, it is my opinion that § 15.1-491.2 would not permit the rezoning applicant to submit proffers for the first time during a public hearing. Compare Puffenbarger, 3 Va. Cir. at 322. It is further my opin-
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ion, however, that proffers may be submitted during a recess of the public hearing, pro-
vided the amended rezoning application, including the written proffers, is properly adver-
tised pursuant to § 15.1-431 prior to the reconvening of the public hearing. The consider-
ation of an amended rezoning application at an additional or reconvened public hearing, in
my opinion, is expressly provided for in § 15.1-493(C).

1 A limited number of Virginia localities are authorized to enact conditional zoning
provisions pursuant to § 15.1-491(a) or § 15.1-491.2:1 rather than through §§ 15.1-491.1
discussing various types of conditional zoning authorized by Virginia's zoning enabling
statutes.

COUNTRIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.
CONSERVATION: SOIL AND WATER CONSERVATION.
CIVIL REMEDIES AND PROCEDURE: INJUNCTIONS.

Effect of approval of preliminary plat by local subdivision agent; vesting of right to seek
final plat approval without regard to subsequent amendments to subdivision ordinance.

December 18, 1989

Mr. Philip P. Purrington Jr.
County Attorney for Lancaster County

You ask several questions concerning the application of Virginia's subdivision stat-
utes.

I. Facts

The Lancaster County Subdivision Committee (the "County" and the "Committee")
approved a preliminary plat for the subdivision of a tract of land in the County on Octo-
ber 17, 1989. At the October 26, 1989, meeting of the Board of Supervisors (the "Board"),
a group of citizens who own property in the area of the proposed subdivision requested
the Board to reverse the Committee's approval of the preliminary plat. Several questions
now have arisen concerning the effect of the Committee's decision to approve the pre-
liminary plat.

II. Applicable Statutes

Virginia's subdivision enabling statutes are detailed in Article 7, Chapter 11 of Title
15.1, §§ 15.1-465 through 15.1-485 of the Code of Virginia ("Article 7"). The primary pur-
pose of these statutes is to assure the orderly subdivision of land and its development. See § 15.1-427. Section 15.1-466 details certain provisions that are required to be in-
cluded in a subdivision ordinance and additional provisions that may be included in such
an ordinance.

Section 15.1-466(A)(f) provides for the legal effect of the approval of a preliminary
§ 15.1-475 (authorizing provision requiring submission of preliminary plat).
Section 15.1-473(a) requires compliance with the local subdivision ordinance prior to the subdivision of land. Section 15.1-473(b) prohibits the recordation of a subdivision plat unless and until the plat has been submitted to, and approved by, the local planning commission, the local governing body, or by the locality's duly authorized subdivision agent. Section 15.1-475 also requires submission of a plat of any proposed subdivision to the local planning commission or subdivision agent designated by the local governing body. Section 15.1-475 also provides for the appeal of the disapproval of a proposed plat to the circuit court by the subdivider.

III. Challenge to Approval of Preliminary Plat Must Be Brought in Circuit Court by Person with Justiciable Interest in Administrative Action

You first ask whether the neighboring citizens have a right to appeal the Committee's approval of the preliminary plat.

For purposes of this Opinion, I assume that the County's subdivision ordinance designates the Committee as the subdivision agent of the County for the review of proposed subdivisions pursuant to §§ 15.1-473(b) and 15.1-475. See also § 15.1-466(A)(i) (providing for the administration and enforcement of a subdivision ordinance, including the review of plats). I also assume that the County's subdivision ordinance does not provide for the review of the Committee's action on a proposed plat by the local planning commission or the Board.

As noted above, § 15.1-475 expressly authorizes a subdivider to seek judicial review of the disapproval of a proposed plat. Compare §§ 15.1-493(G) and 15.1-496.1 (authorizing appeals from administrative decisions by aggrieved persons to the board of zoning appeals). Any challenge to the approval of a proposed subdivision plat, therefore, must be brought (1) pursuant to the general jurisdiction of the circuit court and (2) seeking the appropriate legal remedy challenging the legality of the approval of the proposed subdivision. The individuals challenging the administrative action must satisfy the common law requirements of standing to demonstrate that they have a justiciable interest in the outcome of the dispute. See Cupp v. Board of Supervisors, 227 Va. 580, 589-93, 318 S.E.2d 407, 411-14 (1984) (standing of property owner to challenge denial of special exception to zoning restrictions and imposition of conditions on use of property); Long v. Town of Port Royal, 13 Va. Cir. 29 (1987) (standing of property owner to challenge town's failure to adopt a subdivision ordinance). Compare Va. Beach Beautification Comm. v. Bd. of Zoning, 231 Va. 415, 419-20, 344 S.E.2d 899, 902-03 (1986) (citizen's group is not an "aggrieved person" within the meaning of § 15.1-497, with standing to challenge grant of variance by board of zoning appeals because of inability to demonstrate a direct, immediate, pecuniary and substantial interest in decision to grant variance).

In addition, the approval of a preliminary plat may not be an administrative act of sufficient finality to establish a controversy amenable to judicial review. See E. Ziegler, Rathkopf's The Law of Zoning and Planning § 66.06 (1989); R. Anderson, American Law of Zoning 3d § 25.13, at 304 n.9 (1986). It is my opinion, therefore, that any challenge to the Committee's approval of the preliminary or final plat must be brought in the circuit court by a person or persons who have a justiciable interest in that decision and at a time when the administrative action challenged is ripe for judicial review.

IV. Board Has No Authority to Suspend Development Activities Pending Judicial Review of Approval of Preliminary Plat

You next ask whether the Board may prohibit the subdivider from developing the property while the "appeal" is being considered.
No statute provides for the stay of any development activities pending a judicial challenge to the administrative approval of a proposed subdivision plat. Compare § 15.1-496.1 (statute providing for stay of all proceedings in furtherance of action appealed from board of zoning appeal in certain circumstances). In this instance, however, the Committee has approved only a preliminary plat and that action alone would not authorize the division of the property in question or the sale of any lots. See §§ 15.1-473, 15.1-475. It is my opinion that, in the absence of a provision of the local subdivision ordinance for the review of the Committee's decision by the Board, the Board has no authority to stay any development activities on the subject property that may be undertaken in reliance on the approval of the preliminary plat. The circuit court, of course, could enjoin any development activities pending the resolution of a challenge to the Committee's approval of the preliminary plat. See §§ 8.01-620, 8.01-628.

V. Virginia's Erosion and Sediment Control Law Does Not Require that Subdivider Submit Erosion and Sediment Control Plan as Condition of Subdivision Approval

Your third question is whether the County's Erosion and Sediment Control Ordinance requires a subdivider to submit an erosion and sediment control plan as a prerequisite or condition of subdivision approval.

Virginia's Erosion and Sediment Control Law is detailed in Article 4, Chapter 5 of Title 10.1, §§ 10.1-560 through 10.1-571 ("Article 4"). Section 10.1-562 requires that each soil and water conservation district or local government adopt a local erosion and sediment control program. Section 10.1-563 restricts any land-disturbing activity until the person seeking to engage in this activity has submitted an erosion and sediment control plan for the site to the appropriate authority for approval. The definition of "land-disturbing activity" includes activities "in conjunction with multiple construction in subdivision development." Section 10.1-560(10).

Section 15.1-466 does not expressly require that the erosion and sediment control review process be undertaken as a part of the subdivision review process. You do not provide a copy of the County's local erosion and sediment control program, if any has been adopted pursuant to § 10.1-562.

The subdivision review and approval process pursuant to Article 7 and the erosion and sediment control review and approval processes are related, but distinct, land use control processes. It is my opinion that the different enabling statutes in Article 7 and Article 4 do not require that these two processes be integrated. It is further my opinion, therefore, that these statutes do not require a subdivider to submit an erosion and sediment control plan as a precondition to subdivision approval. Any land-disturbing activity undertaken in conjunction with multiple construction in subdivision development, of course, would be subject to the review and approval process pursuant to § 10.1-563.

VI. Approval of Preliminary Plat, Standing Alone, Does Not Establish Vested Right to Seek Final Approval Without Regard to Subsequent Amendments to Subdivision Ordinance

Your final question is whether it was lawful for the County to amend its subdivision ordinance on October 26, 1989, to require, as a precondition to the approval of a subdivision plat, that all sites have a health department test and 100% reserve sites for drainfields to be effective October 1, 1989, the purpose being to affect a proposed plat presently under consideration by the Committee.

Section 15.1-466(A)(f) and (C) authorize subdivision provisions to ensure the adequacy of sewerage systems and the review of a proposed subdivision site to ensure suitability for the installation of subsurface sewage disposal systems. See generally
The issue presented by your inquiry, therefore, is whether the Committee's approval of the preliminary plat operated to vest the subdivider's right to proceed with the subdivision under common law principles, notwithstanding the Board's amendments to the County's subdivision ordinance prior to the approval of the final plat.

There is little case law in Virginia addressing when, in this process, a subdivider's right to proceed pursuant to the provisions of an existing ordinance vests. In Cooke, Inc. v. County of Louisa, _ F. Supp. _, C.A. No. 89-0017-R (E.D. Va. Aug. 28, 1989), the United States District Court for the Eastern District of Virginia, Richmond Division, held that a subdivision is not created in a way that establishes a vested right until a final plat has been approved and recorded. In Whelan v. Spotsylvania County Planning Comm., 15 Va. Cir. 271 (1989), a Virginia circuit court considered the rights of a subdivider who had submitted a preliminary plat for approval prior to an amendment to the local zoning ordinance that increased the minimum lot size permitted in certain subdivisions. The circuit court concluded that "the submission of a preliminary plat, whether adequate or not, without more, does not confer a vested right upon a landowner to use his property as shown on the plat." 15 Va. Cir. at 274.

A recent Opinion of this Office adopts a rule similar to that adopted by the court in Whelan and concludes that a subdivider not only must record an approved final plat, but also must substantially commence the project and make substantial good faith expenditures in reliance on the approval of the recorded final plat to establish a vested right to proceed with a development plan, notwithstanding intervening changes to the applicable zoning laws. See Op. to Hon. John G. Dicks Jr., H. Del. Mbr. (Oct. 19, 1989).

In the context of the approval of subdivisions and preliminary plats, as well as later amendments to the applicable subdivision restrictions, the resolution of vesting issues is inherently fact based. Among the significant factors a court would consider in this context is whether the subdivider has received threshold approval from the locality (e.g., the approval of a preliminary plat) to proceed with his development. Compare Fairfax County v. Medical Structures, 213 Va. 355, 192 S.E.2d 799 (1972); Fairfax County v. Cities Service, 213 Va. 359, 193 S.E.2d 1 (1972) (grant of special exception as threshold approval to proceed with development; resolution of vesting issue in zoning context). Other factors would include (1) the scope of the vested rights asserted (i.e., the right to develop a single parcel or multiple parcels free from newly adopted restrictions; whether the development would be unregulated or subject to preexisting restrictions), (2) whether the asserted vested right would limit the locality's ability to protect adequately the health and safety of its citizens, (3) the extent of the impact of the new restrictions if imposed on the subdivider, and (4) whether the subdivider has substantially changed his position or made substantial expenditures in reliance on the threshold approval by the local government. Compare 5 E. Ziegler, supra § 66.08[3]; 4 R. Anderson, supra § 25.13 (effect of approval of preliminary plat).

It is my opinion that the approval of a preliminary plat by a duly designated subdivision agent, standing alone, is insufficient to establish a subdivider's vested right to proceed with the proposed subdivision and to seek final approval without regard to amendments to the subdivision ordinance that may impose additional restrictions or require-
ments. On the other hand, actions taken by the developer in reliance on the preliminary plat approval, including a substantial change in position or substantial expenditures made in good faith, could cumulatively serve as the basis for establishing the subdivider's vested right to seek final approval under the same terms in effect at the preliminary approval stage.

You do not provide facts concerning the subdivider's activities subsequent to the Committee's approval of the preliminary plat or the regulatory interests of the County in imposing the new restrictions. It is not possible, therefore, to conclude definitively whether the developer in question has established a vested right to seek final approval of his proposed subdivision without regard to the October 26, 1989, amendments to the subdivision ordinance.

Some subdivision ordinances provide for the review of a subdivision agent's action on a proposed plat by the local governing body. See West v. Mills, 238 Va. 162, 164-65, 167, 380 S.E.2d 917, 919-20 (1989).

The Supreme Court of Virginia has addressed certain issues concerning a developer's vested right to proceed with a subdivision development, notwithstanding the extension of new restrictions to the subdivider by amendments to the local subdivision ordinance. This decision, however, was not for publication and, by direction of the Court, is not to be cited or relied upon as precedent in any other case. See Harrison v. Robinson, Rec. No. 860952 (Sept. 22, 1989).

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

In absence of statute establishing such standing, administrative and governmental interests of planning commission insufficient to establish its standing to petition local governing body to review decisions of zoning administrator concerning proffer interpretations.

July 13, 1989

Mr. David T. Stitt
County Attorney for the County of Fairfax

You ask whether the Fairfax County Planning Commission has standing to appeal a proffer interpretation by the Zoning Administrator to the Board of Supervisors.

I. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498 of the Code of Virginia. Section 15.1-491(a) authorizes the inclusion in a zoning ordinance of provisions establishing a conditional zoning process in certain local governments including Fairfax County. Section 15.1-491(d) authorizes the designation of a zoning administrator responsible for the administration and enforcement of a zoning ordinance.

Sections 15.1-491.1 through 15.1-491.6 authorize local governments generally to establish a conditional zoning process as part of a zoning ordinance. Section 15.1-491.3 provides that the zoning administrator shall be vested with the "necessary authority ... to administer and enforce conditions attached to a rezoning." Section 15.1-491.5 provides, in part, that "[a]ny zoning applicant or any other person who is aggrieved by a
decision of the zoning administrator made pursuant to the provisions of § 15.1-491.3 may petition the governing body for the review of the decision of the zoning administrator." (Emphasis added.)

The Fairfax County, Va., Zoning Ordinance (1978 & reprint 1988) (the "Zoning Ordinance") vests the Zoning Administrator with the authority to administer and enforce conditions proffered in a rezoning application and accepted by the Board of Supervisors. See Zoning Ordinance, supra § 18-204(7), at 18-17. The Zoning Ordinance also provides that "[a]ny person aggrieved by a decision of the Zoning Administrator regarding any proffered condition may appeal such decision to the Board." Id. § 18-204(10), at 18-18. The term "Board" is defined as the Board of Supervisors. See id. § 20-200(9), at 20-5.

Section 15.1-430(f) defines the term "person" as an "individual, firm, corporation or association." Section 20-300 of the Zoning Ordinance defines "person" as "[a] public or private individual, group, company, firm, corporation, partnership, association, society, joint stock company, or any other combination of human beings whether legal or natural." Id. at 20-29.

II. Planning Commission Does Not Have Standing to Petition Governing Body to Review Decisions of Zoning Administrator


Section 15.1-491.5 does not expressly identify a planning commission or any other governmental entity or official as a party with standing to petition the governing body for the review of a decision by a zoning administrator. Compare §§ 15.1-496.1 and 15.1-497 (statutes authorizing local government officials, departments, boards or bureaus to appeal administrative decisions to a board of zoning appeals and, subsequently, to a circuit court). The question presented by your inquiry, therefore, is whether a planning commission is a "person who is aggrieved by a decision of the zoning administrator" within the meaning of § 15.1-491.5.

The "aggrieved person" standard frequently appears in land-use enabling statutes to establish the standing of individuals or entities to challenge the application of land use ordinances. See generally A. E. McQuillin, The Law of Municipal Corporations § 29.258 (3d ed. 1986); 4 R. Anderson, supra § 22.11; Va. Beach Beautification Comm. v. Bd. of Zoning, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986); WANY v. Houff, 219 Va. 57, 84, 244 S.E.2d 760, 764 (1978). In Va. Beach Beautification Commission, the Supreme Court of Virginia held that a nonstock Virginia corporation was not a person aggrieved within the meaning of § 15.1-497 and, therefore, was not a proper party to proceed in the circuit court to review the decision of a board of zoning appeals granting a variance. In its analysis, the Court first concluded that the Beautification Commission was a "person" within the meaning of § 15.1-430(f). The Court then concluded that the Beautification Commission was not "aggrieved" within the meaning of the statute and stated that "[t]he word 'aggrieved' in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." 231 Va. at 419-20, 344 S.E.2d at 902-03.
In this instance, a planning commission is an administrative entity of local government established pursuant to statute. A planning commission is not, in my opinion, a "person" within the meaning of § 15.1-430(f). To the extent the definition of "person" set out in the Zoning Ordinance is broader than the definition detailed in § 15.1-430(f), it is my opinion that the statutory definition must prevail over the terms of the inconsistent definition detailed in the Zoning Ordinance. See § 1-13.17; 1985-1986 Att'y Gen. Ann. Rep. 101, 102.

Even if one assumes that a planning commission is a "person" within the meaning of § 15.1-430(f), it is further my opinion that a planning commission would not be "aggrieved" within the meaning of § 15.1-491.5. Applying the test stated by the Supreme Court of Virginia in Va. Beach Beautification Commission, a planning commission would have no personal, property or pecuniary interests affected by a decision of a zoning administrator sufficient to establish a planning commission's aggrieved status for the purpose of § 15.1-491.5. The administrative and governmental interests of a planning commission, in my opinion, are insufficient to establish a planning commission's standing to petition the local governing body to review decisions of a zoning administrator concerning proffer interpretations in the absence of a statute establishing such standing. It is my opinion, therefore, that the Fairfax County Planning Commission does not have standing to appeal a proffer interpretation by the Zoning Administrator to the Board of Supervisors.

2 Section 18-204(7), (10) of the Zoning Ordinance was enacted pursuant to §§ 15.1-491.3 and 15.1-491.5 as authorized by Ch. 320 cl. 2, 1978 Va. Acts 473, 476.
Section 15.1-491 authorizes a zoning ordinance to include, among other things, reasonable regulations and provisions concerning the administration of the ordinance and for the amendment of the regulations included in the ordinance. See § 15.1-491(d), (g).

II. Zoning Ordinance May Require Conditional Rezoning Applicant to Submit Voluntary Written Proffers Seven Days Prior to Public Hearing

Section 15.1-491(d) and (g) expressly authorizes zoning ordinance provisions governing the administration and the amendment of the ordinance. Other statutes require that specific procedures be followed in the amendment of a zoning ordinance. See, e.g., §§ 15.1-431, 15.1-491(g), 15.1-493. These statutory requirements are mandatory and must be complied with as part of the rezoning process. See Town of Vinton v. Falcon Corpo., 226 Va. 62, 306 S.E.2d 867 (1983). The detailed procedures governing the day-to-day administration of a zoning ordinance, however, generally are provided for by the zoning ordinance itself. See 8A E. McQuillin, The Law of Municipal Corporations §§ 25.242a, 25.245 (3d ed. 1986); 1 R. Anderson, American Law of Zoning 3d § 4.04 (1986 & Supp. 1988).

Based on the above, it is my opinion that the zoning enabling statutes authorize a local government to adopt, as part of a zoning ordinance, reasonable procedural provisions governing the administration of the ordinance. These procedural provisions must be consistent with the express statutory requirements concerning the amendment of a zoning ordinance. See § 1-13.17. In this instance, the proposed provision would require a conditional rezoning applicant to submit any voluntary written proffers seven days prior to the public hearing required by § 15.1-491.2. The utility of such a procedural requirement is evident—to provide a reasonable period for county officials, members of the board of supervisors and other interested persons to review the proffers and to present questions or make reasoned comments, recommendations or decisions concerning the rezoning application. It is my opinion, therefore, that a county may amend its zoning ordinance to require that any person applying for rezoning under the conditional zoning process must submit any voluntary written proffers seven days prior to the public hearing held by the board of supervisors on the application.

A limited number of Virginia localities are authorized to enact conditional zoning provisions pursuant to § 15.1-491(a) rather than §§ 15.1-491.1 to 15.1-491.6. Conditional zoning under § 15.1-491(a) is independent and distinct from conditional zoning implemented pursuant to §§ 15.1-491.1 to 15.1-491.6.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING - ZONING - THE COMPREHENSIVE PLAN.

Bedford County may adopt ordinance similar to proposed Land Use Guidance System ordinance prepared by Bedford County Planning Commission; special exception process involving Growth Guidance Assessment and Compatibility Assessment and inclusion of goals and objectives of County's comprehensive plan consistent with zoning enabling statutes and Virginia Supreme Court case decisions.

August 31, 1989

Mr. J.G. Overstreet
County Attorney for Bedford County

You ask several questions concerning a "Land Use Guidance System" that has been developed by the Bedford County Planning Commission.
I. Proposed Land Use Guidance System

For two years the Bedford County Planning Commission has been developing a Land Use Guidance System ("LUGS") modeled after the Development Guidance System ("DGS") implemented by Hardin County, Kentucky, to be considered by the Board of Supervisors of Bedford County (the "County").

The proposed LUGS ordinance establishes a single countywide district for land use regulation and provides for a limited number of uses-by-right and few prohibited uses. All other developmental uses of property are authorized only pursuant to a "compliance permit" process. The compliance permit process has two major elements—a "Growth Guidance Assessment" and a "Compatibility Assessment."

Article VII of the proposed LUGS ordinance provides for the Growth Guidance Assessment. This procedure is intended to determine whether the proposed use of a site is acceptable and satisfies the goals and objectives of the County's comprehensive plan. The site characteristics examined include the percentage of surrounding area developed, similar land uses near the site, the site's relation to the County's growth areas, public education and road characteristics, groundwater vulnerability, air quality impact, distance to historic sites, water system characteristics, public sewerage characteristics, and distance from fire and rescue squad facilities. Each of these site characteristics is given a weighted points score. The total points scored by a proposed development on a site represent the Growth Guidance Assessment of the proposed site. Once the Growth Guidance Assessment is completed, the development application advances to the Compatibility Assessment.

Article VIII of the proposed LUGS ordinance provides for the Compatibility Assessment. This procedure is intended to identify what steps, if any, should be taken to ensure the compatibility of proposed development activities with surrounding uses of land.

If a proposed development site scores 100 or more points in the Growth Guidance Assessment, the site gains "permitted use status." Permitted use status means development of the site contributes to the fulfillment of enough of the goals of the comprehensive plan and the LUGS ordinance to warrant prompt handling as an approved land use development, subject to making the site compatible with the surrounding uses. An "informal compatibility meeting" is conducted at which the developer explains to the affected property owners the proposed use for the site. The LUGS ordinance identifies relevant topics for consideration as the proposed development's potential negative effect on parking, vehicular and pedestrian traffic, aesthetics, noise, odor, artificial lighting glare, water run-off or flooding problems, air or water pollution, privacy, changes in the character of the area, increased needs for government services and/or utilities, and the proposed development's consistency with the goals and objectives of the County's comprehensive plan.

The goal of the informal compatibility meeting is for the developer and interested persons to identify problems with respect to the proposed development and to identify solutions that will make the development more compatible with surrounding uses. If a consensus is reached between the developer and other interested persons concerning the appropriate conditions to impose on the proposed development, the application then is subject to a public hearing requirement prior to consideration by the board of zoning appeals. The board of zoning appeals may approve the application with the agreed-upon conditions, impose new or different conditions, or deny the application. If no consensus is reached, applications for rural and residential projects are considered, after a public hearing and review by the County's planning commission, by the board of zoning appeals. Commercial and industrial projects also are subject to a public hearing and review by the planning commission but are acted on by the board of supervisors.
A proposed development site that scores less than 100 points in the Growth Guidance Assessment gains "special exception status" and is subject to a similar procedure. An informal compatibility meeting is conducted, compatibility problems are identified as are potential conditions that could be imposed to mitigate the proposed development's negative impact on surrounding properties. Projects that have gained special exception status are subject to a public hearing and review by the planning commission. Rural and residential projects are acted on by the board of zoning appeals. Commercial and industrial projects are acted on by the board of supervisors. The board of supervisors or the board of zoning appeals may approve the project with any agreed conditions, impose new or different conditions, or deny the application.

II. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498 of the Code of Virginia. The purposes served by local zoning ordinances are detailed in §§ 15.1-427 and 15.1-489. Section 15.1-490 requires that zoning ordinances shall be drawn and applied with reasonable consideration for specific factors traditionally related to the police power interests of the local government. Section 15.1-491(c) authorizes the granting of special exceptions to zoning restrictions. Pursuant to § 15.1-491(c), a local governing body may reserve unto itself the right to issue such special exceptions.

Section 15.1-495(f) authorizes a board of zoning appeals to hear and decide applications for special exceptions as may be authorized in the local zoning ordinance. Section 15.1-496 provides for a procedure for a board of zoning appeals to consider applications for special exceptions. Section 15.1-496 also authorizes the local planning commission to make recommendations concerning applications for special exception permits. Both §§ 15.1-495(f) and 15.1-496 provide that no special exception may be granted except after notice and a public hearing.

III. Special Exception Process Pursuant to Proposed LUGS Ordinance Authorized by Zoning Enabling Statutes

You first ask whether Virginia's zoning enabling statutes authorize the County to adopt an ordinance similar to the proposed LUGS ordinance.

A prior Opinion of this Office reviewed the provisions of a DGS ordinance that served as a model for the proposed LUGS ordinance. See 1987-1988 Att'y Gen. Ann. Rep. 214. This Opinion concludes that (1) the zoning enabling statutes do not require the drawing of multiple districts; (2) § 15.1-491(c) authorizes a special exception permit process similar to that provided in the DGS; (3) the enactment of use restrictions similar to those imposed under the DGS would not be per se unreasonable; and (4) the denial of a project under the Growth Guidance Assessment and the Compatibility Assessment generally would be based on objective factors which parallel the factors traditionally considered, and accepted under Virginia's zoning decisions, in land use decisions. Id. at 216-17.

In the facts you present, the proposed LUGS ordinance authorizes a variety of uses as a matter of right, including existing uses, the limited expansion of existing uses, most agricultural and forestry uses, agricultural uses incident to residential uses, and residential use for single family dwellings if minimum lot size requirements are satisfied. The Growth Guidance Assessment is based on objective factors traditionally considered in zoning decisions based on determining whether the site in question is suitable for the proposed use. The Compatibility Assessment seeks to identify the potential negative impact of the proposed use on nearby property and possible steps that would mitigate the identified problems.
The grant or denial of an application for a special exception by the board of zoning appeals or the board of supervisors, with or without conditions, is based on the Growth Guidance Assessment and the Compatibility Assessment. The Growth Guidance Assessment and the Compatibility Assessment, in turn, are based on traditional zoning factors such as the nature and location of the site, the impact of the proposed development on nearby property, and the provisions of the comprehensive plan. The grant or denial of a special exception based on these factors of site suitability and the impact of the proposed use on nearby property is consistent with factors that have been approved by the Supreme Court of Virginia. See County Board of Arlington v. Bratic, 237 Va. 221, 377 S.E.2d 368 (1989) (denial of special exception based on impact of proposed multifamily dwelling on area devoted primarily to single family dwellings upheld); National Memorial Park v. Board of Zoning, 232 Va. 89, 348 S.E.2d 248 (1986) (denial of special exception to operate crematory based on negative impact of crematory on neighboring properties and inconsistency with comprehensive plan upheld). See also 3 R. Anderson, American Law of Zoning 3d §§ 21.12, 21.13 (1986); 8 E. McQuillin, The Law of Municipal Corporations § 25.171 (3d ed. 1983). The adoption of a zoning ordinance providing for the issuance of special exceptions under standards consistent with good zoning practices is entitled to a presumption of legislative validity. See Bell v. City Council, 224 Va. 490, 495, 297 S.E.2d 810, 813 (1982). Compare Cole v. City Council, 218 Va. 827, 241 S.E.2d 765 (1978). Any conditions imposed on a use approved as part of a special exception process, however, must be reasonable and within the power of the local government to impose. See Cupp v. Board of Supervisors, 227 Va. 580, 318 S.E.2d 407 (1984).

Based on the above and consistent with the prior Opinion of this Office described above, it is my opinion that Virginia's zoning enabling statutes authorize the County to adopt an ordinance similar to the proposed LUGS ordinance. It is further my opinion that the special exception process, including the Growth Guidance Assessment and the Compatibility Assessment, is consistent with those factors governing land use decisions that have been approved in cases decided by the Supreme Court of Virginia.

IV. Consideration of Comprehensive Plan as Part of Special Exception Process Is Permissible

You next ask whether the goals and objectives of the comprehensive plan may be used as an element of the Compatibility Assessment.

The proposed LUGS ordinance includes as an appendix the "Bedford County Comprehensive Plan Goals and Objectives." This document sets out general "goals" and specific "objectives" relevant to land use decisions in the areas of the environment, land use, transportation, housing, the economy, and community facilities.

The proposed LUGS ordinance identifies 11 specific topics that are appropriate for discussion in an informal compatibility meeting and further identifies consistency with the comprehensive plan as a general topic. The proposed ordinance also provides that the goals of the comprehensive plan will weigh heavily in the deliberations of the board of supervisors or the board of zoning appeals in considering compliance permit applications. As discussed above, the purpose of the Compatibility Assessment is to identify the problems that may be associated with the proposed development and to identify steps that could be taken to mitigate the negative impact on the surrounding properties.

The Supreme Court of Virginia, however, has acknowledged that the provisions of a comprehensive plan also can be an important factor in land use decisions. See Loudoun Co. v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980) (denial of rezoning based, in part, on inconsistency between proposed shopping center and comprehensive plan upheld). In the context of the special exception process, the Court also has specifically approved zoning ordinance provisions governing the grant or denial of special exceptions that require the consideration of the comprehensive plan or the general purposes of the local zoning ordinance as part of the special exception process. See National Memorial Park, 232 Va. at 92-93, 348 S.E.2d at 250; Bell, 224 Va. at 495, 297 S.E.2d at 813; Maritime Union v. City of Norfolk, 202 Va. 672, 679, 119 S.E.2d 307, 312 (1961). It is my opinion, therefore, that the requirement of the proposed LUGS ordinance that the goals and objectives of the County's comprehensive plan be considered as part of the special exception process is consistent with the zoning enabling statutes and the decisions of the Supreme Court of Virginia.

COUNTIES, CITIES AND TOWNS: PUBLIC FINANCE ACT.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - DEBT — TAXATION AND FINANCE - STATE DEBT.

EDUCATION: VIRGINIA PUBLIC SCHOOL AUTHORITY — PROGRAMS, COURSES OF INSTRUCTION, ETC.

County may issue general obligation bonds, without referendum, to be sold to Virginia Public School Authority to finance acquisition of electronic classroom equipment.

April 17, 1989

Mr. David Wm. Shreve
County Attorney for Campbell County

You ask whether a county may issue general obligation bonds, without prior approval by a public referendum, to be sold to the Virginia Public School Authority (the "Authority") to finance the purchase of computers and related equipment as part of the Statewide Electronic Classroom Program.

I. Facts

In accordance with the Governor's Education Technology Initiative Procurement and Financing Program, 115 Virginia counties, cities and towns have begun proceedings pursuant to the Public Finance Act, §§ 15.1-170 through 15.1-227 of the Code of Virginia, to authorize the issuance of general obligation bonds to finance the acquisition and installation of the "electronic classroom."

Section 22.1-212.2 provides for the establishment and the operation of the Statewide Electronic Classroom Program. The services of this program are limited to educational purposes, including classroom instruction in subject areas which are not available in all schools. See id.

One hundred fifteen localities will finance equipment necessary to participate in the program through the Authority. The 1988-90 Appropriations Act appropriates $2,649,860 to subsidize the equipment financing program. See Ch. 668, Item 134(5), 1989 Va. Acts 1144, 1225 (Reg. Sess.). The 1989 appropriation is understood to be sufficient to pay 100 percent of the debt service on the participating localities' bonds through June 15, 1990.
The equipment to be provided as part of the electronic classroom program consists of microcomputers and peripheral equipment including satellite dishes and associated downlinks, printers and classroom equipment such as television monitors, video cassette recorders, telecopier machines and an electronic cabinet. Campbell County has ordered 50 microcomputers, 12 printers, 4 satellite dishes, and 4 sets of the classroom equipment described above.

The aggregate principal amount to be borrowed by the 115 localities is $10,441,628.10. Campbell County's aggregate expenditure will be $104,829.08; $71,282.72 of this amount is allocated to computer costs and $33,546.36 to satellite dish costs.

The 115 localities participating in the financing program, including Campbell County, will repay their bonds in less than five years. The scheduled delivery date of the bonds is May 25, 1989, and the final principal payment will be due December 15, 1993, approximately four years and seven months later.

The Commonwealth of Virginia Department of Accounts Fixed Asset Accounting and Control System estimates the useful life of telecommunications equipment to be from five to eight years and the useful life of telecopiers to be 20 years. The bonds financing the acquisition of the electronic classroom equipment, therefore, will be retired within the projected useful life of the equipment.

II. Applicable Constitutional Provision and Statutes

Article VII, § 10 of the Constitution of Virginia (1971), imposes certain debt limitations that a local government may incur. Article VII, § 10(b) applies to counties and provides, in part:

No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. 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 [11] for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other State agency prescribed by law, unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt. [Emphasis added.]

The Authority operates pursuant to Chapter 11 of Title 22.1, §§ 22.1-162 through 22.1-175. Section 22.1-166 provides that the Authority is a state agency for purposes of Article VII, § 10(b), and is authorized to purchase bonds issued by or on behalf of a county for capital projects for school purposes. See also § 22.1-162(4).

Section 15.1-185, a portion of the Public Finance Act, authorizes counties (1) to exercise those powers granted by § 15.1-175 and (2) to issue bonds without a referendum for capital projects for school purposes, if these bonds are sold to a state agency as prescribed by law. Section 15.1-175(b), made applicable to counties by § 15.1-185, authorizes a county to issue its negotiable bonds to pay all or any part of the cost of acquiring and improving any project. The terms "project" and "cost" are defined by § 15.1-172(h) and (i).
III. Constitutional History of Provisions of Art. VII, § 10(b) Authorizing Nonreferendum Debts That May Be Incurred by Counties for School Purposes

Article VII, § 10(b) requires that any debt incurred by a county must be authorized by general law and, subject to certain exceptions, also must be approved by public referendum. Bonds issued by a county with the consent of the school board and the county governing body are not subject to this referendum requirement if the bonds are issued "for capital projects for school purposes" and are sold to a state agency as prescribed by law. Id. Section 22.1-166 implements this provision with respect to the Authority. Section 15.1-185 establishes the authority of counties to issue bonds without a referendum for capital projects for school purposes and sold to the Authority. The question presented by your inquiry, therefore, is whether the electronic classroom equipment is a capital project for school purposes within the meaning of Article VII, § 10(b) and §§ 15.1-185 and 22.1-166.

The constitutional restrictions on the incurring of local debt were imposed to protect localities from uncontrolled borrowing by local governing bodies and to safeguard the credit and fiscal integrity of the localities. See Button v. Day, 205 Va. 629, 642, 139 S.E.2d 91, 100 (1964); 2 A. Howard, Commentaries on the Constitution of Virginia 869 (1974). The exception from the referendum requirement of Article VII, § 10(b) for capital projects for school purposes was intended to broaden the opportunities and reduce the cost of financing such capital projects. See 2 A. Howard, supra 872. Compare Button v. Day, 203 Va. 687, 689, 127 S.E.2d 122, 124 (1962).

The constitutional predecessor to Article VII, § 10(b), Sec. 115(a) of the Constitution of Virginia (1902), authorized a county to borrow money from the Virginia Supplemental Retirement System "for the purpose of school construction" without a referendum. Section 115(a) also was interpreted not to require a referendum when a county borrowed money from the Literary Fund for school purposes. Board of Supervisors v. Cox, 155 Va. 687, 156 S.E. 755 (1931).


The only debate concerning the scope of the expanded authority, however, was limited to clarifying a county's authority to borrow without referendum to buy existing buildings rather than merely to construct new buildings. Senate Debates on Constitutional Revision, supra.

The issue whether the term "capital projects" is sufficiently broad to include items of personality and fixtures, such as the electronic classroom equipment in your inquiry, therefore, cannot be determined merely by a consideration of the constitutional history of Article VII, § 10(b).
IV. Article VII, § 10(b) and § 15.1-185 Authorize County to Issue General Obligation Bonds Without Referendum to Finance Acquisition of Electronic Classroom Equipment

Article VII, § 10(b) authorizes nonreferendum borrowing in this context subject to both procedural and substantive limitations. The substantive limitations require that the bonds be sold to a state agency as prescribed by law and that the capital project undertaken be for school purposes. The Authority is designated by § 22.1-166 as a state agency for purposes of Article VII, § 10(b). It is also clear that the electronic classroom is an undertaking for school purposes. See § 22.1-212.2. The final substantive limitation imposed is that the bonds be issued for a "project" that is "capital" in nature.

The electronic classroom program is a statewide program established pursuant to a specific statutory directive. See § 22.1-212.2. The primary purpose of the program is to broaden the subject areas of instruction available to public schools. Id. The local implementation of the program involves equipping classrooms and subsequently integrating the resulting educational opportunities into the local curriculum. An integrated system of electronic and other equipment, including fixtures (satellite dishes, wiring, etc.) and items of personalty (microcomputers, etc.) is necessary to implement the program. Based on these factors, it is my opinion that the electronic classroom program is a specific and systematic undertaking that constitutes a "project" within the meaning of Article VII, § 10(b).

Article VII, § 10(b), however, requires that a project be "capital" in nature to qualify for nonreferendum debt financing. Indicia commonly used to identify capital assets or expenditures include (1) a tangible asset acquired to offset a current investment; (2) the life of the asset acquired being measured in terms of years rather than in months or days; (3) the asset being of continuing use or service beyond the current operating cycle; (4) the major expense associated with the asset being the acquisition expense; and (5) the asset being depreciable over a term of years. See, e.g., Wright v. City of Palmer, 468 P.2d 326 (Alaska 1970) (constitutional provision limiting local debts to "capital improvements"; court identifies factors governing whether improvement is capital in nature); Black's Law Dictionary 189-90 (5th ed. 1979) ("capital").

In this instance, the electronic classroom equipment will be acquired pursuant to a statewide program. The equipment financed will constitute a tangible asset offsetting the initial acquisition investment by a county; the useful life of the equipment is projected to range from five to 20 years; the equipment will be of continued use and service for school purposes over a term of years; the major expense associated with the equipment is the acquisition cost; the bonds sold to finance the acquisition cost will be retired during the equipment's useful life; the equipment involves an integrated system including both fixtures and items of personalty; and the equipment will be located in or attached to school buildings and subject to the exclusive control of school officials.

It is my opinion that these factors establish the electronic classroom equipment as capital in nature. Furthermore, bonds issued by the Commonwealth pursuant to Article X, § 9(c) have financed equipment purchases. See, e.g., 1988 Va. Acts, infra note 1. It is further my opinion, therefore, that the acquisition of the electronic classroom equipment constitutes a capital project for school purposes within the meaning of Article VII, § 10(b) and § 15.1-185. As a result, Article VII, § 10(b) and § 15.1-185 authorize a county to issue its general obligation bonds, without prior approval by a public referendum, for sale to the Authority to finance the acquisition of the electronic classroom equipment discussed above.
The term "capital projects" also appears in Art. X, § 9(b)-(c) governing debts that may be incurred by the Commonwealth. Bonds issued by the Commonwealth pursuant to Art. X, § 9(c) have financed equipment purchases. See, e.g., Ch. 423, 1988 Va. Acts 521, 522.

You suggest that the authority of counties to borrow pursuant to § 15.1-185 should be construed narrowly and that this narrow construction of § 15.1-185 may result in an interpretation that precludes nonreferendum borrowing for projects other than land and buildings. Virginia law, of course, follows a strict rule of construction concerning the powers granted to local governments by statute. See, e.g., County Board v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985). In this instance, however, § 15.1-185 implements the provisions of Art. VII, § 10(b) and uses the exact "capital projects for school purposes" language appearing in the Constitution. In interpreting the constitutional provisions limiting the debts that may be incurred by local governments, the Supreme Court of Virginia has applied the provisions according to the language used and in furtherance of the intent underlying the constitutional provisions. See, e.g., American-LaFrance v. Arlington County, 164 Va. 1, 178 S.E. 783 (1935). In appropriate contexts, the Court has found that debts incurred by local governments are not subject to the limitations imposed by constitutional provisions based on implied exceptions to these limitations. See, e.g., Fairfax County v. County Executive, 210 Va. 880, 173 S.E.2d 869 (1970) (service contract exception); Farquhar v. Board of Supervisors, 196 Va. 54, 82 S.E.2d 577 (1954) (special fund exception). In the circumstances you present, therefore, it is my opinion that the strict construction of the provisions of Art. VII, § 10(b) you suggest is not required.

Compare § 15.1-172(h)-(l), which defines "project" and "cost" for purposes of the Public Finance Act.

COUNTIES, CITIES AND TOWNS: PUBLIC FINANCE ACT - BOND ISSUES BY CITIES AND TOWNS.

Municipalities authorized to collect charges for water and sewer services provided by water and sewer facilities subject to agreement with holders of financing bonds; no statutory distinction between revenue-producing undertakings financed by general obligation bonds or other types of bonds.

November 7, 1989

The Honorable Linda M. Rollins
Member, House of Delegates

You ask whether § 15.1-175(k) of the Code of Virginia authorizes the collection of charges by the Town of Leesburg (the "Town") for water and sewer services provided by utilities constructed from the sale of general obligation bonds which were not issued pursuant to § 15.1-177 or § 15.1-180.

I. Applicable Statutes

Section 15.1-175(k), a provision of the Public Finance Act, Chapter 5 of Title 15.1, provides, in part, that any municipality is authorized

[t]o fix and collect rates, rents, fees and other charges for the services and facilities furnished by or for the use of or in connection with any revenue-producing undertaking, subject to and in accordance with such agreements with holders of bonds as may be made as hereinafter provided. To enable the municipality to enforce the collection of rates, rents, fees or charges for the use of or in connection with any such undertaking against the person or per-
sons, firm or corporation using the same, the rates, rents, fees or charges
when made for the use of any such undertaking shall be collectible by dis-
tress, levy, garnishment, attachment or as otherwise provided by law.

Section 15.1-172(b) defines the term "municipality" as "any city or town in the
Commonwealth of Virginia, whether incorporated by a special act or under a general
law." A "unit" is defined by § 15.1-172(c) as "any county or municipality." Section
15.1-172(e) defines "bonds" as "obligations of a unit for the payment of money." Section
15.1-172(f) defines "general obligation bonds" as "the bonds of a unit for the payment of
which the unit is required to levy ad valorem taxes, including any obligations which may
be additionally secured by a pledge of revenues, special assessments or funds derived
from any other source." The term "revenue-producing undertakings" is defined by
§ 15.1-172(h) as "specific undertakings from which the unit may derive a revenue . . .
such as water, sewer, sewage disposal, and garbage and refuse collection and disposal
systems as defined in § 15.1-1240 . . . ."

II. Town Is Authorized to Collect Charges for Water and Sewer Services

Virginia follows the Dillon Rule of strict construction concerning the authority of
local governing bodies. The Dillon Rule provides that municipal corporations have only
those powers expressly granted, those necessarily or fairly implied, and those that are
essential and indispensable. Commonwealth v. Arlington County Bd., 217 Va. 558, 574,
232 S.E.2d 30, 40 (1977); City of Richmond v. County Board, 199 Va. 679, 684, 101 S.E.2d

The Town is clearly a "municipality" as defined by § 15.1-172(b) and, therefore, is
authorized to exercise the powers specified in § 15.1-175. Section 15.1-175(k) provides
that a municipality may "collect rates, rents, fees and other charges for the services and
facilities furnished by or for the use of or in connection with any revenue-producing
undertaking." Section 15.1-172(h) provides that water and sewer facilities are revenue-
producing undertakings. The charges for water and sewer services, therefore, constitute
charges for services furnished by a revenue-producing undertaking.

Based on the above, it is my opinion that § 15.1-175(k) expressly authorizes the
Town to collect charges for water and sewer services provided by water and sewer facili-
ties, subject to any agreement with holders of the financing bonds. It is further my opinion
that § 15.1-175(k) does not distinguish between revenue-producing undertakings
financed by general obligation bonds or other types of bonds.
You ask whether the advertisement and public bid requirements imposed by §§ 15.1-307 through 15.1-310 of the Code of Virginia on the lease of real property owned by a city apply to a proposed lease of real property by the City of Danville (the "City") to the Department of Game and Inland Fisheries (the "Department").

I. Facts

The Department is considering a lease or other arrangement with the City concerning the Pinnacles hydroelectric project. Appurtenant to its hydroelectric facilities, the City owns several thousand acres of woodlands and a brown trout stream that the Department wishes to manage as a wildlife management area. For several reasons, both the City and the Department prefer a lease rather than some other arrangement.

II. Applicable Statutes and Constitutional Provision

Section 15.1-307 imposes certain requirements on the sale or lease of real property owned by a city or town. Real property that has been dedicated to public use may not be sold without the affirmative vote of three fourths of all the members elected to a municipal council. With respect to leases, no municipally owned real property of any description may be leased for a longer period than forty years. Before the granting of any lease for a term exceeding five years, a city or town is required to advertise and receive bids. Id. The city or town is required to accept the "highest and best bid" if any lease is to be granted. See § 15.1-310. Section 15.1-310 further provides, however, that the municipal council may, by a recorded vote of a majority of its members, reject a higher bid and accept a lower bid and award the lease to the lower bidder if, in the opinion of the council, some reason affecting the interest of the city or town makes it advisable to accept the lower bid, and that reason must itself be expressed in the ordinance granting the lease.

The advertisement and public bid requirements for the lease of municipally owned real property imposed by § 15.1-307 are based on the parallel provisions of Article VII, § 9 of the Constitution of Virginia (1971).

Section 15.1-947, a portion of Chapter 18 of Title 15.1, §§ 15.1-937 through 15.1-907, authorizes a municipal corporation to sell, lease, mortgage, pledge or dispose of its real property. The City has been granted those powers detailed in Chapter 18 pursuant to its charter. See Ch. 657, 1982 Va. Acts 1228 (Reg. Sess.).

III. Lease of Municipally Owned Property to State Agency Must Be in Accordance with §§ 15.1-307 through 15.1-310; Lower Bid May Be Accepted if Interests of City Furthered and Reason Stated in Lease Ordinance


If any municipal property is to be leased, however, the three-fourths majority vote requirement does not apply. Rather, the lease of any municipal property, whether or not dedicated to public use, for a term exceeding five years must be made pursuant to the notice and competitive bidding requirements of §§ 15.1-307 through 15.1-310. The primary purpose of these restrictions is to permit the periodic review of the use of public
property, thereby preventing the permanent dedication of publicly owned property to private use. In addition, the notice and public bid requirements prevent the hasty or clandestine disposition of municipally owned real property by a city or town council. See 2 A. Howard, Commentaries on the Constitution of Virginia 854-55 (1974). See also Town of Victoria v. Ice, Etc., Co., 134 Va. 124, 132, 114 S.E. 89, 91 (1922); 1986-1987 Att'y Gen. Ann. Rep. 135, 139 n.3. The restrictions imposed by § 15.1-307 on the power of a city or town to lease its property are strictly construed. See Town of Victoria, 134 Va. at 128-29, 114 S.E. at 90.

The question presented by your inquiry, therefore, is whether the restrictions imposed by §§ 15.1-307 through 15.1-310 on the City's power to lease its real property apply when the proposed lessee is a governmental agency that intends to devote the property to public use.

The language of § 15.1-307 does not restrict the statute's application based on the identity or nature of the lessee. The General Assembly, however, has granted broad powers to cities and towns to lease property to political subdivisions for such consideration and with such conditions as the municipal council may determine. See, e.g., §§ 15.1-1236 (conveyance or lease to park authority); 15.1-1269 (conveyance or lease to water and sewer authority); 15.1-1276 (conveyance or lease to public recreational facility authority); 15.1-1388 (transfer of real property by sale, lease or gift to industrial development authority); 15.1-1553 (conveyance or lease to hospital authority); 36-6 (dedication, sale, conveyance or lease to housing authority).

The statutes cited above authorize cities and towns to lease property to certain independent political subdivisions without regard to the competitive bidding requirements of §§ 15.1-307 and 15.1-310. These statutes indicate that the General Assembly generally has construed the requirements of Article VII, § 9 and §§ 15.1-307 and 15.1-310 as inapplicable when the municipally owned real property is leased to a governmental entity. The General Assembly, of course, may not construe away or change a constitutional provision, but its legislative interpretation of a constitutional provision is considered persuasive. See City of Richmond v. Hospital, 202 Va. 86, 94, 116 S.E.2d 79, 84 (1960).

[A] transfer of municipal property to another public agency is not required to be made in strict compliance with statutes designed to regulate transfers generally of municipal property, or, as the rule is sometimes phrased, the statutes are not applicable to transfers among agencies representing the common interest, i.e., the public.


In this instance, however, no statute expressly authorizes a city or town to lease its real property to a state agency without complying with the requirements of §§ 15.1-307 through 15.1-310. In the absence of such an express exception, it is my opinion that a city or town council is required to comply with the requirements of §§ 15.1-307 through 15.1-310 with respect to the term of the lease, the advertisement of the proposed lease, and the public acceptance of bids. A city or town council is authorized by § 15.1-310, however, to award the lease to a state agency even if the state agency is not the high bidder, provided the reason for doing so is set forth in the lease ordinance. It is my opinion, therefore, that the City must comply with the limitation on the lease term imposed by § 15.1-307 and the advertisement and public bid requirements imposed by §§ 15.1-307 through 15.1-310 in leasing its property to the Department.
IV. Dedication of Property as Natural Area Preserve Must Be in Accordance with § 15.1-307 if Property Has Been Dedicated to Public Use

You also ask whether the same restrictions would apply to the dedication of the same property as a natural area preserve to the Department of Conservation and Recreation pursuant to § 10.1-213(D).

Section 10.1-213(A) authorizes the Department of Conservation and Recreation to accept the dedication of natural areas that qualify as natural area preserves. Section 10.1-213(A) further provides that the owner of a qualified natural area may transfer fee simple title or other interest in land to the Commonwealth. Section 10.1-213(D) provides that "[p]ublic departments, commissions, boards, counties, municipalities, corporations, colleges, universities and all other agencies and instrumentalities of the Commonwealth and its political subdivisions are empowered to dedicate suitable areas within their jurisdiction as natural area preserves."

As discussed above, municipal property that has been dedicated to public use may not be sold without a three-fourths vote of all members elected to a municipal council. See § 15.1-307. A prior Opinion of this Office concludes that this requirement applies only to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions. See 1983-1984 Att'y Gen. Ann. Rep., supra. You do not state how the property appurtenant to the hydroelectric facilities currently is being used or whether the property is being devoted to any use at all. It is my opinion, however, that the dedication of real property to the Department of Conservation and Recreation pursuant to § 10.1-213(D) is tantamount to the sale of municipal property for the purpose of § 15.1-307. It is further my opinion, therefore, that if the real property in question has been devoted to use by the public at large or by the City itself in carrying out its governmental functions, the dedication of the property as a natural area preserve must be by ordinance and approved by the recorded affirmative vote of three fourths of all the members elected to the City's council, as required by § 15.1-307.


2 Similarly, § 2.1-504.3 authorizes the sale or lease of property owned by the Commonwealth to political subdivisions for such consideration as is deemed proper.

COUNTIES, CITIES AND TOWNS: URBAN COUNTY FORMS OF GOVERNMENT—COUNTY EXECUTIVE AND COUNTY MANAGER FORMS OF GOVERNMENT.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Proposed change in form of government in Fairfax County from urban county executive form to county manager form. Petition for referendum to adopt change must be signed by ten percent of qualified voters of county; change would not operate to withdraw authority previously granted to certain local governments on basis of proximity to county with urban county executive form of government.

July 27, 1989

The Honorable Gladys B. Keating
Member, House of Delegates
You ask several questions concerning a proposed change in the form of government in Fairfax County.

I. Facts

Fairfax County operates under the urban county executive form of government. A petition has been circulated in the County seeking a referendum on the adoption of the county manager form of government to replace the existing urban county executive form.

II. Applicable Constitutional Provision and Statutes

A. Constitutional Provision

Article VII, § 2 of the Constitution of Virginia (1971) provides, in part:

The General Assembly shall provide by general law for the organization, government, powers, change of boundaries, consolidation, and dissolution of counties, cities, towns, and regional governments. The General Assembly may also provide by general law optional plans of government for counties, cities, or towns to be effective if approved by a majority vote of the qualified voters voting on any such plan in any such county, city, or town. [Emphasis added.]

B. Chapter 15--Urban County Executive Form of Government

Chapter 15 of Title 15.1, §§ 15.1-722 through 15.1-791.15 of the Code of Virginia ("Chapter 15"), provides for the urban county executive form of government. Any county having a population of more than 90,000 may adopt the urban county executive form. See § 15.1-722. Chapter 15 was enacted by the 1960 Session of the General Assembly, and has been amended many times by the legislature since its enactment.

Section 15.1-757 authorizes a county that has adopted the urban county executive form thereafter to adopt another optional form of county government provided for by general law. Section 15.1-757 further provides that "[t]he procedure for initiating, conducting and determining the results of a referendum thereon, shall be the same, insofar as applicable, as that herein provided in Article 1 (§ 15.1-722 et seq.) of this chapter."

Section 15.1-723, the relevant portion of Article 1 of Chapter 15, provides for the adoption of the urban county executive form after approval by referendum. Such a referendum is initiated by a petition "signed by ten per centum of the qualified voters of such county or by at least 3,000 qualified voters of the county." Id.

C. Chapter 13--County Manager Form of Government

Articles 1, 3 and 4, Chapter 13 of Title 15.1, §§ 15.1-582 through 15.1-587 and §§ 15.1-622 through 15.1-668 ("Chapter 13"), provide for the county manager form of government. Section 15.1-582 authorizes any county, subject to certain exceptions not relevant here, to adopt the county manager form by complying with the requirements and procedures detailed in Article 1 of Chapter 13. Section 15.1-583 provides for the adoption of the county manager form after approval by voter referendum. Such a referendum is initiated by a petition "signed by ten per centum of the qualified voters of such county which in no event shall be less than 100 qualified voters of the county." Id.
III. Petition for Referendum to Adopt County Manager Form of Government Must Be Signed by Ten Percent of Qualified Voters of County

You first ask how many signatures are needed to initiate a referendum to change the form of government in Fairfax County and to adopt the county manager form of government.

Section 15.1-757 provides that the procedure for initiating, conducting and determining the results of a referendum for a change from the urban county executive form shall be the same, "insofar as applicable," as provided in Article 1 of Chapter 15. Section 15.1-723, a portion of Article 1 of Chapter 15, provides for the initiation of a referendum by a petition signed by ten percent of the voters or by at least 3,000 voters.

Sections 15.1-582 and 15.1-583 are in Article 1 of Chapter 13 and provide for the adoption of the county manager form. Section 15.1-582 requires compliance with the requirements of Article 1 of Chapter 13 to adopt the county manager form. Section 15.1-583 provides for the initiation of a referendum by a petition signed by ten percent of the voters, but not less than 100 voters.

The provisions of §§ 15.1-723 and 15.1-757 of Chapter 15, standing alone, are not clear with respect to whether the signatures of only 3,000 qualified voters on the petition to change the urban county executive form of government to some other form would be legally sufficient if that number were less than ten percent of the qualified voters in the county. In this instance, however, §§ 15.1-723 and 15.1-757 must be read together with the provisions of Article 1 of Chapter 13, which provides for the adoption of the county manager form.

Section 15.1-757, a provision dealing with changes from the urban county executive form of government, expressly contemplates the application of other statutes governing the procedures for initiating, conducting and determining the results of a referendum to adopt some other optional form of government. In addition, § 15.1-582, a provision dealing with the adoption of the county manager form of government, expressly requires compliance with the requirements specified in Chapter 13 for the adoption of the county manager form. Reading these statutes together, it is my opinion that the provisions of § 15.1-757 of Chapter 15 do not displace the otherwise applicable referendum initiative requirements of § 15.1-583 of Chapter 13 when a county that has adopted the urban county executive form seeks to change to the county manager form. Rather, it is my opinion that the initiation of a referendum to implement the adoption of the county manager form requires compliance with both §§ 15.1-757 of Chapter 15 and § 15.1-583 of Chapter 13, notwithstanding the potentially inconsistent provisions of § 15.1-723 of Chapter 15.

Based on the above, it is my opinion that the petition for the referendum to change a form of government from the urban county executive form to the county manager form must be signed by ten percent of the qualified voters in the county, not merely 3,000 qualified voters, where that number is less than ten percent of the qualified voters.

IV. Change in Form of Government in Fairfax County Would Not Affect Powers Granted to Certain Local Governments by Enabling Statutes Classifying Local Governments on Basis of Proximity to County with Urban County Executive Form

You next ask what effect, if any, a change in the form of government in Fairfax County would have on the operation of enabling statutes granting certain powers to a number of local governments based on their proximity to a county that has adopted the urban county executive form of government.
A number of statutes authorize certain local governments to exercise specific powers based on the proximity of those local governments to a county that has adopted the urban county executive form. See, e.g., §§ 15.1-11.01, 15.1-16.1, 15.1-491(a). These enabling statutes, in effect, classify local governments based on that proximity.

The authority granted to local governments based on their proximity to a county with the urban county executive form of government reflects the legislative intent at the time the enabling statutes were enacted that those local governments within the classification should have the powers granted. The General Assembly, of course, has the authority to withdraw powers previously granted to local governments. See 1987-1988 Att'y Gen. Ann. Rep. 183, 184. Such a withdrawal of authority previously granted, however, should be accomplished by clear legislative action rather than by implication or by a combination of circumstances. See 2 E. McQuillin, The Law of Municipal Corporations § 4.05, at 19 (3d ed. 1988) ("a power once granted as to local affairs will not be considered withdrawn unless the intention of the legislature to that effect is clear"). In the analogous area of population classifications, the General Assembly specifically has provided that changes in population will not affect powers previously granted by operation of a statute establishing a population classification. See § 1-13.35.

In the facts you present, actions taken by the citizens of Fairfax County with respect to changing their form of government could have the effect of withdrawing powers granted to other local governments. This withdrawal of powers would not result from any act of the General Assembly but rather from the unilateral acts of citizens of a single county. The literal application of the various enabling statutes involving a classification based on proximity to a county with the urban county executive form of government, however, could result in the withdrawal of powers previously granted by the General Assembly by extinguishing the basis of classification in the enabling statutes.

The primary object in the interpretation of a statute is to ascertain and give effect to the legislative intent underlying the statute. In the appropriate case, a construction of a statute that gives effect to legislative intent will be adopted even if the construction adopted may not be in conformity with the strict letter of the law. Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976) (proposed change in the form of government in Arlington County). "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms." Id.

The legislative intent underlying the enabling statutes which grant authority to local governments based on their proximity to a county that has adopted the urban county executive form was to grant certain powers to those governments within that classification. To permit a single county's change in form of government to extinguish the classification and, thereby, withdraw the authority expressly granted, in my opinion, would frustrate completely the primary purpose underlying the enactment of the enabling statutes. The withdrawal of those powers as a result of a change in the form of government by a single county would create uncertainty and confusion concerning the authority of the local governments involved, as currently exercised or exercised in the past. It is my opinion, therefore, that a change in the form of government in Fairfax County would not operate to withdraw authority previously granted to certain local governments on the basis of their proximity to a county that had adopted the urban county executive form of government.

2Even if §§ 15.1-723 and 15.1-757 provided the entire statutory means for a change in the form of government in a county that had adopted the urban county executive form, it is my opinion that § 15.1-723 would still require ten percent of the voters' signatures to
COUNTIES, CITIES AND TOWNS: VIRGINIA COALFIELD ECONOMIC DEVELOPMENT AUTHORITY.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - DEBT.

TAXATION: LICENSE TAXES.

Program for funding of eligible projects by Virginia Coalfield Economic Development Authority with agreement of participating locality to dedication of future contributions to Authority to eliminate deficit in locality's Fund account authorized.

November 7, 1989

The Honorable Ford C. Quillen
Member, House of Delegates

You ask several questions concerning the power of the Virginia Coalfield Economic Development Authority (the "Authority") to expend funds for eligible projects when such expenditures exceed the available contributions of the locality which is the site of the project.

I. Facts and Applicable Statutes

The Authority was created and operates pursuant Chapter 40 of Title 15.1, §§ 15.1-1635 through 15.1-1650 of the Code of Virginia ("Chapter 40"). Section 15.1-1637 specifies the eight localities (seven counties and one city) participating in the Authority. The Authority maintains the Virginia Coalfield Economic Development Fund (the "Fund"). See § 15.1-1644. The Fund is capitalized by mandated contributions to the Authority by the specified local governments of twenty-five percent of the revenues collected during the next to last calendar month from the coal and gas road improvement tax pursuant to § 58.1-3713.

Section 15.1-1645 provides:
The treasurer may invest and reinvest funds of the Authority pending their need. All moneys received by the Authority pursuant to § 15.1-1644, together with any matching funds received from state or federal sources, shall be applied and used only in the county or city from which the funds were received, unless the governing body of the county or city consents to their use in another county or city.

Section 15.1-1646 authorizes the Authority to make loans and grants for the benefit of qualified private, for-profit enterprises, nonprofit industrial development corporations, or industrial development authorities. Section 15.1-1646 also specifies the eligible uses and projects for which such loans and grants may be made.

The coal and gas tax revenues of the seven participating localities vary widely. The mandated contributions to the Authority by these localities and, as a result, the "account" of each locality within the Fund also varies. In an effort to maximize the immediate effectiveness of the Authority's activities, the Authority and the participating localities are considering a program by which a locality with a limited account may "borrow" funds from the account of another locality with a larger account because of greater coal and gas road tax revenues and correspondingly greater mandated contributions to the Fund.

Pursuant to this program, one locality would consent pursuant to § 15.1-1645 to the use of a portion of its account with the Fund for an Authority project in another locality. The Authority would agree to dedicate the future mandated contributions of the second locality to the "creditor" locality's Fund account to pay back the creditor locality's account. The "debtor" locality would agree to the dedication of its future contributions to the creditor locality's account until the deficit was eliminated. The debtor county would not be obligated to expend any funds beyond its mandated contributions to the Fund.

You state that the proposed program may be the only practical method by which eligible projects may be funded adequately in those localities with relatively small coal and gas road tax revenues. The anticipated term of the dedication of the debtor locality's contributions to eliminate its deficit is five to ten years.

Pursuant to the provisions of Chapter 40, the Authority has the sole power to make expenditures from the Fund and to determine which eligible projects to support.

II. Proposed Program Would Not Establish Debt Within Provisions of Art. VII, § 10 of Virginia Constitution

You first ask whether the proposed program would establish a debt of the "debtor" county subject to the limitations imposed by Article VII, § 10(b) of the Constitution of Virginia (1971).

The ability of a local government to contract debt and otherwise incur financial obligations is limited by Article VII, § 10. Subject to a number of exceptions, Article VII, § 10(a) limits the total debt which may be incurred by a city or town to an amount not exceeding ten percent of the assessed value of the taxable real estate in the city or town. Article VII, § 10(b), again subject to certain exceptions, prohibits counties from contracting debt payable from revenues not collectible in the current year. See 1985-1986 Att'y Gen. Ann. Rep. 86. As discussed above, the contributions of the eight participating localities to the Fund are mandated by §§ 15.1-1644 and 58.1-3713. A prior Opinion of this Office concludes that the mandated contributions by counties to the Fund do not result in a debt within the provisions of Article VII, § 10. See 1987-1988 Att'y Gen. Ann. Rep. 110. In this instance, the proposed program does not involve any obligation of
the debtor locality to appropriate any funds beyond the contributions to the Fund mandated by statute. It is my opinion, therefore, that the proposed program, involving the agreement of a debtor locality to the dedication of its future contributions to the Fund to eliminate a deficit in its Fund account, does not establish a debt subject to the limitations of Article VII, § 10.

III. Proposed Program and Necessary Agreement Are Within Powers of Authority and Participating Localities

Your second question is whether the proposed program, and the necessary agreement, are within the powers of the Authority and the participating localities.

Section 15.1-1645 provides that all moneys received by the Authority shall be "applied and used only in the county or city from which the funds were received, unless the governing body of the county or city consents to their use in another county or city." This provision reserves to the governing body of each participating locality the power to consent to the application or use of funds contributed by it in another county or city. The manifest purpose of this consent requirement is to ensure that each participating locality receives, at least indirectly, the benefit of its mandated contributions to the Fund. On the other hand, Chapter 40 reserves to the Authority the power to make expenditures from the Fund and to determine which eligible projects shall receive such support. See § 15.1-1646.

Chapter 40 is remedial in nature and is intended to address long-standing and intractable problems related to economic development and the absence of a diverse economic base in the coalfield region of Virginia. See §§ 15.1-1636, 15.1-1637. As a remedial statute, Chapter 40 should be liberally construed to accomplish this underlying legislative intent. Att'y Gen. Ann. Rep.: 1987-1988 at 147, 150; 1982-1983 at 151, 152; 1981-1982 at 48, 49. If the proposed program is implemented, the Authority will have a far greater degree of flexibility in its ability to support projects in localities with smaller accounts with the Fund, provided the participating localities determine to cooperate with respect to any given project. To that extent, therefore, the public policies underlying Chapter 40, and expressed in §§ 15.1-1636 and 15.1-1637, would be promoted by the implementation of the program you describe.

On the other hand, § 15.1-1645 expressly reserves to each locality the power to consent to the use of funds received from that locality in another county or city. This reservation of power ensures that each participating locality receives at least an indirect benefit from its contributions to the Fund. As a general principle, a local governing body does not have the power to bind its successors by agreement, in the absence of statutory authority, when such an agreement would impair the governmental powers of the successor governing bodies. See Att'y Gen. Ann. Rep.: 1987-1988 at 184, 186-87 (agreement to request budget appropriations administratively in future years authorized; obligation would not deprive local governing body of any legislative or executive authority in the future); 1985-1986 at 70, 73 (lease obligation conditioned on annual appropriation by governing body authorized); 1982-1983, supra, at 154 n.9 (statute authorized binding agreement on annexation moratorium); 1981-1982, supra (statute authorized binding agreement on revenue sharing). See also 3 C. Sands & M. Libonati, Local Government Law § 22.05 (1982); 10 E. McQuillin, The Law of Municipal Corporations § 29.101 (3d ed. 1981 & Cum. Supp. 1988); C. Rhyne, The Law of Local Government Operations § 5.2 (1980).

In this instance, the "debtor" locality would consent to the dedication of its future contributions to the Fund to eliminate a deficit in its Fund account resulting from an Authority project in the debtor county. This agreement would prevent future governing bodies in the debtor locality from exercising their consent power concerning future contributions to the Fund. The Authority, however, has the power to determine which proj-
ects shall be supported. The expenditure of Authority funds in the debtor locality in a single year in an amount exceeding that locality's account in the Fund, in effect, creates a deficit in that account. The dedication of the debtor locality's future contributions to eliminate that deficit, in my opinion, does not constitute application or use of those contributions in another county or city. In fact, the deficit amount already has been expended in the debtor locality presumably to the benefit of the residents of that locality. The debtor locality, therefore, is the immediate beneficiary of the financial flexibility available to the Authority with the cooperation and consent of the participating localities. Weighing the competing principles involved and considering the language of § 15.1-1645 and the public policies expressed in §§ 15.1-1636 and 15.1-1637, it is my opinion that the proposed program, and the necessary agreements, are within the powers of the Authority and the participating localities.

COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND SEWER AUTHORITIES ACT.

TAXATION: REAL PROPERTY TAX - EXEMPTIONS FOR ELDERLY AND HANDICAPPED.

No statutory authorization exists for Greene County Board of Supervisors or Rapidan Service Authority, in cases of financial hardship, to waive mandatory water and sewer connection fees.

August 9, 1989

Mr. Raymond L. Clarke
County Attorney for Greene County

You ask whether, in cases of financial hardship, the Greene County Board of Supervisors or the Rapidan Service Authority may waive the mandatory water and sewer connection fees required by § 15.1-1261 of the Code of Virginia.

I. Applicable Statutes

The Virginia Water and Sewer Authorities Act, §§ 15.1-1239 through 15.1-1270 (the "Act"), concerns the public provision of water and sewer services in the Commonwealth. Section 15.1-1241 provides that the governing body of one or more political subdivisions may create a water authority, a sewer authority, a sewage disposal authority, or a garbage and refuse collection and disposal authority, or any combination of these authorities. Section 15.1-1250 details the powers of such authorities and provides, in part:

Each authority created hereunder shall be deemed to be an instrumentality exercising public and essential governmental functions to provide for the public health and welfare, and each such authority is hereby authorized and empowered:

* * *

(i) To fix, charge and collect rates, fees and charges for the use of or for the services furnished by any system operated by the authority. Such rates, fees, rents and charges shall be charged to and collected from any person contracting for the same; or lessee or tenant, or some or all of them, who uses or occupies any real estate which is served by any such system ....

Section 15.1-1261 concerns water and sewer connections and provides, in part:
Upon the acquisition or construction of any water system or sewer system...
the owner...
shall, if so required by the rules and regulations or a resolution of the authority, with concurrence of such local government, municipality, or county that may be involved, connect such building with such water main or sanitary sewer, and shall cease to use any other source of water supply for domestic use or any other method for the disposal of sewage, sewage waste or other polluting matter. All such connections shall be made in accordance with rules and regulations which shall be adopted from time to time by the authority, which rules and regulations may provide for a charge for making any such connection.

* * *

Persons who have obtained exemption from or deferral of taxation pursuant [to an] ordinance authorized by § 58.1-3210 may be exempted or deferred by the authority from paying any charges and fees authorized by the preceding paragraph, to the same extent as the exemption from or deferral of taxation pursuant to such ordinance.

Section 58.1-3210 authorizes local governing bodies to provide for the exemption or deferral of certain taxation for persons sixty-five years of age, or older, or for persons who are permanently and totally disabled, as defined in § 58.1-3217.

II. Neither Board of Supervisors nor Authority May Waive Mandatory
Water and Sewer Connection Fees for Cases of Financial Hardship


Section 15.1-1250(b) authorizes an authority to adopt rules and regulations that are not inconsistent with the Act or the general laws of the Commonwealth to regulate its affairs and conduct its business. Section 15.1-1250(i) grants an authority the power to fix, charge and collect rates, fees and charges for use of its services, and expressly provides that "[s]uch rates, fees, rents and charges shall be charged to and collected from any person contracting for the same; or lessee or tenant, or some or all of them, who uses or occupies any real estate which is served by any such system." (Emphasis added.)

As discussed above, § 15.1-1261 does provide a possible exemption from this required charge for persons who are sixty-five years of age or older, or anyone who is permanently and totally disabled as defined in § 58.1-3217, who have obtained an exemption or deferral of taxes on real estate or a mobile home as authorized by § 58.1-3210. No other exemptions are contained in § 15.1-1261.

The language of § 15.1-1250(i) clearly requires an authority to charge and collect fees for all real estate which is served by the authority's system. This statute empowers an authority to charge and collect the fees from either the person contracting for the service, or the lessee or tenant of the property, or any combination of these persons. Section 15.1-1261 permits an authority to exempt persons who are at least sixty-five years old or who are permanently disabled, and who have obtained an exemption or deferral of taxation pursuant to an ordinance authorized by § 58.1-3210, to the same extent as the exemption or deferral allowed by the ordinance. It is an accepted principle of statutory construction that the mention of one thing in a statute implies the exclusion of

Based on the above, it is my opinion that no statutory authorization exists for the Greene County Board of Supervisors or the Rapidan Service Authority, in cases of financial hardship, to waive the mandatory water and sewer connection fees required by § 15.1-1261.1

1This conclusion assumes, of course, that the citizen does not qualify for either of the other exemptions in § 15.1-1261.

COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND SEWER AUTHORITIES ACT — PLANNING, SUBDIVISION OF LAND AND ZONING.

Water and sewer authority may adopt regulations limiting reservation of sewage treatment capacity; may not deny service if treatment capacity available, unless denial supported by utility related reason.

December 22, 1989

Mr. Paul S. McCulla
County Attorney for Fauquier County

You ask several questions concerning the power of the Fauquier County Board of Supervisors (the "County" and the "Board") to impose conditions upon a proposed sewage treatment plant to be constructed by the County Water and Sanitation Authority (the "Authority").

I. Facts

The Authority operates pursuant to the Virginia Water and Sewer Authorities Act, §§ 15.1-1239 through 15.1-1270 of the Code of Virginia. The Authority was created by action of the Board in 1964. Among other projects, the Authority operates two sewage treatment plants within the County. These plants currently are operating at full capacity and are in need of expansion. The County's zoning ordinance permits, by special exception, sewage treatment, disposal and water purification plants in all zoning districts. The Authority has applied for a special exception to locate a sewage treatment plant on approximately 23.9 acres in the Remington Service District located in the County.

The Authority previously has financed sewer treatment plant expansions and development by the sale of sewer taps from the treatment plant yet to be built, which are reserved for use by the purchaser at the time the plant actually is built. The proceeds of the tap sales then are used to finance the construction of the plant. This method of financing has resulted in (1) long periods of time when no sewer taps are available, (2) the hoarding of sewer taps by large residential developers, resulting in the unavailability of taps for other residential, commercial or industrial developers, and (3) intense periods of growth when the plant begins operation. These intensive growth periods burden the County's ability to provide the infrastructure necessary to support the population growth in a manner consistent with its comprehensive plan and the available financial resources of the County.
The County's comprehensive plan designates specific areas of the County as growth areas based on a village and settlement area concept. The comprehensive plan provides for projected population growth of between two and three percent each year. The plan also provides for the expansion of existing sewage treatment capacity in the Remington Service District within the current planning period. The County's capital improvement program currently is under review but does not provide for capital improvements for sewage treatment because such improvements are considered an "off-budget" item, funded through the Authority.

The Board seeks to impose the following conditions on any special exception granted to the Authority: (1) sewer taps must be allocated or phased in in compliance with the comprehensive plan and its population projections for the ten-year planning period; and (2) a specific percentage of taps must be reserved for small developers, individual landowners, low-income housing, and general commercial and industrial uses. These proposed conditions are intended to (1) alleviate the burdens on the County resulting from the expected intense population growth period when the plant is completed; (2) maintain the steady rate of growth contemplated and planned within the comprehensive plan; and (3) ensure the availability of sewer taps for low- and moderate-income housing, and commercial and industrial development as contemplated in the comprehensive plan.

The apparent effect of the proposed conditions is to limit the number of sewer connections that the Authority may accept in any given year after completion of the plant. In addition, the location of those taps will be limited to areas where residential housing is permitted as of right, or has been approved up to a specific level of density through the special exception process. The second proposed condition would limit the number of future connections that could be reserved by purchase by requiring the reservation of taps for designated types of uses.

The Authority is concerned that the imposition of the proposed conditions will make the construction of the plant financially impractical because sufficient revenue could not be maintained to finance construction and to satisfy the costs of debt service and operations. This potential problem is particularly acute if the number of connections that may be accepted in a given year is severely restricted. In addition, the Authority is concerned that the proposed conditions will interfere unreasonably with its operations and are inconsistent with the Authority's operational independence from the County. Finally, the conditions are perceived as a growth control mechanism that should properly be exercised through the direct exercise of the County's authority to regulate the subdivision and use of land with respect to proposed residential developments.

The County is concerned that, without the proposed conditions, a growth spurt will result in the County based upon the availability of sewer service to the reserved taps, creating an immediate need for infrastructure improvements to provide other services to new residents. In addition, the conditions would minimize the hoarding of a large percentage of the available sewage treatment capacity by a few property owners. The condition requiring the reservation of taps would ensure the availability of taps for low-income housing and economic development activities in the County.

II. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498. Among the purposes underlying zoning ordinances are the promotion of the rational development of land, the availability of adequate public utilities, the economic development of communities, and the protection against overcrowding of land and undue density of population in relation to community facilities. See §§ 15.1-427, 15.1-489, 15.1-490. Section 15.1-491(c) authorizes reasonable provisions for
the granting of special exceptions to zoning regulations under suitable regulations and safeguards.

Section 15.1-446.1 provides for the development of a comprehensive plan, which may include the designation of areas for public and private development and use and the designation of a system of community service facilities. Section 15.1-447(2)(b) provides that the comprehensive plan may include, as part of its implementation provisions, a capital improvements program. Section 15.1-456(a) provides that a comprehensive plan shall control the general development of land within a locality. Section 15.1-456(a) further provides that no public utility facility shall be established unless the general location and character of the facility is shown on the comprehensive plan or has been approved as substantially in accord with the plan.

III. Authority Subject to Provisions of County Zoning Ordinance

You first ask whether the Authority is subject to the provisions of the County's zoning ordinance.

The Authority is an independent political subdivision created to further a specific governmental purpose. See § 15.1-1250; 1987-1988 Att'y Gen. Ann. Rep. 233, 234. The Authority, therefore, is a legal and political entity distinct from the County and the Board. In City of Richmond v. County Board, 199 Va. 679, 101 S.E.2d 641 (1958), the Supreme Court of Virginia held that a city must comply with a county's zoning ordinance when establishing a public facility in the county. In Bd. of Supervisors v. City of Roanoke, 220 Va. 195, 257 S.E.2d 781 (1979), the Court held that a city was subject to the approval requirements of § 15.1-456 in establishing a community facility in a county.

Prior Opinions of this Office conclude that, absent a statutory exception, zoning and planning regulations apply to facilities of governmental bodies of equal or lesser authority than the local government seeking to apply them, such as other political subdivisions and subordinate agencies of counties, cities and towns. See Att'y Gen. Ann. Rep.: 1984-1985 at 91 (city must comply with county zoning ordinance in establishing sanitary landfill in county); 1982-1983 at 458 (school board must comply with county zoning ordinance to construct school building). See also City of Richmond v. Southern Railway, 203 Va. 220, 223-25, 123 S.E.2d 641, 643-45 (1962) (city retains authority to regulate use of property by a privately owned public service corporation, notwithstanding regulatory powers vested in State Corporation Commission).

While it is an independent political subdivision, the Authority also is a special purpose unit of government subordinate to the local governing body. A review of the Commonwealth's zoning enabling statutes and the Virginia Water and Sewer Authorities Act reveals that there is no statute that excepts an authority from the application of a local zoning ordinance. It is my opinion, therefore, consistent with the prior Opinions cited above, that the Authority is subject to the provisions of the County's zoning ordinance.

I note, however, that the application of local zoning regulations, particularly special exception requirements, to public utilities presents special problems in balancing the public interests in regulating the use of land and public interests in ensuring an adequate and effective utility system. In many instances, courts in other states have held that a local governing body has less discretion in considering a special exception application of a public utility provider than it has in considering such applications for uses that do not involve the provision of a necessary public service. See 2 R. Anderson, American Law of Zoning § 12.32 (1986 & Cum. Supp. 1988); 4 A. Rathkopf, The Law of Zoning and Planning §§ 55.01, 55.03 (1989 & Cum. Supp.).
IV. County May Require that Authority Permit Reservation of Taps Only in Areas Suitable for Development; County May Not Limit Number of Connections Authority May Accept Each Year

You next ask whether the County may require, as a condition of the special exception for the siting of the sewage treatment plant, that the Authority phase in or allocate sewer taps from the plant in accordance with the comprehensive plan and its population projections for the ten-year planning period.

A. Virginia Supreme Court Has Established General Standards Governing Grant or Denial of Special Exceptions

The Supreme Court of Virginia has described the special exception process:

The terms 'special exception' and 'special use permit' are interchangeable. Both terms refer to the delegated power of the state to set aside certain categories of uses which are to be permitted only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public. The legislature may require certain uses, which it considers to have a potentially greater impact upon neighboring properties or the public than those uses permitted in the district as a matter of right, to undergo the special exception process. Each site is to be examined by public officials, guided by standards set forth in the ordinance, for the impact the use will have if carried out on that site.


The grant or denial of a special use permit is a legislative act. Id. at 522, 297 S.E.2d at 722. The decision to grant or deny these permits must be made in accordance with sound zoning principles. Cole v. City Council, 218 Va. 827, 837-38, 241 S.E.2d 765, 771-72 (1978). Any conditions imposed upon the use authorized must be reasonable and within the power of the local government to impose. Cupp v. Board of Supervisors, 227 Va. 580, 318 S.E.2d 407 (1984).

In providing for and granting special exceptions, a local government may consider, among other factors, the character of the property, the existing land use plan, the general welfare of the public, and the economic development of the community. See Bell v. City Council, 224 Va. 490, 495, 297 S.E.2d 810, 813 (1982) (grant of special exception for condominium project in historic district upheld). See also National Memorial Park v. Board of Zoning, 232 Va. 89, 348 S.E.2d 248 (1986) (denial of special exception to operate crematory based on negative impact of use on neighboring properties and inconsistency with comprehensive plan upheld). As with other legislative decisions, the grant or denial of a special exception involves the balancing of the consequences of private conduct against the interests of public health, safety, and welfare. See Southland Corp., 224 Va. at 522, 297 S.E.2d at 722.

B. Proposed Conditions Directed at Foreseeable Impact of Availability of Sewer Service on County Growth Patterns and Impact on Land Use Decisions

The proposed conditions for the Authority's sewage treatment plant will limit the timing by which the Authority may accept sewer connections and the locations where connections may be reserved. There is little judicial authority in Virginia concerning the types of conditions that may be imposed on a specific use of property. Any conditions imposed on the development and use of land, however, must be substantially related to
problems associated with the use of the subject property. See Cupp, 227 Va. at 594-95, 318 S.E.2d at 414. Also, the application of conditions as part of the special exception process generally has been limited to problems associated with a particular use at a specific site rather than the impact of a use on the development and growth patterns in the locality. See 3 R. Anderson, supra §§ 21.31, 21.32.

Public utility facilities, such as the proposed sewage treatment plant, commonly are subject to the special exception process under local zoning ordinances. See 2 R. Anderson, supra §§ 12.32, 12.34, 12.36. The conditions proposed in this instance are not directed at the physical characteristics of the sewage plant site, but rather at the foreseeable impact of the plant's construction on development patterns in the County. As such, the conditions address matters that are traditionally regulated by land use controls, including the designation of growth areas and control of the rate of growth. The grant or denial of the special exception sought by the Authority, as well as any conditions imposed, will have a profound impact upon land use throughout the plant's service area. To some extent, therefore, the proposed conditions are consistent with the power granted to the County by the zoning enabling statutes and the purposes underlying local land use regulations. See §§ 15.1-486, 15.1-489, 15.1-490, 15.1-491(c).

On the other hand, the County has a general obligation to plan for the County's growth and the provision of adequate public utility systems. See §§ 15.1-446.1, 15.1-447, 15.1-456, 15.1-489, 15.1-490. The Authority was created to assist in providing necessary public utility services to County residents. The County currently is experiencing population growth pressure, and there is no available sewage treatment capacity to satisfy current or foreseeable demand.

The exercise of the zoning power as a means to regulate the rate and location of population growth clearly is affected by the provisions of the comprehensive plan and the existing or foreseeable availability of public utility services. See, e.g., Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975) (denial of rezoning for higher density residential use held unreasonable and discriminatory based on availability of adequate public facilities in foreseeable future and prior zoning decisions approving nearby properties for similar use densities); Bd. of Supervisors of Fairfax Co. v. Allman, 215 Va. 434, 211 S.E.2d 48, cert. denied, 423 U.S. 940 (1975) (denial of rezoning for higher density residential use held unreasonable and discriminatory based on provisions of plan calling for same density sought by developer, availability of public facilities during course of development and prior zoning decisions approving nearby properties for similar use densities). See also Loudoun Co. v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980) (denial of rezoning upheld based on supporting provisions of comprehensive plan). The expansion of existing sewage treatment facilities and the location of available sewer connections, therefore, will directly affect the County's ability to regulate the rate of population growth and where that growth occurs.

C. "Holding Out" Doctrine of Public Utilities Law Establishes Authority's Obligation to Provide Service in Areas Where Available

The validity of the proposed conditions also must be considered with reference to the Authority's obligation to provide sewage treatment service to property owners within its service area if existing capacity is available. See 11 E. McQuillin, The Law of Municipal Corporations § 31.30 (3d ed. 1983 & Cum. Supp. 1988); 64 Am. Jur. 2d Public Utilities §§ 16, 38 (1972 & Cum. Supp. 1989). Applying this "holding out" doctrine of public utilities law, courts in other states have invalidated the denial of utility service or connections as a growth management technique through the exercise of the police power unless the service denial is supported by a supplemental "utility related" reason. See 1 A. Rathkopf, supra §§ 13.07[2]-[4], 13.08 (1989); J. Gailey, 1986 Zoning and Planning Law Handbook, § 9.04 (1986) (collecting cases). Compare Dateline Builders, Inc. v. City
of Santa Rosa, 146 Cal. App. 3d 520, 529-31, 194 Cal. Rptr. 258, 264-66 (1983) (denial of sewer connection for property near existing sewer lines based on provisions of municipal development policy restricting urban sprawl or "leap frog" development upheld). Limiting the number of connections the Authority may accept in one year, therefore, could result in a developer with proper zoning and a previously reserved sewage treatment capacity not being permitted to commence development based solely on the condition imposed on the expansion of the plant.

D. Limits on Areas Where Sewer Capacity May Be Reserved Permissible; Limits on Annual Connections Not Authorized

The factors reviewed above demonstrate the complexity of the issue you present. It is clear that there is an existing unmet demand for additional treatment capacity in the County. The County's comprehensive plan provides for the expansion of existing sewage treatment facilities. The construction of the proposed plant and the locations in which sewage treatment service is available, however, will have a profound impact on where and when growth occurs and on the range of discretion available to the Board in making land use decisions. The proposed conditions relate directly to the foreseeable impact of the plant's construction on growth patterns in the County and are consistent with the comprehensive plan provisions concerning the rate and location of growth. Considering these factors, it is my opinion that the Board properly may require that the Authority limit the reservation of sewer capacity to those areas where residential use is permitted as of right or has been approved through the special exception process and for industrial and commercial uses based on the realistic use of the property. This condition avoids the reservation of the limited available capacity to serve areas that are not planned or suitable for development.

It is further my opinion, however, that the Board may not limit the number of connections that the Authority may accept each year to a number consistent with the projected population growth under the comprehensive plan. This condition would present many practical problems in its implementation. More importantly, however, the condition would be inconsistent with the Authority's obligation to provide service to qualified property owners if capacity is available. Finally, the condition would impermissibly infringe upon the Authority's operational independence and financial needs. In my opinion, the growth regulation goal underlying this condition is more properly addressed through the effective exercise of zoning and subdivision controls than through limitation being placed on the availability of utility service even when capacity is available.

V. Conditions Intended to Ensure Availability of Sewer Connections for Specific Classes of Individuals Not Authorized by Zoning Enabling Statutes

Your third question is whether the County may require, as a condition of a special exception for the siting of a sewage treatment plant by the Authority, that the Authority reserve a certain number of sewer taps for small developers, individual landowners, low-income housing, and general commercial and industrial uses. The purpose of this proposed condition is to ensure the availability of sewer taps and treatment capacity to certain types of uses, notwithstanding the reservation of most of the proposed plant's treatment capacity as a preconstruction financing mechanism. The effect of the condition, however, is to create certain favored classes as an exercise of the zoning power with respect to access to sewer taps.

In Fairfax County v. DeGroff, 214 Va. 235, 198 S.E.2d 600 (1973), the Supreme Court of Virginia invalidated a county zoning ordinance that required large developers to set aside a portion of residential developments for low- and moderate-income housing. The Court reasoned that the zoning enabling statutes authorized localities to enact only traditional zoning ordinances directed at the physical characteristics of the use of land
and having the purpose neither to include nor exclude any particular socioeconomic group. Id. at 238, 198 S.E.2d at 602. See also Att'y Gen. Ann. Rep.: 1985-1986 at 345, 346; 1981-1982 at 461(2); 1975-1976 at 437 (Opinions discussing socioeconomic zoning issues). Compare § 15.1-491.8 (statute authorizing "affordable dwelling unit ordinances" in certain counties).

Promoting the availability of low- and moderate-income housing is a legitimate police power interest of a local government. See DeGroff, 214 Va. at 236-37, 198 S.E.2d at 601. The promotion of economic development activities is an authorized factor in zoning decisions. See §§ 15.1-489(7), 15.1-490. The condition proposed in this instance, however, is not directed primarily at the physical characteristics of land use but, rather, is intended to promote the availability of sewage service to specific classes of individuals. It is my opinion, therefore, that the proposed condition requiring the reservation of sewer connections for specific types of landowners or classes of individuals is not authorized by § 15.1-491(c).

VI. Authority May Adopt Rules Limiting Areas Where Connections May Be Reserved; Authority May Not Deny Service if Treatment Capacity Is Available Unless Denial is Supported by Utility Related Reason

Your final question is whether the Authority has the power to adopt rules and regulations requiring the phasing in or allocation of taps from the plant in accord with the comprehensive plan and the reservation of taps for small developers, individual landowners, low-income housing, and general commercial and industrial uses.

Section 15.1-1250(b) authorizes a water and sewer authority to adopt rules and regulations for the regulation of its affairs and the conduct of its business and to implement its powers and purposes. Section 15.1-1261 provides additional authority for regulations governing sewer connections. These statutes vest broad discretion in a water and sewer authority to adopt rules and regulations governing its operations.

Generally, the decision where or when publicly owned utility services will be made available is left to the discretion of the appropriate legislative or administrative body. See Front Royal & Warren Cty. Ind. Park v. Front Royal, 708 F. Supp. 1477, 1484-87 (W.D. Va. 1989) (decisions concerning public utility service will be upheld under equal protection analysis if rationally related to legitimate governmental interests); Westbrook v. Town of Falls Church, 185 Va. 577, 583, 39 S.E.2d 277, 280 (1946) (whether and when town shall make municipal improvements left to discretion of town's council); 11 E. McQuillin, supra § 31.17. As noted above, however, a utility provider that holds itself out as a service provider in a given area has a general obligation under the "holding out" doctrine to provide service within available capacity to those persons who desire such service.

Considering these factors and the other matters discussed above, it is my opinion that the Authority may adopt regulations limiting the reservation of sewage treatment capacity to those areas where residential uses are permitted as of right or have been approved through the special exception process and for industrial and commercial uses based on the realistic use of the property. It is further my opinion, however, that the Authority may not limit the number of connections that may be accepted annually, absent a utility related reason for such a limitation. Finally, it is my opinion that the Authority may not set aside treatment capacity for preferred classes of users unless such a preference is supported by a utility related reason.
COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Adult defendant who commits offense prior to reaching age 18 treated as child for purpose of deciding whether juvenile court proceedings to be open or closed to public.

March 1, 1989

The Honorable Patrick D. Molinari
Judge, Thirty-First District Juvenile and Domestic Relations District Court

You ask whether a person who allegedly commits an offense while a juvenile and subsequently attains the age of eighteen prior to trial should be treated as a juvenile or as an adult for purposes of deciding whether the juvenile court proceedings should be open or closed to the public.

I. Applicable Statutes

Section 16.1-241 of the Code of Virginia grants to the juvenile and domestic relations district court (the "juvenile court") exclusive original jurisdiction over matters involving children who, among other things, are alleged to be delinquent. The last sentence of this statute provides that "[t]he ages specified in [the Juvenile and Domestic Relations District Court Law] refer to the age of the child at the time of the acts complained of in the petition."

Section 16.1-228 defines a "child" as a person under the age of eighteen and also defines a "delinquent child" as "a child who has committed a delinquent act or an adult who has committed a delinquent act prior to his or her eighteenth birthday."

Section 16.1-242 provides that, when the juvenile court has acquired jurisdiction over a child's case, this jurisdiction may be retained by the court until that person becomes twenty-one years of age.

Section 16.1-302 provides, in part, that "[t]he general public shall be excluded from all juvenile court hearings and only such persons admitted as the judge shall deem proper."

II. Defendant in Facts Presented Is Juvenile for Purposes of Deciding Whether Proceeding Is Open or Closed to Public

In the facts you present, the juvenile court has obtained jurisdiction over the adult defendant because the defendant is alleged to have committed an offense prior to his eighteenth birthday. See § 16.1-241. A prior Opinion of this Office concludes that "[i]t was the intent of the General Assembly . . . to confer on adults who committed offenses prior to reaching the age of eighteen years the benefits provided by the juvenile system." See 1986-1987 Att'y Gen. Ann. Rep. 155, 157. Section 16.1-269 authorizes the juvenile court to transfer jurisdiction over such an adult, as well as children fifteen years of age or older, to a circuit court when certain crimes are involved. In the absence of such a transfer of jurisdiction, however, it is my opinion that a juvenile court must treat an adult defendant who is alleged to have committed an offense prior to reaching his eighteenth birthday as a child for the purpose of deciding whether the proceedings should be open or closed to the public pursuant to § 16.1-302.
Juvenile detention home/facility employees are local, rather than state, employees. Local government where facility located may employ, terminate, hear grievances and otherwise control facility employees. Chief juvenile court judge has no control over operation of facility or its employees.

May 25, 1989

The Honorable Joseph B. Benedetti
Member, Senate of Virginia

You ask three questions concerning the status and control of employees of a local juvenile detention facility. You first ask whether these employees are state or local employees. You next ask who has the authority "to employ, terminate, hear grievances or . . . control the employees of [this] facility." Your third inquiry is whether the chief judge of the juvenile and domestic relations district court (the "juvenile court") has the ultimate control over the operation of the local juvenile detention facility and its employees.

I. Applicable Statutes

Section 16.1-228 of the Code of Virginia describes a local juvenile detention facility as "a local or regional public or private locked residential facility which has construction fixtures designed to prevent escape and to restrict the movement and activities of children held in lawful custody." (Emphasis added.)

Section 16.1-310 requires the Department of Corrections (the "Department") to develop "a statewide plan for the establishment and maintenance of suitable local and regional detention homes." (Emphasis added.) Section 16.1-311 further authorizes the State Board of Corrections (the "State Board") "to prescribe the necessary positions required in the operation of detention homes," and to set minimum standards for the construction and operation of these facilities.

Sections 16.1-322.1 and 16.1-322.2 establish a procedure for the Commonwealth to provide financial assistance to a locality for the operational expenses of the local detention facility.

Section 16.1-312 further provides that, although the detention home is subject to visitation, inspection and regulation by the State Board [the facility] shall be furnished and carried on so far as possible as a family home under the management of a superintendent, appointed from a list of eligibles submitted by the State Board, and such other employees for such home as the State Board may deem necessary.

II. Employees of Local Detention Facility Are Local Employees

Although the State Board establishes minimum standards for the construction and operation of local detention homes pursuant to §§ 16.1-310 and 16.1-311, and a portion of the budgets for these facilities is funded by grants made by the Commonwealth through the Department, it is the locality in which the facility is located that actually operates the facility, employs its staff, and pays employee salaries and facility expenses.

In McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987), cert. denied sub nom., Virginia ex rel. State Bd. of Elections v. Kilgore, 486 U.S. 1006 (1988), the United States Court of Appeals for the Fourth Circuit held that any determination whether a government employee is a state or local employee must be based upon whether the official
bears "a closer nexus to the state than to a local governmental entity." 829 F.2d at 1327. "At common law, courts determined whether an employer-employee relationship existed by reference to four elements: (1) selection and engagement of the employee, (2) payment of wages, (3) power of dismissal, and (4) the power of control over the employee's actions." 829 F.2d at 1328. When each of these criteria is applied to juvenile detention home employees, the conclusion is inescapable that these employees are local, rather than state, employees.

The United States District Court for the Eastern District of Virginia has held that a supervisor in the Richmond Juvenile Detention Home is a municipal employee and subject to discharge by the municipal official supervising him. Jones v. Kelly, 347 F. Supp. 1260 (E.D. Va. 1972) [hereinafter Jones]. It is my opinion, therefore, that an employee of a juvenile detention facility is a local, rather than a state, employee.2

III. Locality in Jurisdiction Where Facility Located May Employ, Terminate, Hear Grievances and Otherwise Control Facility Employees

Pursuant to §§ 16.1-310 and 16.1-311, the State Board has promulgated standards for the secure detention of juveniles. See State Bd. Corrections, Standards for Secure Detention (Apr. 13, 1983) (the "Standards"). Paragraph A8 of the Standards requires the locality to have written policies concerning, among other things, grievances, terminations, and the recruitment and selection of employees:

The agency, commission, or unit of government operating a detention home shall have or make available to all staff, written policies and procedures approved by their parent, governmental authority in the following areas: (a) recruitment and selection, (b) grievance and appeal, (c) annual employee evaluation, (d) confidential, individual employee personnel records, (e) discipline, (f) equal employment opportunity, (g) leave and benefits, (h) resignations and terminations, (i) promotion, (j) probationary period.

Id. at 3 (emphasis omitted).

When a regional detention facility is established, the commission created by the member localities to administer the facility has the authority to hire and terminate employees, as well as to adopt and enforce rules and regulations for the management and operation of the facility. See § 16.1-318.

The authorization granted by the General Assembly to localities and regional commissions evidences a clear legislative intent that the local detention facility is to be managed locally. It is my opinion, therefore, that the local government in which a juvenile detention facility, other than a regional facility, is located has the authority, subject to the general regulatory authority of the State Board, to employ, terminate, hear grievances and otherwise control the employees of the local facility. The commission established pursuant to §§ 16.1-315 through 16.1-322 has such authority for regional juvenile detention facilities.

IV. Chief Juvenile Court Judge Does Not Have Ultimate Control over Detention Home

The authority of the juvenile court concerning juvenile detention facilities is found in the Commonwealth's Juvenile and Domestic Relations District Court Law, which provides that a juvenile judge, in appropriate circumstances, may place a child in a detention facility. See §§ 16.1-249, 16.1-284.1. These statutes, however, do not provide for the overall management and control of a detention home by the juvenile court.
To the contrary, § 16.1-312 provides that the juvenile detention facility "shall be furnished and carried on ... under the management of a superintendent." As discussed above, the superintendent of the detention facility is a local employee, and it is the locality which, subject to the Standards of the State Board, sets the operational policy for the local juvenile detention facility.

I also note that the ultimate authority for the operation of regional detention facilities rests with the commission. See § 16.1-316. Specifically excluded from membership on the commission is the chief judge and any other juvenile court judge. See § 16.1-316.

It is an accepted principle of statutory construction that the mention of one thing in a statute implies the exclusion of another. "When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982). The specific language of § 16.1-312, which vests management authority for the juvenile detention facility in the facility superintendent, implies that this management authority should not be exercised by a different person or authority. Based on the above, therefore, it is my opinion that the chief juvenile court judge does not have ultimate control over the operation of the local juvenile detention facility or its employees. 1

1A local juvenile detention facility should be distinguished from a facility established, staffed and maintained by the Department of Corrections for the purpose of receiving children committed to its care. See § 53.1-237.

Your inquiries pertain specifically to local, rather than regional, juvenile detention facilities. A regional facility is operated pursuant to concurrent ordinances or resolutions of the member jurisdictions through a commission. See §§ 16.1-315 to 16.1-322.

But cf. Jones, supra Op. text (municipal detention home employee serves at the pleasure of the local juvenile judge, who at the time the case was decided, also was a municipal employee and was delegated this authority pursuant to city charter).

Section 16.1-278(A) provides, in part, that "[t]he [juvenile court] judge may order, after notice and opportunity to be heard, any state, county or municipal officer or employee or any governmental agency or other governmental institution to render only such information, assistance, services and cooperation as may be provided for by state or federal law or an ordinance of any city, county or town." This authority is limited by the jurisdictional boundaries of the court. See 1987-1988 Att'y Gen. Ann. Rep. 463, 464. Any such order must be consistent with law, including regulations promulgated by the State Board pursuant to § 16.1-311.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Sheriff may fingerprint thirteen-year-old child at any time after being charged with certain statutory offenses. No requirement that fingerprinting be delayed until disposition ordered by juvenile court.

April 12, 1989

The Honorable Andrew J. Winston
Sheriff for the City of Richmond

You ask whether § 16.1-299(C)(4) of the Code of Virginia authorizes a sheriff to take a thirteen-year-old child's fingerprints immediately upon conviction of the child, or whether the sheriff must delay taking the child's fingerprints until sentence is imposed.
I. Applicable Statute

Section 16.1-299 authorizes the fingerprinting and photographing of children in certain circumstances and provides:

A. Fingerprints and photographs of a child thirteen years of age or older who is charged with bodily wounding as provided in § 18.2-51 or § 18.2-52, use of a firearm in committing a felony as provided in § 18.2-53.1, attempted poisoning as provided in § 18.2-54.1, extortion as provided in § 18.2-59, robbery, rape as provided in § 18.2-61, forcible sodomy as provided in § 18.2-67.1, inanimate object sexual penetration as provided in § 18.2-67.2, grand larceny as provided in § 18.2-95, burglary as provided in §§ 18.2-89 through 18.2-91, arson and related crimes as provided in §§ 18.2-77 through 18.2-78 or murder, or any attempt to commit the above mentioned felonies as provided in § 18.2-25 or § 18.2-26 may be taken and filed by law-enforcement officers.

B. A child may be fingerprinted and photographed regardless of age or offense if he has been taken into custody for and charged with a violation of law, and a law-enforcement officer has determined that there is probable cause to believe that latent fingerprints found during the investigation of an offense are those of such child.

C. The fingerprints and photographs authorized in subsections A and B shall be retained or disposed of as follows:

4. If a child fifteen years of age or older is certified to the circuit court pursuant to § 16.1-269 and is found guilty as an adult of the offense charged, or if a child thirteen years of age or older is found guilty of any of the offenses specified in subsection A of this section or an attempt to commit any such offense in a juvenile court and is adjudicated delinquent, copies of his fingerprints shall be forwarded to the Central Criminal Records Exchange.

II. Sheriff May Fingerprint Child After Charge Is Initiated

Section 16.1-299(A) clearly authorizes, but does not require, fingerprinting a child who is thirteen years of age or older and who is charged with certain offenses detailed in that statute. If the child who is thirteen years of age or older is found guilty of any of these offenses in a juvenile and domestic relations district court and is adjudicated delinquent, § 16.1-299(C)(4) requires the forwarding of fingerprints of the child to the Central Criminal Records Exchange.

The children identified in § 16.1-299(C)(4) comprise the same class of children as those in § 16.1-299(A). The only difference is that the children referred to in § 16.1-299(A) only have been charged with the commission of one or more of the offenses enumerated, and the taking of fingerprints before an adjudication is discretionary. The children referred to in § 16.1-299(C)(4) have been adjudicated delinquent, and the taking of fingerprints after this adjudication is required, since this statute mandates that the fingerprints be forwarded to the Central Criminal Records Exchange. Based on the above, it is my opinion that, at any time after the charge is instituted, § 16.1-299(A) and (C)(4) authorizes the sheriff to fingerprint a child who is thirteen years of age or older and who is charged with any of the offenses detailed in § 16.1-299(A). It is further my opinion that there is no requirement that this fingerprinting be delayed until disposition is ordered by the juvenile court.
If the child is found not guilty, any fingerprints taken pursuant to § 16.1-299(A) must be destroyed. See § 16.1-299(C)(1)-(2).

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Teen court may not be implemented as diversionary program in juvenile court.

February 10, 1989

The Honorable Frank J. Ceresi
Judge, Arlington Juvenile and Domestic Relations District Court

You ask whether a proposed "teen court" lawfully may be implemented as a diversionary program in your jurisdiction and, if so, how compliance with the confidentiality statutes in the Commonwealth relating to juveniles may be assured.

I. Facts

You have provided a three-page description of the teen court, which is designed for first-time juvenile offenders who have committed certain misdemeanor offenses, such as the illegal possession of alcohol, trespassing, small scale vandalism, and shoplifting. You state that cases involving these offenses currently are not tried in formal court proceedings before the Arlington Juvenile and Domestic Relations District Court but, rather, are informally diverted at the intake level. Under the teen court project you propose, an intake officer of the court service unit would continue to screen incoming complaints of criminal behavior, but now also would provide eligible juvenile offenders with the option of participating in teen court. Prerequisites to participation in this program include an admission by the juvenile that he or she committed the offense and the written agreement of the juvenile and his parents that they are willing participants in the teen court program.

Once the juvenile has agreed to participate in this program, he would appear before a jury of his peers, which would decide the appropriate disposition. This disposition may include a specific amount of community service, a private apology to the victim, restitution, or required service on the teen jury in future cases. The jury, chosen by the intake officer, would be composed of seven students or prior juvenile offenders who would not come from the same school as the defendant. The jury would have no prior knowledge of the case and would not know the defendant or be told his real name. The judge of the teen court would be a person with prior judicial experience or a volunteer from the local bar association. If the juvenile or his parents were dissatisfied with the results of the teen court, they would have the option to have the case heard by the juvenile and domestic relations district court ("juvenile court").

II. Applicable Statutes

Section 16.1-260(A) of the Code of Virginia provides, in part, that all matters within the jurisdiction of the juvenile court normally will be commenced by the filing of a petition and that the receipt of complaints and the processing of petitions "shall be the responsibility of the intake officer." The intake officer has the authority to proceed informally to make such adjustment as is practicable without the filing of a petition . . . . [If the intake officer believes that . . . the authorization of a petition will not be in the best interest of the family or child or that the matter may
be effectively dealt with by some agency other than the court, he may refuse to authorize the filing of a petition.\[^1\]

Section 16.1-260(B).

Section 16.1-227 provides that juvenile justice statutes in the Commonwealth should be "interpreted and construed," among other things, to "divert from the juvenile justice system, to the extent possible, consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs." Section 16.1-227(1).

III. Teen Court Not Diversionary Program Authorized by §§ 16.1-227(1) and 16.1-260

The teen court concept, in my opinion, is not a diversionary program contemplated by §§ 16.1-227(1) and 16.1-260. These statutes refer to children who are diverted from the juvenile justice system and receive assistance from agencies or individuals other than the juvenile court.\[^2\]

In contrast, the teen court you describe has almost every characteristic of a formal juvenile court proceeding. First, to be eligible for teen court, the juvenile must admit guilt. The juvenile next appears in a quasi-judicial proceeding to be sentenced—a sentence which would be binding on the juvenile if it is accepted. This is comparable to the dispositional phase in juvenile court, even though the use of a jury of one's peers is a procedure unique to the teen court.\[^3\] Finally, the teen court is presided over by a "judge" and supervision of the process is provided by the juvenile court's intake officer.

While not a formal juvenile court proceeding, it is my opinion that the teen court concept is certainly more than the informal handling by an intake officer of a complaint as contemplated by § 16.1-260.

IV. Teen Court Constitutes Improper Delegation of Juvenile Court's Jurisdiction

Even if the teen court you describe qualified as an appropriate diversionary program pursuant to §§ 16.1-227(1) and 16.1-260, it is further my opinion that the program is an improper delegation of the juvenile court's jurisdiction in these cases. Section 16.1-241 provides that a juvenile court has exclusive jurisdiction over any child alleged to be delinquent. This jurisdiction clearly includes the authority to determine the appropriate disposition for the child pursuant to § 16.1-279(E). Yet, because several of the enumerated dispositions available to the juvenile court in § 16.1-279(E) also are among the suggested dispositions available to the teen court, it is my opinion that the juvenile court is improperly delegating a portion of its authority to the teen court.

For example, § 16.1-279(E)(7a) permits the juvenile court to require the child to work on a public service project. Section 16.1-279(E)(7) allows the juvenile court to require the child to make restitution to the victim. Finally, § 16.1-279(E)(4) authorizes a juvenile court to place a child on probation under conditions and limitations as the court may prescribe, which may include a private apology.

In *Raiford v. Raiford*, 193 Va. 221, 68 S.E.2d 888 (1952), the Supreme Court of Virginia addressed whether a trial court could refer a suit for divorce to a commissioner in chancery for the taking of evidence and recommendations. Quoting *Shipman v. Fletcher*, 91 Va. 473, 477-78, 22 S.E. 458, 460 (1895), the Court stated that "[c]ommissioners [in chancery] are to assist the court, not to supplant it... They are its assistants, and their work is subject to the absolute review of the power they are appointed to assist." *Raiford*, 193 Va. at 229-30, 68 S.E.2d at 894. The Court concluded that the trial court could not delegate its judicial functions to the commissioner in chancery, and the trial
court had not done so by the referral for purposes of taking evidence and making advisory recommendations.

In the proposed teen court, the juvenile is, in essence, required to plead guilty to the offense and then is sentenced by a jury of his peers. If he accepts that verdict, the disposition is final. Although the child or his parents may "appeal" the teen court's disposition to the juvenile court for a de novo determination, the fact that the teen court's findings may be accepted by the juvenile, in my opinion, is an impermissible and unauthorized delegation of the court's authority in such juvenile proceedings. Not only are the teen court proceedings similar in many respects to the formal juvenile court proceedings, but also the teen court supplants the juvenile court in making dispositions, unlike the facts in Raiford. Although an informal diversion by an intake officer is authorized by § 16.1-260(B), it is my opinion that there is no similar statutory authority for the teen court concept you describe.

Based on the above, it is my opinion that the teen court concept you describe may not be implemented as a diversionary program in a juvenile court in the Commonwealth. Since I conclude that this concept is not authorized under existing law, a response to your second question is unnecessary.

1 If a complainant is dissatisfied with the refusal of the intake officer to initiate a petition, he may apply to a magistrate for a warrant in cases which would constitute a felony or Class 1 misdemeanor if committed by an adult. See § 16.1-260(C).

2 For example, a child who is caught with alcohol illegally in his possession may be diverted to an alcohol counseling program, rather than formally charged and tried for a misdemeanor by the juvenile court.

3 There is no statutory authority for a jury either to adjudicate the guilt or innocence of a juvenile or to recommend a disposition in a formal proceeding in juvenile court.

4 Section 16.1-69.35(d) does not provide authority for a juvenile court to create a teen court as a diversionary program. That provision only authorizes the chief judge of a general district court to establish voluntary civil mediation programs for an alternate resolution of disputes. The general district court is, by definition in § 16.1-69.5, separate and apart from a juvenile court, although they are each, by definition, a "district court."

5 The teen court concept you present is an innovative approach to involve a child, and other children in his age group, directly in the proceedings. Express statutory authorization for this, or a similar, program by the General Assembly, of course, would satisfy the questions raised in this Opinion concerning the implementation of the program in your jurisdiction. This Office will assist you and the Supreme Court in any way possible to make the teen court concept a viable alternative to the traditional juvenile court proceedings for certain offenses.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS.

When juvenile case transferred and indictment returned, circuit court obtains jurisdiction to try child as adult; circuit court's file open to public inspection to same extent as in other adult criminal cases.

November 9, 1989

The Honorable J. Curtis Fruit
Clerk, Virginia Beach Circuit Court
You ask whether a circuit court file is open to public inspection in a criminal case over which the juvenile and domestic relations district court (the "juvenile court") has transferred jurisdiction to the circuit court for trial of a child as an adult and the grand jury subsequently has returned an indictment against the child.

I. Applicable Statutes

Section 16.1-269 of the Code of Virginia details the procedure and circumstances in which jurisdiction over a child may be transferred from the juvenile court to the circuit court for trial of the child as an adult.

Although § 16.1-305 provides that juvenile court case files are confidential except as to certain persons specified in the statute, § 17-43 generally provides that circuit court records are open to public inspection. An exception to this general rule exists when "the circuit court deals with the child in the same manner as a case in juvenile court," typically in an appeal from the final disposition of a case in the juvenile court. Section 16.1-307.

Section 16.1-272(A) provides:

In the hearing and disposition of felony cases properly before a circuit court having criminal jurisdiction of such offenses if committed by an adult, the court, after giving the juvenile the right to a trial by jury on the issue of guilt or innocence and upon a finding of guilty, may sentence or commit the juvenile offender in accordance with the criminal laws of this Commonwealth or may in its discretion deal with the juvenile in the manner prescribed in this law for the hearing and disposition of cases in the juvenile court.

II. Court Files in Juvenile Cases Transferred to Circuit Court for Trial as Adult Are Open to Public Inspection

When a case has been transferred pursuant to § 16.1-269 and an indictment has been returned, the jurisdiction of the juvenile court has been terminated, and the circuit court obtains jurisdiction to try the child as an adult. I am aware of no statutory or case authority that the circuit court record in such a case should be treated confidentially as an exception to § 17-43.

The provisions of § 16.1-272(A), quoted above, merely give the circuit court dispositional alternatives after a finding of guilt.

While, for the purpose of determining guilt or innocence, a transferred juvenile is treated as an adult, and although he may be subject to adult penalties in the sentencing phase of his case, Code § 16.1-272 permits a circuit court to treat him in all respects as a juvenile, with full panoply of beneficent alternatives available in juvenile court, including the use of a juvenile probation officer.


When a case from a juvenile court is transferred to the circuit court for trial of the child as an adult, therefore, it is my opinion that the circuit court's file is open to public inspection to the same extent as in other adult criminal cases.
Section 16.1-307 provides: "In proceedings against a child in the circuit court in which the circuit court deals with the child in the same manner as a case in the juvenile court, the clerk of the court shall preserve all records connected with the proceedings in files separate from other files and records of the court. Such records shall be open for inspection only in accordance with the provisions of § 16.1-305." (Emphasis added.)

A prior Opinion of this Office applies the public disclosure provision of § 17-43 in juvenile cases before the circuit court if the child is "treated as an adult" by the circuit court in its disposition of the case. This Opinion further concludes, however, that, if the child is treated as a juvenile, the confidentiality provisions of § 16.1-307 apply. See 1984-1985 Att'y Gen. Ann. Rep. 157, 158. It is unclear whether the latter conclusion concerns an appeal from a juvenile court to a circuit court, or a case that has been transferred to the circuit court for trial of the child as an adult. If the case is an appeal, I am in agreement with the prior Opinion. To the extent the conclusion of this prior Opinion concerning the confidentiality provisions of § 16.1-307 is construed to apply to a case transferred from the juvenile court to the circuit court, however, it is hereby overruled.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS - ADJUDICATION.

Court may waive, but not reduce, fee assessable to local department of social services pursuant to statute. Court must assess fee in accordance with regulations and schedules established by State Board of Social Services; may not require local department to determine actual costs.

January 12, 1989

The Honorable Daniel M. Chichester
Commonwealth's Attorney for Stafford County

You ask whether a juvenile and domestic relations district court ("juvenile court") is authorized to reduce a fee assessed pursuant to § 16.1-274 of the Code of Virginia, or only to waive the fee. You also ask whether § 16.1-274 authorizes the juvenile court to require a local department of social services to determine the actual cost of service involved in each case and then to award the department a fee based upon this actual cost.

I. Applicable Statute

Section 16.1-274(B) provides:

Notwithstanding the provisions of §§ 14.1-112, 14.1-113 and 14.1-125, when the [juvenile] court directs the appropriate department of social services to conduct an investigation pursuant to § 16.1-273 in adjudicating matters involving a child's custody, visitation or support, the court may assess a fee against the petitioner, the respondent or both, in accordance with regulations and fee schedules established by the State Board of Social Services. The State Board of Social Services shall establish regulations and fee schedules, which shall include (i) standards for determining the paying party's or parties' ability to pay and (ii) a scale of fees based on the paying party's or parties' income and family size and the actual statewide average cost of the services provided. The fee charged shall not exceed the actual cost of the service. The fee shall be paid as prescribed by the court to the department of social services which performed the service, unless payment is waived.
II. Court May Waive, But May Not Reduce, Fee Assessable Pursuant to § 16.1-274(B)

Section 16.1-274(B) provides that, when a juvenile court directs an investigation by the local department of social services in matters involving custody, visitation or support, "the court may assess a fee ... in accordance with regulations and fee schedules established by the State Board of Social Services." (Emphasis added.) The statute further provides that this fee "shall be paid ... unless payment is waived." The term "waive" refers to the abandonment, renunciation or repudiation of a claim, privilege or right. See Black's Law Dictionary 1417 (5th ed. 1979). The use of the phrase "in accordance with" in § 16.1-274(B) contemplates that, if the fee is assessed at all by the juvenile court, it will be assessed in conformity with the fee schedules established by the State Board of Social Services (the "Board"). See Black's Law Dictionary, supra, at 16 (the term "accordance" defined as "agreement," "conformity").

It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning. See 1986-1987 Att'y Gen. Rep. 78, 79 and 147, 148. When the language of a statute is clear and unambiguous, effect must be given to the plain and ordinary meaning of its provisions. Harward v. Commonwealth, 229 Va. 363, 330 S.E.2d 89 (1985). Based on the above, it is my opinion that the juvenile court may waive the fee assessed pursuant to § 16.1-274 in its entirety, but that the court is not empowered to reduce the fee assessed. The statute anticipates an equitable fee arrangement for services since it requires that the regulations and fee schedules established by the Board be based upon such factors as the paying party's or parties' ability to pay. The fees established by the Board demonstrate a scale of fees which may vary from a full 100% of the cost, due to factors such as family size, income and the type of service rendered by the local department of social services. Any further reduction of this fee by the court would result in the fee not being assessed "in accordance with regulations and fee schedules" established by the Board, as required by § 16.1-274(B).

III. Court Must Assess Fees in Accordance with Regulations and Schedules Established by Board; Court May Not Require Local Department to Determine Actual Costs

Your second question concerns the language in § 16.1-274(B), which provides that "[t]he fee charged shall not exceed the actual cost of the service." This language seems ambiguous when it is read together with the requirement that the court assess a fee in accordance with regulations and schedules established by the Board, which must take into account "the actual statewide average cost of the services provided." Id. When an ambiguity exists in statutory language, resort to legislative history is appropriate. 2A N. Singer, Sutherland Stat. Const. § 48.01 (4th ed. 1984).

Section 16.1-274(B) was enacted by the 1987 Session of the General Assembly following a joint legislative subcommittee study concerning the costs to localities for public assistance programs. In its report to the General Assembly, the subcommittee proposed legislation to require the Board to establish regulations and fee schedules which take into account the "actual statewide average cost of the services provided" and further recommended that "[t]he fee charged shall not exceed the actual cost of the service." See 2 H. & S. Docs., Report of the Joint Subcommittee Studying the Costs to Localities for Public Assistance Programs, H. Doc. No. 26, at 35 (1986 Sess.). The joint subcommittee explained the latter provision by noting that "[t]he maximum fee charged should not exceed the actual cost of the service." Id. at 12 (emphasis added). In the income and fee schedule included as a part of the report, the maximum fee proposed is 100% of the actual statewide average cost for any individual whose income exceeds 100% of the medium income. Id. at 34. It is my opinion, therefore, that the joint subcommittee intended to limit the amount that any individual could be required to pay to the actual statewide average cost of the service provided, and that no individual could be required to pay more, regardless of income. Based on the above, it is further my opinion that
$16.1-274$ does not authorize a juvenile court to require a local department of social services to determine the actual cost of service involved in each case and then to award the department a fee based upon this actual cost.

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**COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS - JURISDICTION AND VENUE.**

Juvenile court, not general district court, has exclusive original jurisdiction over case in which adult half-brother charged with assaulting adult half-sister when parties not living in same home.

October 18, 1989

The Honorable John F. Ewell
Judge, Page General District Court

You ask whether the general district court or the juvenile and domestic relations district court (the "juvenile court") has exclusive original jurisdiction over a case in which an adult half-brother is charged with assaulting his adult half-sister, when these parties do not live in the same home.

I. Applicable Statute

Section 16.1-241 of the Code of Virginia provides:

[Each juvenile and domestic relations district court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction ... over all cases, matters and proceedings involving: * * *

J. All offenses in which one family member is charged with an offense in which another family member is the victim.... The word 'family' as herein used shall be construed to include husband and wife, parent and child, brothers and sisters, grandparent and grandchild, regardless of whether such persons reside in the same home.

II. Siblings of Half Blood Are Within Statutory Definition of "Family" in $16.1-241$

The issue whether siblings of the half blood come within the definition of the term "family" in §16.1-241(d) has not previously been decided by the Supreme Court of Virginia or by this Office. Prior Opinions have considered similar issues concerning other familial relationships, but none of the facts presented in prior Opinions involved blood relatives and, therefore, are distinguishable. See Att'y. Gen. Ann. Rep.: 1987-1988 at 249; 1981-1982 at 212; 1976-1977 at 121, 123.

State and federal courts in other jurisdictions have held that the term "brothers and sisters" commonly is construed to include half-brothers and half-sisters. See, e.g., Modern Woodmen of America v. Barnes, 61 F. Supp. 660, 663 (D.C. Minn. 1945); In Re Estate of Peterson, 259 Cal. App. 2d 492, 66 Cal. Rptr. 629, 633 (1968).

III. Exclusive Original Jurisdiction over Half-Brother in Facts Presented Is in Juvenile Court

Because § 16.1-241(J) defines the term "family" to include "brothers and sisters," and since "brothers and sisters" typically include half-brothers and half-sisters, it is my opinion that exclusive original jurisdiction over the half-brother in the facts you present is vested in the juvenile court.

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES.

Clerk of circuit court may charge discretionary fee as authorized by statute for duplication of microfilm records.

February 24, 1989

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

You ask whether the clerk of a circuit court that utilizes a procedural microfilm process may sell duplicate copies of the microfilm at a price to be determined in the clerk's discretion, absent specific statutory authority for the assessment of fees for the duplication of microfilm.

I. Facts

In your office, copies of deeds and other real estate records are made on microfilm reels with up to 2,000 frames or images per reel. Title insurance and other companies have asked to purchase entire reels of microfilm, rather than having to search for and request copies of individual microfilm frames. You state that duplication of an entire microfilm reel can be accomplished more economically than producing hard paper copies of individual frames. Your research demonstrates that a duplicate microfilm reel can be provided for approximately $50, which includes both the cost of processing the reel and the projected lost revenue for the fees that would be charged for making individual hard copies. You further state that a fee of fifty cents per page, which you normally charge for hard copy, would result in a fee of as much as $1,000 for a duplicate microfilm reel.

II. Applicable Statutes

Sections 17-59 and 17-70 of the Code of Virginia provide that every writing authorized by law to be recorded may be recorded by microfilm, microfiche, or microphotographic process in accordance with standards established pursuant to § 42.1-82.

Section 14.1-112(10) provides that the clerk of a circuit court may charge the following fee:

For making out a copy of any paper or record to go out of the office, which is not otherwise specifically provided for, for each page, a fee to be estab-
lished in the discretion of the clerk not to exceed one dollar for the first two pages and fifty cents for each page thereafter. [Emphasis added.]

III. Duplication of Microfilm Records Included with Fees Authorized by § 14.1-112(10)

It is my opinion that § 14.1-112(10), by its reference to a "record," authorizes the clerk of a circuit court to charge a fee for the duplication of microfilm. The statute provides for a copying fee, in the clerk's discretion, not to exceed one dollar for the first two pages and fifty cents for each additional page. A charge of fifty cents per page is not required by this statute; the clerk in his discretion may establish a lower fee. In establishing a fee for the duplication of an entire microfilm reel, the clerk may establish a per page fee so that the total fee amounts to the actual cost of providing the duplicated microfilm reel. For example, a fee of two and one-half cents per page for a 2,000 frame reel of microfilm would amount to a total charge of $50.

It is my opinion, therefore, that § 14.1-112(10) currently authorizes the clerk of a circuit court that utilizes a procedural microfilm process to sell duplicate copies of the microfilm reels and to set the cost for these duplicate reels at a price not exceeding one dollar for the first two frames and fifty cents for each additional frame on the reel.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PEACE AND ORDER - PICKETING OF DWELLING PLACES.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION - SEVERABILITY.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS — LEGISLATURE.

Labor dispute exemption to statutory prohibition against residential picketing in violation of equal protection clause of Fourteenth Amendment to U.S. Constitution; although unenforceable, provision severable from remainder of statute.

March 23, 1989

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

You ask whether § 18.2-419 of the Code of Virginia violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because of the labor dispute exemption to the statute's prohibition against residential picketing.

I. Applicable Statute

Section 18.2-419, with exceptions, prohibits residential picketing and provides, in part:

Any person who shall engage in picketing before or about the residence or dwelling place of any individual, or who shall assemble with another person or persons in a manner which disrupts or threatens to disrupt any individual's right to tranquility in his home, shall be guilty of a Class 3 misdemeanor. Each day on which a violation of this section occurs shall constitute a separate offense.
Nothing herein shall be deemed to prohibit (1) the picketing in any lawful manner, during a labor dispute, of the place of employment involved in such labor dispute; (2) the picketing in any lawful manner of a construction site; or (3) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.

When current § 18.2-419 was first enacted in 1970, the General Assembly preceded the substantive provisions of the statute with a declaration of legislative intent.

It is hereby declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes a feeling of well-being, tranquility, and privacy, and when absent from their homes carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes; that the practice of picketing before or about residences and dwelling places causes emotional disturbance and distress to the occupants; that such practice has as its object the harassing of such occupants; and without resort to such practice, full opportunity exists, and under the terms and provisions of this act will continue to exist, for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary in the public interest, to avoid the detrimental results herein set forth.


II. Supreme Court Has Held Substantively Similar Illinois Statute Unconstitutional

The Supreme Court of the United States has held that an Illinois statute prohibiting the picketing of residences, but exempting "the peaceful picketing of a place of employment involved in a labor dispute" violates the equal protection clause of the Fourteenth Amendment. Carey v. Brown, 447 U.S. 455, 471 (1980). Accord State v. Schuller, 280 Md. 305, 372 A.2d 1076 (1977) (similar Maryland statute declared unconstitutional); People Acting Through Community Effort v. Doorley, 468 F.2d 1143 (1st Cir. 1972) (municipal ordinance identical to Illinois statute in Carey held invalid). In Carey, the Court noted that the Illinois statute "accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted." 447 U.S. at 461. In concluding that such content-based distinctions are constitutionally impermissible as violative of the equal protection clause, the Court observed that

[n]umerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests, and numerous other actions of a homeowner might constitute 'nonresidential' uses of his property and would thus serve to vitiiate the right to residential privacy. For example, the resident who prominently decorates his windows and front yard with posters promoting the qualifications of one candidate for political office might be said to 'invite' a counter-demonstration from supporters of an opposing candidate. Similarly, a county chairman who uses his home to meet with his district captains and to discuss some controversial issue might well expect that those who are deeply concerned about the decision the chairman will ultimately reach would want to make their views known by demonstrating outside his home during the meeting.
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447 U.S. at 469 (footnote omitted). Because the Court concluded that the labor dispute exception to the Illinois statute at issue in Carey was not severable from the remainder of the statute, the entire statute was invalidated. 447 U.S. at 459 n.2.

It is my opinion that no substantive distinction exists between the portion of the Illinois statute declared unconstitutional in Carey and the labor dispute exception in § 18.2-419. It is further my opinion, therefore, that the exception to the prohibition of § 18.2-419 for "the picketing in any lawful manner, during a labor dispute, of the place of employment involved in such labor dispute" violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and, therefore, is unenforceable.

III. Although Unenforceable, Unconstitutional Provision Severable from Remainder of Statute

Unlike the Illinois statute in Carey, however, the constitutionally invalid provision of § 18.2-419 may be severed from the remainder of that statute. "The provisions of statutes in [the Virginia] Code . . . which are held invalid shall not affect the validity of other . . . provisions or applications of this Code which can be given effect without the invalid provisions or applications." Section 1-17.1. The test to determine the severability of an invalid portion of a statute from the remainder of the statute is whether or not the General Assembly would have passed the statute if it had been presented with the invalid portion removed. Heublein, Inc. v. Alcoholic Beverage Control Dept., 237 Va. 192, 199-200, 376 S.E.2d 77, 81 (1989); 2 N. Singer, Sutherland Stat. Const. § 44.04 (4th ed. 1986).

There is no constitutional proscription against the blanket prohibition of residential picketing. In Frisby v. Schultz, 487 U.S. ___, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988) (town ordinance completely banning picketing "before or about" any residence upheld), the United States Supreme Court held that

"[E]ven if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt:

'To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s]. . . . [T]he tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility." Carey, 447 US, at 478, 65 L Ed 2d 263, 100 S Ct 2286 (Rehnquist, J., dissenting) (quoting Wauwatosa v King, 49 Wis 2d 397, 411-412, 182 NW2d 530, 537 (1971)).

487 U.S. at ___, 101 L. Ed. 2d at 433, 108 S. Ct. at 2503.

In its statement of legislative intent, the General Assembly expressly declared "that the practice of picketing before or about residences and dwelling places causes emotional disturbance and distress [and] has as its object the harassing of such occupants; and without resort to such practice, full opportunity exists . . . for the exercise of freedom of speech." 1970 Va. Acts, supra. Based on the above, it is my opinion that the General Assembly would have enacted current § 18.2-419 without the provision that I conclude violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. It is further my opinion, therefore, that the phrase "the picketing in any lawful manner, during a labor dispute, of the place of employment involved in such labor dispute" in § 18.2-419 is severable from the remainder of this statute and that § 18.2-419 may be enforced without the provision quoted above.
Although the Constitution of Virginia does not contain an equal protection clause similar to that found in the United States Constitution, the antidiscrimination clause of Va. Const. Art. I, § 11 (1971) and the prohibition against special legislation in Art. IV, § 14 provide analogous limitations upon legislative authority. Neither of these Virginia constitutional provisions, however, provides broader rights than those guaranteed by the Fourteenth Amendment. See Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986); Archer and Johnson v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

The Illinois statute at issue provided that "It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest." Carey v. Brown, 447 U.S. 455, 457 (1980) (quoting Ill. Rev. Stat. Ch. 38, § 21.1-2 (1977)).

See supra Pt. II of this Opinion.

1

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE ADMINISTRATION OF JUSTICE.

No requirement that employer pay employee, whether salaried or nonsalaried, for days missed when employee summoned to court as witness or juror.

January 5, 1989

The Honorable Neil S. Vener
Commonwealth's Attorney for Campbell County

You ask whether § 18.2-465.1 of the Code of Virginia requires an employer to pay a nonsalaried, hourly employee for those days missed because the employee was summoned to court as a witness or as a juror.

I. Applicable Statute

Section 18.2-465.1 provides:

Any person who is summoned to serve on jury duty or any person, except a defendant in a criminal case, who is summoned or subpoenaed to appear in a court of law when a case is to be heard shall neither be discharged from employment, nor have any adverse personnel action taken against him, nor shall he be required to use sick leave or vacation time, as a result of his absence from employment due to such jury duty or court appearance, upon giving reasonable notice to his employer of such court appearance or summons. Any employer violating the provisions of this section shall be guilty of a Class 4 misdemeanor.

II. Prior Opinion Concludes Payment of Wages Not Required; No Statutory Amendment or Subsequent Case Authority Alters Conclusion

A prior Opinion of this Office concludes that § 18.2-465.1 does not require an employer to pay an employee wages for those days missed because of jury duty. See 1981-1982 Att'y Gen. Ann. Rep. 136. This conclusion "is reinforced by the fact that § 18.2-465.1 at one point prior to its enactment in its present form specifically prohibited employees from being 'deprived of pay.'" Id.
Since its enactment in 1981, \(^1\) § 18.2-465.1 has been amended twice by the General Assembly. See Ch. 415, 1988 Va. Acts 513; Ch. 436, 1985 Va. Acts 605. The 1985 amendment added the phrase "nor have any adverse personnel action taken against him" in the first sentence of the statute. 1985 Va. Acts, supra. It is my opinion that this amendment was not intended by the General Assembly to include a loss of pay but, rather, to refer generally to disciplinary actions or other similar conduct against the employee. Compare § 2.1-114.5:1 (grievance procedures available for disciplinary actions, including dismissals, demotions and suspensions).

The 1988 amendment to § 18.2-465.1 expanded the coverage of the statute to include employees, other than criminal defendants, who are summoned or subpoenaed to appear in court. 1988 Va. Acts, supra. Although this amendment did enlarge the number of employees potentially protected by the statute, it did not expand the rights of those employees to include pay for the period missed from work. I also am unaware of any opinion from the Supreme Court of Virginia, the Virginia Court of Appeals, or this Office which is, in any manner, contrary to the conclusion reached in the 1981-1982 Att'y Gen. Ann. Rep., supra.

Based on the above, it is my opinion that § 18.2-465.1 does not require an employer to pay an employee, whether salaried or nonsalaried, for those days missed because the employee was summoned to court as a witness or as a juror.

\(^1\)Ch. 609, 1981 Va. Acts 1281 (Reg. Sess.).

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING FRAUD - FALSE REPRESENTATIONS TO OBTAIN PROPERTY OR CREDIT.

HOUSING: HOUSING AUTHORITIES LAW.

COUNTRIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER.

Housing authority has duty to report to appropriate law enforcement authorities information concerning suspected false and fraudulent housing assistance applications; not obligated to conduct investigation of possible criminal conduct. Failure to report known fraud may constitute malfeasance, misfeasance or nonfeasance in office.

October 18, 1989

The Honorable Edward R. Harris Jr.
Member, House of Delegates

You ask (1) whether a local redevelopment and housing authority (the "Authority") has a duty to report possible fraud cases involving false and fraudulent applications for housing assistance payments; (2) whether the Authority has a legal obligation to investigate cases for possible criminal conduct if fraud is suspected; and (3) whether the Authority risks any criminal liability if it decides not to report suspected fraud cases.

I. Facts

The Authority administers a federally funded program (the "Section 8 Program"), providing rental assistance funds to qualified individuals. The housing assistance payments from the Section 8 Program, provided by annual contribution contracts with the United States Department of Housing and Urban Development ("HUD"), help low-income
persons live in otherwise unaffordable private housing projects. See 42 U.S.C.A. § 1437(f) (West 1978 & Supp. 1989). The Authority determines individual eligibility according to guidelines established by HUD. Persons seeking assistance must complete several applications to determine eligibility. They are required to supplement the information if the number of people in the household or the income of persons who live in the household changes, and persons included in the program must provide periodic applications from which the Authority determines whether they continue to meet HUD eligibility requirements. See 24 C.F.R. §§ 882.209, 882.212 (1988).

You state that the Authority believes that some recent applications contain false information, and the false statements are made ostensibly for the purpose of meeting eligibility requirements.

II. Applicable Statutes

Section 18.2-186.2 of the Code of Virginia provides:

Any person who: (i) knowingly makes or causes to be made either directly or indirectly or through any agent or agency, any false statement in writing with the intent that it shall be relied upon, or fails to disclose any material fact concerning the financial means or ability to pay of himself or of any other person for whom he is acting, for the purpose of procuring aid and benefits available under any local, state or federally funded housing assistance program, or (ii) knowingly fails to disclose a change in circumstances in order to obtain or continue to receive under any such program aid or benefits to which he is not entitled or who knowingly aids and abets another person in the commission of any such act is guilty of a Class 1 misdemeanor.

Section 1001 of Title 18 of the United States Code Annotated (West 1976) provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

III. Authority Has Obligation to Identify and Act on Cases of Suspected Fraud

The Section 8 Program is one of several similar programs available to local housing authorities to help low-income persons. The General Assembly has declared that "the providing of safe and sanitary dwelling accommodations for persons of low income" is a governmental function "of grave concern to the Commonwealth," Section 36-2(1). The importance of maintaining the integrity of housing assistance programs, and of assuring that those persons genuinely entitled to assistance are allowed to participate, is emphasized in the General Assembly's enactment of § 18.2-186.2 to deter and punish those who would abuse the program. This statute provides criminal sanctions for persons who make false statements to procure or continue housing assistance benefits, and for those who aid and abet such conduct. The federal "false statements" statute also appears applicable to the conduct you describe. See 18 U.S.C.A. § 1001.

The Virginia statute does not impose an express statutory obligation upon the Authority to report conduct it believes to be fraudulent. The powers and duties of the Authority, which are detailed in §§ 36-19 and 36-22, likewise do not expressly obligate the Authority to report possible criminal conduct to the appropriate law enforcement agency.
The absence of a specific statutory directive to report suspected criminal activity, however, should not be interpreted as an encouragement or authorization to ignore it. The Authority is authorized to implement programs in accordance with both state and federal laws and regulations, and it also may be subject to certain specific obligations under its annual contributions contract with HUD. The Authority has a duty to allow assistance only for qualified persons. See § 36-22. Federal regulations require the Authority to determine the applicant's eligibility and to conduct regular re-examinations of eligibility. 24 C.F.R. §§ 882.209, 882.212. As a result, the proper administration of the Section 8 Program requires efforts to assure that applicants are, in fact, qualified.

I am advised that HUD has published a handbook to provide information to local public housing authorities that administer this type of assistance program. See Handbook 7420.7, Public Housing Agency Administrative Practices (1979 & reprint 1981) (the "Handbook"). The Handbook specifically addresses the responsibility of the local authority to prevent program abuse, and directs a three-step process to cure this abuse. The local authority is to conduct an initial assessment if it has reason to believe program abuse has occurred; the authority must take administrative action to correct such abuse; and, if the authority has reason to believe that the abuse is intentional, the case must be referred either to a HUD Regional Inspector General or the local prosecutor. "Handbook, supra ¶ 9-12(a)-(b), at 9-11.

IV. Authority Not Required to Conduct Investigation
Concerning Possible Criminal Conduct

The appropriate investigation into an applicant's eligibility and possible program abuse, as indicated in the Handbook, often may overlap investigations for possible criminal prosecutions. The Authority, however, is not investigating for possible criminal conduct. It investigates eligibility and program abuse. If possible fraud is revealed in this eligibility investigation, such information should be reported to the local authorities charged with the duty of investigating violations of the criminal law, and to the appropriate federal officials. The responsibility to investigate and prosecute violations of the criminal law is vested in the local Commonwealth's attorney and other law enforcement authorities. See §§ 15.1-8.1, 15.1-138.

Based on the above, it is my opinion that the Authority is not obligated to conduct an investigation of possible criminal conduct.

V. Criminal Liability of Authority is Question for Local Prosecutor,
Grand Jury and Trier of Fact; Responsibility Depends upon Particular Facts

I am unaware of any specific statute that requires the Authority to report potential or suspected fraud cases, and no criminal penalties are specified for refusing to report merely suspected criminal conduct. The ultimate decision of whether the Authority would incur criminal liability for its failure to report suspected fraud cases, however, is a
function properly reserved to the Commonwealth's attorney, the grand jury, and the trier of fact, and is not an appropriate issue on which to render an Opinion. See 1987-1988 Att'y Gen Ann. Rep. 69, 72. This decision also will depend on the particular facts of each case.

Within this context, the Authority should recognize that the failure to report known fraud may, in an appropriate case, constitute malfeasance, misfeasance or nonfeasance in office, all of which are indictable offenses. See 1987-1988 Att'y Gen. Ann. Rep., supra, at 71 (malfeasance and misfeasance defined). In a particularly egregious situation, an individual's conduct also may constitute aiding and abetting, which is prohibited by § 18.2-186.2.

The responsibility of carrying out the duties of the Authority must rest primarily with the Authority itself, acting in compliance with state and federal law, federal administrative regulations and the Authority's contractual obligations with HUD. The failure to carry out these obligations also may create the need for administrative action within the Authority. It is expected that public officials charged with the duty of administering a program of such grave concern to the Commonwealth will attend to their responsibilities and assure that the program is conducted in accordance with statutory law, applicable regulations and contractual obligations.

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**CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY.**

In prosecution for drinking while driving motor vehicle, no statutory authority exists to require laboratory analysis to establish that liquid contained in can of beer is alcoholic beverage; sufficiency of evidence issue for trier of fact.

August 23, 1989

The Honorable Eddie R. Vaughn Jr.
Commonwealth's Attorney for Hanover County

You ask whether, in a prosecution under § 18.2-323.1 of the Code of Virginia for drinking while operating a motor vehicle, the Commonwealth must prove by laboratory analysis that the liquid contained in a beer can in the defendant's possession actually is beer.

1. Facts

You state that a deputy sheriff on patrol saw the driver of a passing vehicle raising a beer can in a "toasting" manner toward the deputy. You further state that the deputy stopped the car and again observed the beer can he had previously seen. The driver identified herself to the deputy sheriff and admitted drinking from the beer can. The deputy sheriff smelled the contents of the beer can at the scene, concluded that the can contained beer, and charged the driver with drinking while operating a motor vehicle, in violation of § 18.2-323.1.
Although the deputy sheriff making this arrest does not drink beer and, therefore, is not certain that the contents of the beer can actually were beer, he will testify at trial that, based upon his experience, the contents of the can smelled like beer.

II. Applicable Statute

Section 18.2-323.1 makes it a Class 4 misdemeanor "for any person to consume an alcoholic beverage while driving a motor vehicle upon a public highway of this Commonwealth."

III. Statute Does Not Require Laboratory Analysis; Sufficiency of Evidence Is Issue for Trier of Fact

Unlike some statutes,1 § 18.2-323.1 does not expressly require a laboratory analysis to prove the existence of alcohol. The elements of the offense of drinking while operating a motor vehicle are the consumption of an alcoholic beverage while driving a motor vehicle upon a public highway. See § 18.2-323.1.

In People v. Angeli, 184 Ill. App. 3d 712, 540 N.E.2d 1106 (1989), the defendant appealed his conviction for transporting alcohol in a vehicle, contending that the failure of the state to conduct a chemical analysis of the contents of beer cans discovered in his car precluded a finding of guilt. The appellate court held that no authority existed which required a chemical analysis, especially since the defendant did not argue that the arresting officer was incompetent to testify to his observations and conclude that the beer cans introduced at trial contained alcohol at the time of the traffic stop. In upholding the conviction, the court held that, "[t]he trial court as the trier of fact could properly rely on this [officer's] testimony." Id. at __, 540 N.E.2d at 1109.

It is well established that the competency of a witness is a question for the trial court and, unless it is shown that the court has abused its discretion in the admission of evidence, the Supreme Court of Virginia will not interfere on appeal. Wessells v. Commonwealth, 164 Va. 664, 671, 180 S.E. 419, 421 (1935).

In the facts you present, the trier of fact obviously will determine the weight to be given to the deputy sheriff's testimony. This decision will rest largely on the deputy's familiarity with the smell of beer, both in his experience as a deputy sheriff and in other situations. It is my opinion, however, that § 18.2-323.1 does not require a chemical analysis to establish that the liquid contained in a can of beer is an alcoholic beverage.

1Section 18.2-266, for example, provides: "It shall be unlawful for any person to drive or operate any motor vehicle . . . (i) while such person has a blood alcohol concentration of 0.10 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of § 18.2-268 . . . ."

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DANGEROUS USE OF FIREARMS OR OTHER WEAPONS.

WORKERS' COMPENSATION: DEFINITIONS AND GENERAL PROVISIONS.

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES - DUTIES OF SHERIFFS.
"Official duties" of law-enforcement officer generally factual determination; officer not acting in official capacity when appearing in court as criminal defendant or as civil plaintiff or defendant.

December 28, 1989

The Honorable Michael J. Valentine
Judge, Nineteenth Judicial District

You ask that I construe the second paragraph of § 18.2-283.1 of the Code of Virginia with respect to law-enforcement officers who are present in court as criminal defendants or as civil plaintiffs or defendants and, therefore, not in the conduct of their official duties.

I. Applicable Statute

Section 18.2-283.1 restricts the transportation or possession of a weapon in a Virginia courthouse and provides, in part:

It shall be unlawful for any person to possess in or transport into any courthouse in this Commonwealth any (i) gun or other weapon designed or intended to propel a missile or projectile of any kind, (ii) frame, receiver, muffler, silencer, missile, projectile or ammunition designed for use with a dangerous weapon and (iii) any other dangerous weapon, including explosives, tasers, stun weapons and those weapons specified in subsection A of § 18.2-308....

The provisions of this section shall not apply to any police officer, sheriff, law-enforcement agent or official, game warden, conservator of the peace, magistrate, court officer, or judge while in the conduct of such person's official duties.

II. "Official Duties" of Law-Enforcement Officer Generally Is Factual Determination; Officer Not Acting in Official Capacity in Facts Presented

As quoted above, § 18.2-283.1 excepts law-enforcement officials, and others, from its proscriptions if these persons are "in the conduct of [their] official duties." What constitutes the "official duties" of a law-enforcement officer has not been defined in the Code of Virginia or by any official Opinion of this Office. In analogous circumstances, however, the Supreme Court of Virginia has construed the Commonwealth's workers' compensation statutes in a way that is instructive in the facts you present.

An accident must arise "in the course of" employment for the workers' compensation statutes of the Commonwealth to apply. See § 65.1-7. The Supreme Court of Virginia has held that the phrase "in the course of" in the workers' compensation statutes refers to the time, place and circumstances under which the accident occurred; and that an accident occurs in the 'course of employment' when it takes place within the period of employment, at a place where the employee may be reasonably expected to be, and while he is reasonably fulfilling the duties of his employment or is doing something which is reasonably incident thereto.

Based on the above and considering the diverse nature of the duties of a law-enforcement officer, even during normal "off-duty" hours, it is my opinion that any determination of what constitutes the "official duties" of a law-enforcement officer is inherently factual. Each situation should be examined on a case-by-case basis to determine whether a law-enforcement officer is, in fact, carrying on his "official duties" at a particular time.¹

Even though I conclude that the determination whether a law-enforcement officer is conducting his official duties, for purposes of the exception in § 18.2-283.1, is a factual one, it is further my opinion that, as a matter of law, an officer is not acting in his official capacity when the officer appears in court as a criminal defendant, or as a civil plaintiff or defendant.

¹I am aware that some law-enforcement agencies have operating procedures that require their officers to carry a firearm while off duty, a practice which is consistent with the exemption from the concealed weapon prohibition in § 18.2-308(B)(2). This factor obviously will be a consideration in the court's determination whether the officer is, in fact, in the conduct of his official duties.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

Successful completion of Virginia Alcohol Safety Action Program required for any license suspension pursuant to § 18.2-271.

May 1, 1989

The Honorable Paul M. Peatross Jr.
Judge, Charlottesville General District Court

You ask whether a court may suspend one year of a three-year license revocation for a defendant convicted of a second violation of § 18.2-266 of the Code of Virginia, which prohibits the operation of a motor vehicle while under the influence of intoxicants or drugs, less than five years after a previous conviction for the same offense, without the successful completion of a program approved by the Virginia Alcohol Safety Action Program ("VASAP").

I. Applicable Statute

Section 18.2-271 provides for the forfeiture of the driver's license of any person convicted of a violation of § 18.2-266. Section 18.2-271(C) provides:

Six months of any license suspension or revocation imposed pursuant to this section for a first offense conviction may be suspended, in whole or in part, by the court upon the entry of the person convicted into and the successful completion of a [VASAP] pursuant to § 18.2-271.1. If a person is charged with a second offense of violating § 18.2-266 and is convicted thereof, the court may suspend no more than one year of such license suspension or revocation if such conviction occurred less than five years after a previous conviction under § 18.2-270,[¹][¹] nor more than two years if such conviction occurred five to ten years after a previous conviction upon such person's entry into and successful completion of a program entered into pursuant to § 18.2-271.1. [Emphasis added.][¹][²]
Successful Completion of VASAP Required for Any License Suspension Pursuant to § 18.2-271

Section 18.2-271(C), quoted above, requires the successful completion of a VASAP before a license revocation may be partially suspended for a first offender. The statute also clearly requires the completion of a VASAP by a second offender when the defendant's previous conviction occurred less than ten years but more than five years before his present conviction. The question presented by your inquiry, therefore, is whether the clause, "upon such person's entry into and successful completion of a program entered into pursuant to § 18.2-271.1" ending the final sentence of § 18.2-271(C), also controls the suspension of a license revocation for a second offender whose previous conviction was less than five years ago.

The interpretation of a statute susceptible of different interpretations should be based upon a determination of legislative intent. *Harris v. Commonwealth*, 142 Va. 620, 625, 128 S.E. 578, 579 (1925). "The purpose for which a statute is enacted is of primary importance in its interpretation or construction." *Norfolk So. Ry. Co. v. Lassiter*, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952). In making such a determination, the statute should be examined as a whole so that the statute may be interpreted "as a consistent and harmonious whole so as to effectuate the legislative goal." *VEPCO v. Prince William Co.*, 226 Va. 382, 388, 309 S.E.2d 308, 311 (1983).

The General Assembly clearly intended that the completion of VASAP precede the suspension of a license revocation for a violation of § 18.2-266. Even more importantly, it must be presumed "that the General Assembly does not intend the application of a statute to lead to irrational consequences." *VEPCO v. Citizens*, 222 Va. 866, 869, 284 S.E.2d 613, 615 (1981). See also *F.B.C Stores, Inc. v. Duncan*, 214 Va. 246, 249-50, 198 S.E.2d 595, 598 (1973).

An interpretation which applies the qualifying phrase in § 18.2-271(C), quoted above, only to a second offender whose previous conviction was more than five years ago could not have been intended by the legislature. To do so would give a defendant convicted of two offenses of driving under the influence of intoxicants or drugs within five years more consideration than a first offender or second offender whose conviction was more than five years ago.

A prior Opinion of this Office concludes that amendments to § 18.2-271, including the 1983 amendment cited above, are intended "to make uniform the period of license revocation for one or more DUI convictions and to provide authority for trial courts to suspend part or all of the revocation under certain conditions, except in cases of three or more convictions." 1983-1984 Att'y Gen. Ann. Rep. 251, 253. Applying the requirement of completion of a VASAP to some, but not all, defendants would frustrate this legislative attempt at uniformity. It is my opinion, therefore, that any suspension of the revocation of a license pursuant to § 18.2-271(C) requires the successful completion of a VASAP.

Section 18.2-270 establishes a Class 1 misdemeanor penalty for a violation of § 18.2-266 and additional penalties for subsequent offenses. The emphasized portion of § 18.2-271(C) was added by the 1983 Session of the General Assembly. See Ch. 504, 1983 Va. Acts 653, 654.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY — DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED — IN GENERAL.
February 27, 1989

The Honorable C. Phillips Ferguson
Commonwealth's Attorney for the City of Suffolk

You ask whether a regular game warden is authorized to arrest a person for operating a motor vehicle under the influence of alcohol or drugs ("DUI"), reckless driving or a traffic infraction.

I. Applicable Statutes

Section 29.1-205 of the Code of Virginia, which details the arrest authority of game wardens, provides, in part, that "[r]egular game wardens are vested with the same authority as sheriffs and other law-enforcement officers to enforce all of the criminal laws of the Commonwealth."

Criminal offenses are classified in § 18.2-8 as "either felonies or misdemeanors. Such offenses as are punishable with death or confinement in a state correctional facility are felonies; all other offenses are misdemeanors. Traffic infractions are violations of public order as defined in § 46.1-1(40) and not deemed to be criminal in nature."

Section 46.1-178.01 provides that "[f]or purposes of arrest, traffic infractions shall be treated as misdemeanors," and that "the authority and duties of arresting officers shall be the same for traffic infractions as for misdemeanors."

Section 18.2-270 provides that a violation of § 18.2-266, the DUI statute, is punishable as a Class 1 misdemeanor and that further violations carry enhanced punishments. Reckless driving is punished as provided in § 18.2-12. See § 46.1-192. Section 18.2-12 provides that "[a] misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor."

II. Regular Game Wardens Have Authority to Arrest for DUI and Reckless Driving

The plain language of §§ 18.2-270 and 46.1-192 makes it clear that DUI and reckless driving are misdemeanor criminal offenses. Section 29.1-205 likewise makes it clear that regular game wardens are authorized to arrest for a violation of a criminal law. When the language of a statute is clear and unambiguous, effect must be given to the plain and ordinary meaning of the provision. Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982); School Board v. State Board et al., 219 Va. 244, 247 S.E.2d 380 (1978). It is my opinion, therefore, that a regular game warden is authorized to arrest a person for DUI or reckless driving."

III. Regular Game Wardens Have Authority to Arrest for Traffic Infractions

Although §§ 18.2-8 and 29.1-205, when read alone, seem to restrict the arrest authority of regular game wardens in a way that prohibits their making an arrest for a traffic infraction, these statutes must be read together with § 46.1-178.01, since they pertain to the same subject matter. It is an accepted rule of statutory construction that, when construing statutes on the same subject, each section should be considered in con-
junction with every other section to produce a harmonious result. Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953). Section 46.1-178.01 expressly provides that "[f]or purposes of arrest, traffic infractions shall be treated as misdemeanors." (Emphasis added.) Because regular game wardens are empowered to arrest for misdemeanors, and because traffic infractions are to be treated as misdemeanors for purposes of arrest, it is further my opinion that regular game wardens also are authorized to arrest for a traffic infraction.

security and/or any other identification number and (ii) requested and received criminal history record information by a telephone call to the State Police.[1] [Emphasis added.]

** **

G. ... 'Dealer' means any person licensed as a dealer pursuant to 18 U.S.C. § 921 et seq.


Section 52-4.4 provides, in part:

The Superintendent of the Department of State Police shall establish a toll-free telephone number ... for purposes of responding to inquiries from licensed firearms dealers, as such term is defined in 18 U.S.C. § 921 et seq., pursuant to the provisions of § 18.2-308.2:2.

Section 54.1-4005 provides, in part, that "[n]o pawnbroker shall sell any pawn or pledge until (i) it has been in his possession for four months, unless a shorter period of not less than thirty days is agreed to in writing by the pawner, and (ii) a statement of ownership is obtained from the pawner."

II. During Redemption Period, Firearm Is Not Inventory of Pawnbroker; Criminal Records Check Not Required in Facts Presented

As quoted above, § 18.2-308.2:2 provides that "[n]o dealer shall sell, rent, trade or transfer from his inventory any such firearm to any other person" without the requisite criminal history record information check. (Emphasis added.) Although a pawnbroker clearly is a "dealer," as that term is used in § 18.2-308.2:2, a firearm in the facts you present is not a part of a pawnbroker's inventory. The pawnbroker cannot dispose of a pawned item until it has been in his possession for four months, unless a shorter period of not less than thirty days is agreed to in writing by the pawner. See § 54.1-4005. If the pawner repays the loan and retrieves his property within the period described in § 54.1-4005, it is my opinion that the provisions of §§ 18.2-308.2:2 and 52-4.4 do not apply.

It is further my opinion, however, that a firearm does become the inventory of the pawnbroker when the pawner loses his right of redemption of the firearm. At this point, the pawnbroker must comply with the requirements of § 18.2-308.2:2 before selling, renting, trading or transferring the firearm back to the original pawner or to a purchaser.

1Similar provisions for a criminal history record information check apply to the sale of a firearm, in Virginia, to an out-of-state resident. See § 18.2-308.2:2(C).

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES.

"Bingo Nut" not within statutory definition of "instant bingo"; locality may not amend ordinance to permit playing of "Bingo Nut" game.
November 21, 1989

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

You ask whether a city ordinance paralleling Virginia's statutes regulating bingo games and raffles may authorize the playing of a game similar to "instant bingo" in which the letters B.I.N.G.O. do not appear on the back of the game card.

I. Facts

The City of Norfolk has enacted an ordinance which, for present purposes, is identical to Virginia's laws governing bingo games and raffles. Some local organizations eligible to conduct bingo games wish to play a game similar to "instant bingo" entitled "Bingo Nut." In this game, a player purchases a card, pulls five tabs off the front of the card, and wins a prize if any one of the five columns on the front of the card has three matching objects underneath any one tab. The winner of "Bingo Nut," therefore, is not determined by the preprinted appearance of the letters B.I.N.G.O.

II. Applicable Statutes

Virginia's statutes concerning bingo games and raffles are contained in Article 1.1, Chapter 8 of Title 18.2 ("Article 1.1"), §§ 18.2-340.1 through 18.2-340.14 of the Code of Virginia.

Section 18.2-340.1 authorizes a qualifying organization to conduct, among other games, an "instant bingo" game. "Instant bingo" is defined as "a specific game of chance played by the random selection of one or more individually prepacked cards, with winners being determined by the preprinted appearance of the letters B.I.N.G.O. in any prescribed order on the reverse side of such a card." Section 18.2-340.1(4).

Section 18.2-340.5(C) authorizes a locality to adopt an ordinance prohibiting the playing of instant bingo. Section 18.2-340.8 further authorizes the governing body of a county, city or town to adopt an ordinance, not in conflict with Article 1.1, which regulates bingo games and raffles. Section 18.2-340.14 provides that organizations may conduct only those raffles and bingo games which are "explicitly authorized" by Article 1.1.

III. "Bingo Nut" Not Within Definition of "Instant Bingo";
Locality May Not Amend Local Ordinance to Authorize "Bingo Nut" Game

Prior Opinions of this Office consistently conclude that, if a game does not fall within one of the definitions of a bingo game or raffle detailed in § 18.2-340.1, the game is illegal pursuant to § 18.2-340.14 because it is not "explicitly authorized" by Article 1.1. See, e.g., Att'y Gen. Ann. Rep.: 1987-1988 at 282; 1986-1987 at 169, 170. In the facts you present, the game "Bingo Nut" does not conform to the definition of "instant bingo" in § 18.2-340.1(4) because the winner is not determined "by the preprinted appearance of the letters B.I.N.G.O. in any prescribed order on the reverse side of [the] card." It is my opinion, therefore, that the game "Bingo Nut," as you describe it, does not constitute "instant bingo," as that term is defined in § 18.2-340.1(4) and that the playing of this game is prohibited by § 18.2-340.14.

The remaining question presented by your inquiry is whether § 18.2-340.8 enables a locality to adopt an ordinance permitting a game not otherwise authorized pursuant to Article 1.1. Section 18.2-340.8 authorizes the adoption of local ordinances to regulate bingo games and raffles as long as they are "not in conflict with the provisions of [Article 1.1]." It is my opinion, therefore, that a local governing body is not authorized to adopt
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES.

"Fish bowl" does not constitute "raffle," "bingo" or "instant bingo" as those terms defined by statute; may not be conducted by organization eligible to conduct bingo games and raffles.

April 14, 1989
The Honorable Neil S. Vener
Commonwealth's Attorney for Campbell County

You ask whether a game you describe as "fish bowl," which is held in conjunction with bingo games and raffles conducted by a qualified organization, is authorized by the Commonwealth's statutes regulating bingo and raffles, Article 1.1, Chapter 8 of Title 18.2, §§ 18.2-340.1 through 18.2-340.14 of the Code of Virginia ("Article 1.1").

I. Facts

The organization conducts the "fish bowl" game you describe along with its weekly bingo game. To play "fish bowl," each bingo player pays a $1.00 fee, which is placed in a fish bowl. Prior to beginning the regular bingo game, the operator draws a number between one and seventy-five from the bingo machine. If any player in the "fish bowl" game subsequently wins a regular bingo game in which the last number called matches the predetermined number drawn from the fish bowl, that player wins the funds accumulated from the $1.00 fee charged to each player. If there is no winner, the money prize is carried over to the following night until there is a winner.

II. Applicable Statutes

Section 18.2-325(1) provides:

The making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling.

Section 18.2-334.2 provides that the prohibitions of § 18.2-325(1) shall not apply "to any bingo game, instant bingo, or raffle conducted solely by organizations defined in § 18.2-340.1[1](a) and (b) and meeting the qualifications set forth in § 18.2-340.3 and having received a permit as set forth in § 18.2-340.2."
Section 18.2-340.1(2) defines the term "bingo" as a specific game of chance played with individual cards having randomly numbered squares ranging from one to seventy-five, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers selected at random. Such cards shall have five vertical rows headed respectively by the letters B.I.N.G.O., with each row having five randomly numbered squares.

Section 18.2-340.1(4) defines the phrase "instant bingo" as "a specific game of chance played by the random selection of one or more individually prepacked cards, with winners being determined by the preprinted appearance of the letters B.i.N.G.O. in any prescribed order on the reverse side of such card."

Section 18.2-340.14 expressly provides that "[Article 1.1] permits organizations to conduct raffles, bingo and instant bingo games. All games not explicitly authorized by this article are prohibited."

The term "raffle" is defined 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." Section 18.2-340.1(3).

III. Section 18.2-340.14 Requires Strict Construction of Definitions of "Bingo," "Instant Bingo," and "Raffle"; "Fish Bowl" Game Does Not Constitute Authorized Activity

A prior Opinion of this Office concludes that a game entitled "Super 7 Bingo," which is substantively similar to the "fish bowl" game you describe, is not one permitted under Article 1.1. See Op. to Hon. Ray A. Conner, Comm'r of Rev., City of Chesapeake (Mar. 21, 1989) (the "Conner Opinion"). In "Super 7 Bingo," a player purchases a card containing three rows with three squares in each row, resembling a tic-tac-toe game. Except for two squares designated as "free" spaces, the remaining seven squares are blank. A player then fills in the seven blank squares on the card with seven randomly chosen numbers from one to seventy-five. If the operator of the game then selects seven numbers in the same order from a bin containing numbers from one to seventy-five, the player wins a prize accumulated from the entry fees. If there is no winner, the prize is carried over to the following night until a winner is selected.

The Conner Opinion concludes that "Super 7 Bingo" does not fall within the statutory definitions of "raffle," "bingo" or "instant bingo." In light of § 18.2-340.14, which mandates a strict construction of these statutory terms by providing that "[a]ll games not explicitly authorized by [Article 1.1] are prohibited," this prior Opinion continues that Super 7 Bingo may not be conducted by an organization eligible to conduct bingo games and raffles pursuant to § 18.2-340.1(1).

While "fish bowl" is played somewhat differently than "Super 7 Bingo," these two games are similar in several important respects. Neither game satisfies the definition of "bingo" in § 18.2-340.1(2). As discussed in the Conner Opinion, "Super 7 Bingo" is not a game played on a card with "five vertical rows headed respectively by the letters B.I.N.G.O., with each row having five randomly numbered squares," as the definition requires. Section 18.2-340.1(2). "Fish bowl," on the other hand, is not a game "in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers selected at random." Id. Neither game selects the prize winner or a prearranged number by a random drawing. Finally, in contrast to statutorily authorized bingo games and raffles, there is much less probability that a prize will be awarded during each game of "Super 7 Bingo" or "fish bowl." Consistent with the conclusion in the Conner Opinion, therefore, it is my opinion that the "fish bowl" game you
describe does not constitute a "raffle," "bingo" or "instant bingo," as those terms are
defined in § 18.2-340.1. It is further my opinion, therefore, that this "fish bowl" game
may not be conducted in this Commonwealth by an organization eligible to conduct bingo
games and raffles.

1 A qualified "organization" is defined in Va. Code Ann. § 18.2-340.1(1) (volunteer fire
departments, rescue squads, organizations operated exclusively for religious, charitable,
community or educational purposes, etc.).

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY
- BINGO AND RAFFLES.

Organization sponsoring bingo games may not accept check as payment for participation
in such games.

October 20, 1989

The Honorable Neil S. Vener
Commonwealth's Attorney for Campbell County

You ask whether an organization sponsoring bingo games may accept a check as
payment for participation in such games.

I. Applicable Statutes

Virginia's statutes concerning bingo games and raffles are contained in Article 1.1,
Chapter 8 of Title 18.2 ("Article 1.1"), §§ 18.2-340.1 through 18.2-340.14 of the Code of
Virginia. Section 18.2-340.4 provides that organizations sponsoring bingo games "shall
accept only cash in payment of any charges or assessments for players to participate" in
these games.

II. Prior Opinions Adopt Common Meaning of Term;
Checks May Not Be Accepted from Bingo Participants

No statute in Article 1.1 defines the terms "cash" or "check," or specifies whether a
check is to be regarded as the equivalent of cash. Two prior Opinions of this Office con-
struing former § 6.1-2.6 (Repl. Vol. 1979), which required that certain loan proceeds be
paid "in cash or its equivalent," conclude that this phrase requires the use of loan pro-
ceeds "in a form that does not lend itself to the use of a stop-order" and which will be
the practical equivalent of currency. 1978-1979 Att'y Gen. Rep. 328(2), 330; see id. at
328(1). The term "cash" is commonly understood to mean ready money or currency
issued by a lawful authority and intended to pass and circulate as such. Lee v. State
Department of Public Health & Welfare, 480 S.W.2d 305, 309-10 (Mo. App. 1972); A. W.

If the General Assembly had intended to authorize the acceptance of checks, in
addition to cash, from bingo participants, it easily could have done so. The legislature has
authorized the purchase of more than one gallon of alcoholic beverages by "cash, or cer-
tified check." Section 4-15(f). See also § 59.1-200(16) (Virginia Consumer Protection Act
provision specifying that retail purchase paid by check is treated as a cash purchase for
purposes of refund). By requiring cash from bingo participants, the General Assembly has
precluded potential collection problems for sponsoring organizations with regard to
checks upon which stop orders have been issued or which are returned for insufficient
funds.
Based on the above, it is my opinion that an organization sponsoring bingo games may not accept a check as payment for participation in such games.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES.

"Super 7 Bingo" game does not meet statutory definitional requirements; may not be conducted by organization eligible to conduct bingo games and raffles.

March 21, 1989

The Honorable Ray A. Conner
Commissioner of the Revenue for the City of Chesapeake

You ask whether a game you describe as "Super 7 Bingo" is authorized to be conducted by a qualified organization pursuant to the Commonwealth's statutes regulating bingo and raffles, Article 1.1, Chapter 8 of Title 18.2, §§ 18.2-340.1 through 18.2-340.14 of the Code of Virginia ("Article 1.1").

I. Facts

In "Super 7 Bingo," you state that a player purchases a card which contains three rows with three squares in each row, resembling a tic-tac-toe game. Other than the left and right squares in the middle horizontal row, which are designated as "free" spaces, the remaining seven squares on the game card are blank. The player then randomly selects seven numbers from 1 to 75, places these seven numbers randomly in the seven blank squares on the card, and turns in a carbon copy of the card to the operator of the game. The operator then selects seven numbers from a bin containing numbers from 1 to 75. If a player has written on his card the same seven numbers, in the same order, as those numbers that are subsequently drawn by the operator, the player wins a cash prize accumulated from the purchases of the "Super 7 Bingo" cards. You state that, if there is no winner, the prize is carried over to the following night until a winner has been selected.

II. Applicable Statutes

Section 18.2-325(1) provides:

The making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling.

Section 18.2-334.2 provides that the prohibitions of § 18.2-325(1) shall not apply "to any bingo game, instant bingo, or raffle conducted solely by organizations as defined in § 18.2-340.1(1)(a) and (b) and meeting the qualifications set forth in § 18.2-340.3 and having received a permit as set forth in § 18.2-340.2."

Section 18.2-340.1(2) defines the term "bingo" as

a specific game of chance played with individual cards having randomly numbered squares ranging from one to seventy-five, in which prizes are awarded on the basis of designated numbers on such cards conforming to a
predetermined pattern of numbers selected at random. Such cards shall have five vertical rows headed respectively by the letters B.I.N.G.O., with each row having five randomly numbered squares.

Section 18.2-340.1(4) defines the phrase "instant bingo" as "a specific game of chance played by the random selection of one or more individually prepacked cards, with winners being determined by the preprinted appearance of the letters B.I.N.G.O. in any prescribed order on the reverse side of such card."

Section 18.2-340.14 expressly provides that "[Article 1.1] permits organizations to conduct raffles, bingo and instant bingo games. All games not explicitly authorized by this article are prohibited."

The term "raffle" is defined 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." Section 18.2-340.1(3).

III. Statute Requires Strict Construction of Definition of "Bingo," "Instant Bingo," and "Raffle"; "Super 7 Bingo" Does Not Qualify as Permitted Activity

Consistent with the decision of the Supreme Court of Virginia in Maugh v. Porter, 157 Va. 415, 161 S.E. 242 (1931), this Office consistently has concluded that an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together. See § 18.2-325; Att'y Gen. Ann. Rep.: 1986-1987 at 169, 170; 1979-1980 at 227, 228; 1977-1978 at 238, 239, 241; 1972-1973 at 258; 1969-1970 at 167, 168; 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, however, requires that the statutory definitions of "raffle," "bingo" and "instant bingo" be strictly construed by providing that "all games not explicitly authorized by [Article 1.1] are prohibited." (Emphasis added.)

The "Super 7 Bingo" game you describe clearly is not an "instant bingo" game, as that phrase is defined in § 18.2-340.1(4). It is also my opinion that the game in the facts you present does not constitute a "bingo" game, since it is not played on a card with "five vertical rows headed respectively by the letters B.I.N.G.O., with each row having five randomly numbered squares," as § 18.2-340.1(2) requires. Further, the definition of the term "bingo" in § 18.2-340.1(2) contemplates that a prize will be awarded at each game. In contrast, it does not appear from the facts you present that there is the same likelihood that "Super 7 Bingo" will result in a winner being selected each evening the game is played.

As quoted above, § 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, 364 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 random drawing from some container in which all the chances purchased have been placed. See 1979-1980 Att'y Gen. Ann. Rep. 51, 52.

In the "Super 7 Bingo" game you describe, the game cards themselves are not placed in the container for a drawing. Neither the name of the prize winner nor a prearranged number is selected by a random drawing. It is my opinion, therefore, that this game does not constitute a "raffle," as that term is defined in § 18.2-340.1(3).
Based on the above, it is my opinion that the "Super 7 Bingo" game you describe may not be conducted by an organization eligible to conduct bingo games and raffles.

1A qualified "organization" is defined in Va. Code Ann. § 18.2-340.1(1).
2For purposes of this Opinion, I assume that the organization conducting the "Super 7 Bingo" game you describe satisfies the definitional and permit requirements of these statutes.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - GAMBLING.

Application of Commonwealth's gambling statutes to slot machines and pinball machines used exclusively in private residence for noncommercial use. County may not enact ordinance in conflict with state gambling statutes.

April 7, 1989

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

You ask several questions concerning the application of the Commonwealth's gambling statutes to slot machines and pinball machines that are used exclusively in a private residence for noncommercial purposes.

Specifically, you ask (1) whether §§ 18.2-326 through 18.2-331 of the Code of Virginia prohibit the manufacture, sale, transportation, rental, or gift of these machines for the use you describe, (2) whether these statutes prohibit a Virginia resident who is not an "operator," as that term is defined in § 18.2-325(3), from owning such machines for noncommercial use at the resident's home, and (3) whether a county board of supervisors is authorized by § 18.2-340 to adopt an ordinance that prohibits the manufacture, sale, transportation, rental, or gift of these machines for such personal use.

I. Applicable Statutes

Section 18.2-326 provides that "any person who illegally gambles shall be guilty of a Class 3 misdemeanor." Section 18.2-327 provides for additional fines for any person who "cheats or by fraudulent means wins or acquires for himself or another money or any other valuable thing."

The operator of an illegal gambling enterprise, activity or operation is guilty of a Class 6 felony. See § 18.2-328. Section 18.2-329 establishes a criminal penalty for the "owner, lessee, tenant, occupant or other person in control of any place or conveyance [who] knows, or reasonably should know, that it is being used for illegal gambling, and permits such gambling to continue without having notified a law-enforcement officer of the presence of such illegal gambling activity." It is a Class 1 misdemeanor for any person, firm or association of persons to knowingly aid, abet, or assist in the operation of an illegal gambling enterprise, activity or operation. See § 18.2-330.

Section 18.2-331 further provides:
A person is guilty of illegal possession of a gambling device when he manufactures, sells, transports, rents, gives away, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of any gambling device, believing or having reason to believe that the same is to be used in the advancement of unlawful gambling activity. Violation of any provision of this section shall constitute a Class I misdemeanor.

For purposes of the statutes cited above, the terms "illegal gambling," "gambling device," and "operator" are defined in § 18.2-325 as follows:

(1) 'Illegal gambling'.—The making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling.

(2) 'Gambling device'.—A gambling device includes:

* * *

(b) Any machine, apparatus, implement, instrument, contrivance, board or other thing, including but not limited to those dependent upon the insertion of a coin or other object for their operation, which 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; provided, however, that the return to the user of nothing more than additional chances or the right to use such machine is not deemed something of value within the meaning of this subsection; and provided further, that machines that only sell, or entitle the user to, items of merchandise of equivalent value that may differ from each other in composition, size, shape or color, shall not be deemed gambling devices within the meaning of this subsection.

* * *

(3) 'Operator'.—An operator includes any person, firm or association of persons, who conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling enterprise, activity or operation.

Section 18.2-334 provides:

Nothing in §§ 18.2-325 through 18.2-340 shall be construed to make it illegal to participate in a game of chance conducted in a private residence, provided such private residence is not commonly used for such games of chance and there is no operator as defined in subsection (3) of § 18.2-325.

Section 18.2-340 provides:

The governing body of any county is hereby authorized and empowered to adopt ordinances prohibiting illegal gambling and other illegal activity related thereto, including provision for forfeiture proceedings in the name of the county. Such ordinances shall not be in conflict with the provisions of §§ 18.2-325 through 18.2-340 or with other state laws . . . .
II. Activity Not Prohibited by Statute; Machines in Facts Presented Are Not "Gambling Devices"

A prior Opinion of this Office concludes that a slot machine is not a "gambling device," as that phrase is defined in § 18.2-325(2), if the machine is used purely for entertainment purposes and the player wins "only additional game credits upon successful operation of the device and these credits are used for no other purpose than for replaying the machine." 1977-78 Att'y Gen. Ann. Rep. 238. The same result is true for a pinball machine, which typically awards the player nothing more than the opportunity to play another game. You present facts which demonstrate that these machines will be used exclusively in a private residence and not for commercial purposes. Based on the above, it is my opinion that the activity you describe does not constitute "illegal gambling," as defined in § 18.2-325(1), and that the pinball machine and slot machine that are the subject of your inquiry are not "gambling device[s]," as this phrase is defined in § 18.2-325(2). It is further my opinion, therefore, that the manufacture, sale, transportation, rental, or gift of a slot machine and a pinball machine that is used exclusively in a private residence and not for commercial purposes does not violate §§ 18.2-326 through 18.2-331.1

III. Private Possession of Machines Not Prohibited

The same rationale supports the conclusion that the Commonwealth's gambling statutes do not prohibit a Virginia resident who is not an "operator,"2 as that term is defined in § 18.2-325(3), from owning these machines purely for personal use in his own home. Since I conclude that the operation of a pinball machine or slot machine in a private home for noncommercial use by a person who plays solely for the opportunity to play again does not constitute illegal gambling, it is further my opinion that the possession of these machines for such noncommercial use in the resident's home does not violate § 18.2-331.

IV. County May Not Enact Ordinance in Conflict with State Gambling Statutes

As quoted above, § 18.2-340 authorizes a county to adopt an ordinance prohibiting illegal gambling but, in doing so, also requires that these ordinances "not be in conflict with the provisions of [§§ 18.2-325 through 18.2-340]." To the extent that the activity you describe in your inquiry is not prohibited by state statute, it is my opinion that § 18.2-340 expressly prohibits a county from enacting an ordinance to prohibit such activity.

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1A Class 3 misdemeanor is punishable by a fine of not more than $500. See § 18.2-11(c).
2A Class 6 felony is punishable by "a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than $1,000, either or both." Section 18.2-10(f).
3A Class 1 misdemeanor is punishable by "confinement in jail for not more than twelve months and a fine of not more than $1,000, either or both." Section 18.2-11(a).
4Whether or not a person who manufactures, sells, transports, rents, or possesses these machines believes, or has reason to believe, that they will be used for illegal gambling activity obviously is a question of fact. The facts you present in your inquiry are that the person does not believe that the machines will be used for other than personal, noncommercial entertainment.
5Whether the resident is an "operator" will be relevant to any assertion raised pursuant to § 18.2-331 that the resident had no belief, or reason to believe, that he possessed an illegal gambling device.
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - GAMBLING.

TAXATION: STATE LOTTERY LAW — RETAIL SALES AND USE TAX.

Corporation's payment to Virginia customers of out-of-state lottery proceeds and forwarding of proceeds to out-of-state purchaser not prohibited; may purchase state lottery ticket for resident/nonresident provided customer at least eighteen years of age. No sales or use taxes applicable to fees or charges paid to corporation for nontaxable service related to lottery tickets.

February 27, 1989

The Honorable Charles R. Hawkins
Member, House of Delegates

You ask whether a Virginia corporation engages in illegal gambling or violates the State Lottery Law, §§ 58.1-4000 through 58.1-4028 of the Code of Virginia, if it purchases tickets from the Virginia lottery or an out-of-state lottery on behalf of Virginia or non-Virginia customers. You also ask whether Virginia retail sales and use taxes apply to this corporation in the facts you present.

I. Facts

You describe a Virginia corporation which takes orders from Virginia and non-Virginia customers for the purchase of Virginia and out-of-state lottery tickets. The customer pays the corporation an initial fee to cover the cost of the ticket, the cost incurred by the corporation in obtaining the ticket, and a fee to the corporation for its services. The corporation then purchases and retains the lottery ticket, checks the ticket against the winning lottery numbers, and forwards any winnings to the customer via United Parcel Service.

II. Applicable Statutes

Section 18.2-325(1) provides:

The making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling.

Section 18.2-334.3 provides that "[n]othing in [the Virginia statutes concerning gambling] shall apply to any lottery conducted by the Commonwealth of Virginia pursuant to Chapter 40 of Title 58.1." Section 58.1-4015, a portion of Chapter 40 of Title 58.1, prohibits the sale of any Virginia State lottery ticket to any person under eighteen years of age.

III. Corporation's Payment to Virginia Customers of
Out-of-State Lottery Proceeds Not Prohibited

A prior Opinion of this Office concludes that, while no "wager" or "bet" is "placed" or "made" in the Commonwealth when a Virginia business purchases a lottery ticket in another jurisdiction for a Virginia customer, the customer's receipt in Virginia of the out-of-state lottery ticket amounts to the "receipt" of a "wager" within the meaning of
In the facts you present, however, unlike the facts in the Ackerman Opinion, the Virginia customer does not receive the wager—the out-of-state lottery ticket—from the corporation. The corporation, instead, retains the ticket, redeems it for the Virginia resident if it is a winning ticket, and forwards the proceeds to the customer via United Parcel Service. Since the Ackerman Opinion concludes that "the receipt of the lottery ticket from the courier service by the Virginia customer constitutes the 'receipt' of a wager within the prohibition of § 18.2-325(1)" and that "[t]he lottery ticket ... is, in effect, the wager itself," the receipt of the proceeds of that wager cannot be said to be the receipt of the wager itself. 1987-1988 Att'y Gen. Ann. Rep., supra, at 287. Criminal statutes must "be construed strictly, and against the Commonwealth." Commonwealth v. American Booksellers Assoc., 236 Va. 168, 178, 372 S.E.2d 618, 624 (1988). It is my opinion, therefore, that the corporation in the facts you present does not violate § 18.2-325(1) when it purchases out-of-state lottery tickets, redeems the winning tickets, and forwards the proceeds to the Virginia customers.

IV. Corporation's Forwarding of Proceeds to Out-of-State Purchaser Not Prohibited by Virginia Statute

With respect to the corporation's purchase of out-of-state lottery tickets for out-of-state residents, if the corporation forwards the net proceeds of the out-of-state lottery to its out-of-state customers, it is my opinion that this would not constitute a "receipt" of a "wager" in Virginia within the meaning of § 18.2-325(1). See Pt. III of this Opinion.

V. Virginia Lottery Exempt from Gambling Proscriptions

With respect to the corporation's purchase of Virginia State lottery tickets, the Virginia State lottery is expressly exempted from the various gambling provisions in §§ 18.2-325 through 18.2-340. See § 18.2-334.3. There is nothing in the State Lottery Law that would prohibit the corporation's purchase of Virginia State Lottery tickets provided the customer is at least eighteen years of age. See § 58.1-4015. It is my opinion, therefore, that Virginia law does not prohibit the corporation in the facts you present from purchasing a Virginia lottery ticket for either a resident or nonresident of Virginia, provided that the customer is at least eighteen years of age.

VI. No Sales or Use Taxes Apply to Amounts Paid to Corporation on Permissible Transactions

You also ask whether either the fee charged by the corporation or the amount paid to the corporation to cover the cost of the lottery tickets is subject to Virginia sales and use taxes, provided the service is not prohibited. The sales tax is imposed generally on sales of tangible personal property and certain services, subject to statutory exemptions.

Taxable services include those specifically described as taxable under the Virginia Retail Sales and Use Tax Act, §§ 58.1-600 through 58.1-639 (the "Act"). None of these services includes the facts you present. A service also may be taxable when the transaction includes a service in connection with the sale of tangible personal property. When the true object of such a transaction is to secure the tangible personal property which it produces, the transaction is, in effect, a sale of the tangible personal property and the tax applies to the total charge, in the absence of an applicable exemption. See Va. Dep't Taxation, Va. Retail Sales & Use Tax Reg. § 630-10-97.1(A), (B)(2) (1985). The transaction you describe is not such a taxable service because lottery tickets are intangible per-

Based on the above, it is my opinion that no sales and use taxes would apply to the facts you describe because no taxable service is involved.

1Although I conclude that a Virginia corporation purchasing out-of-state lottery tickets and forwarding the proceeds, if any, to a Virginia or non-Virginia customer does not violate the Virginia gambling statutes, this activity may violate federal statutes or the gambling statutes of the state from which the lottery ticket is purchased. See, e.g., 18 U.S.C.A. § 1953 (West 1984) (prohibiting the interstate transportation of wagering paraphernalia, including "wagering pools"). See also Annotation, Validity, Construction, and Application of Statutes or Ordinances Involved in Prosecutions for Transmission of Wagers or Wagering Information Related to Bookmaking, 53 A.L.R.4th 891 (1987).

2See §§ 58.1-603 (statute imposing sales tax); 58.1-604 (statute imposing use tax); 58.1-602(14) (defining "retail sale" to include "a sale to any person for any purpose other than for resale in the form of tangible personal property or services taxable under [the Virginia Retail Sales and Use Tax Act]").

3See, e.g., §§ 58.1-602(14) (services taxable as "retail sale" include charges for any rooms, lodgings, or accommodations furnished to transients by hotels, inns, motels and other similar places for less than ninety continuous days); 58.1-602(16) (services taxable as sale include furnishing, preparing, or serving by a person for consideration of meals or other tangible personal property consumed on his property).

4Cf. § 58.1-602(19) of the Act, which defines tangible personal property, in part, as "personal property which may be seen, weighed, measured, felt, or touched."

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CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES — RECOVERY OF FINES AND PENALTIES.

BANKING AND FINANCE: MONEY AND INTEREST.

CIVIL REMEDIES AND PROCEDURE: JUDGMENTS AND DECREES GENERALLY — SATISFACTION.

ADMINISTRATION OF GOVERNMENT GENERALLY: ATTORNEY GENERAL AND DEPARTMENT OF LAW.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY.

Commonwealth’s attorney may not release judgment entered on behalf of Commonwealth either against surety in bond forfeiture proceeding for less than full payment or for unpaid fines and costs upon partial payment.

July 21, 1989

The Honorable J. Ray Carper
Commonwealth’s Attorney for Pittsylvania County
You ask several questions concerning the authority of a Commonwealth's attorney to release civil judgments entered on behalf of the Commonwealth in criminal-related matters.

I. Bond Forfeitures

You first ask whether a Commonwealth's attorney is authorized to release a judgment entered against a surety in a recognizance bond forfeiture proceeding upon remittance of an amount less than the total amount due on the judgment principal, plus post-judgment interest.

A. Both Principal and Surety Liable for Bond Forfeiture Judgment


Pursuant to § 19.2-136, such a judgment would be entered on behalf of the Commonwealth in criminal prosecutions based upon a state statute. The judgment rate of interest in § 6.1-330.54\(^2\) accrues on a forfeited bond from the date of entry of the final judgment order. See 1984-1985 Att'y Gen. Ann. Rep. 32.

"While the taking of the recognizance grew out of a matter criminal in its nature, the execution of the bond and the effort of the Commonwealth to collect a debt due by reason of the forfeiture of the recognizance is a matter purely civil." *Collins v. Commonwealth*, 145 Va. 468, 471, 134 S.E. 688, 688-89 (1926).

B. No Statutory Authority Exists for Commonwealth's Attorney to Release Bond Forfeiture Judgment for Less than Full Payment

The Commonwealth's attorney is charged with affirmative statutory duties with respect to the collection of judgments rendered in favor of the Commonwealth in bond forfeiture proceedings. Specifically, § 19.2-349\(^3\) imposes a duty on the Commonwealth's attorney to inquire into the collectibility of forfeitures and to initiate collection procedures if the debts appear recoverable. Pursuant to § 8.01-457, the clerk of the circuit court is responsible for marking satisfied judgments entered on behalf of the Commonwealth for bond forfeitures.

Several methods exist by which a judgment entered in a bond forfeiture proceeding may be compromised, released or remitted. The Attorney General is empowered by § 2.1-127 to compromise, settle or discharge civil claims involving the interests of the Commonwealth upon approval by the Governor. The Governor is authorized by §§ 19.2-363 through 19.2-368 to remit forfeitures upon proper petition by the judgment debtor. In addition, a trial court is required by § 19.2-143 to remit or reduce the bond forfeiture if the principal is delivered to the court within twelve months of default.

I am aware of no statute, however, that enables the Commonwealth's attorney to release forfeiture judgments upon partial satisfaction. Based on the above, a prior Opinion of this Office concludes that the Commonwealth's attorney is not authorized "to enter into a firm commitment for the payment of [a bond forfeiture] judgment on a weekly basis." See 1963-1964 Att'y Gen. Ann. Rep. 82.

It is my opinion, therefore, that a Commonwealth's attorney is not authorized to release a judgment entered against a surety in a bond forfeiture proceeding upon remit-
tance by the surety of an amount less than the total amount due on the judgment principal, plus postjudgment interest.

II. Fines and Costs

You also ask whether the Commonwealth's attorney is authorized to release a judgment entered on behalf of the Commonwealth for unpaid fines and costs upon remittance of an amount less than the total amount due on the judgment principal, plus postjudgment interest.

A. Fines Imposed and Costs Taxed Constitute Judgment in Favor of Commonwealth

Section 19.2-340 provides, in part:

Fines imposed and costs taxed in a criminal prosecution for committing an offense against the State shall constitute a [civil] judgment in 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.


B. Commonwealth's Attorney Not Authorized to Release Judgment for Fines and Costs for Less than Full Payment

As with bond forfeitures, a Commonwealth's attorney is charged with affirmative duties with respect to the collection of judgments entered on behalf of the Commonwealth for unpaid fines and costs. Section 19.2-349\(^5\) requires the Commonwealth's attorney to inquire into the collectibility of unpaid fines and costs and to initiate collection procedures if the debts appear collectible. The clerk of the circuit court is required by § 8.01-457 to mark satisfied judgments entered on behalf of the Commonwealth for fines and costs.

As with bond forfeitures, several methods exist by which judgments for unpaid fines and costs may be compromised, released or remitted. The Attorney General is authorized by § 2.1-127 to compromise, settle or discharge civil claims involving the interests of the Commonwealth upon approval by the Governor. The Governor is authorized by §§ 19.2-363 through 19.2-368 to remit most fines after conviction upon proper petition by the criminal defendant. Furthermore, the sentencing court retains the discretion pursuant to § 19.2-358(B) to reduce or remit the amount due for unpaid fines and costs during its supervision of an installment payment plan.

As with bond forfeitures, however, I am aware of no statute that authorizes a Commonwealth's attorney to release judgments for unpaid fines and costs upon partial payment. A prior Opinion of this Office concludes that the Commonwealth's attorney is not authorized to release a judgment for unpaid fines and costs as to a particular parcel of real property upon the payment of an amount equivalent to the criminal defendant's interest in that parcel, but less than the amount of the judgment. 1964-1965 Att'y Gen. Ann. Rep. 143, 144.

It is my opinion, therefore, that a Commonwealth's attorney is not authorized to release a judgment entered on behalf of the Commonwealth for unpaid fines and costs upon the remittance of an amount less than the total amount due on the judgment principal, plus postjudgment interest.
The duties of the Commonwealth's attorney are prescribed by general law or special act. See Va. Const. Art. VII, § 4 (1971); § 15.1-40.1. As discussed above, a Commonwealth's attorney is charged by statute with the primary responsibility for collection of fines, costs, forfeitures, penalties and, to a lesser extent, restitution. The applicable statutes, however, do not provide the Commonwealth's attorney with the discretionary authority to compromise or discharge these obligations during his collection efforts. Although such authority might enhance the prospects of successful collections on behalf of the Commonwealth in some cases, that determination must necessarily be made by the General Assembly.

1Section 19.2-143 provides, in part: "When a person, under recognizance in a case, either as party or witness, fails to perform the condition of appearance thereof . . . a hearing shall be held upon reasonable notice to all parties affording them opportunity to show cause why the recognizance or any part thereof should not be forfeited. If the court finds the recognizance or any part thereof should be forfeited, the default shall be recorded therein, unless, the defendant . . . is brought before the court within sixty days of the findings of default. After sixty days of the finding of default, his default shall be recorded therein . . . . The process on any such forfeited recognizance shall be issued from the court before which the appearance was to be, and wherein such forfeiture was recorded or entered. Any such process issued by a judge . . . shall be made returnable before, and tried by, such judge, who shall promptly transmit to the clerk of the circuit court of his county or city wherein deeds are recorded an abstract of such judgment as he may render thereon, which shall be forthwith docketed by the clerk of such court."

2Formerly § 6.1-330.10.

3Section 19.2-349 provides, in part: "It shall be the duty of the attorney for the Commonwealth to make inquiries into the reasons why such fines, costs, forfeitures, penalties and restitution remain unsatisfied. If it appears from such inquiries that any such amounts may be satisfied, the attorney for the Commonwealth forthwith shall cause proper proceedings to be instituted for the collection and satisfaction thereof."

4Section 19.2-353.5 provides that no interest shall accrue on fines and costs for ninety days after judgment, during incarceration for the same case, or during a court-ordered installment payment plan.

5See supra note 3.

CRIMINAL PROCEDURE: CONSERVATORS OF THE PEACE AND SPECIAL POLICEMEN - APPOINTMENT.

COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER - IN COUNTIES.

Private security officer of property owners association, serving by order of county circuit court as special police officer, has authority to enforce county ordinances within his designated jurisdiction.

July 20, 1989

The Honorable Kevin G. Miller
Member, Senate of Virginia

You indicate that the Circuit Court of Rockingham County has entered an order dated April 4, 1989, pursuant to § 19.2-17 of the Code of Virginia appointing a private security officer employed by the Massanutten Property Owners Association, Inc., to serve as a "Special Policeman" within the boundaries of the property known as Massanutten or the Massanutten Village Project. The order provides that this special police officer
"shall have the powers and duties as are vested in special policemen in counties as set forth under Article 3 of Chapter 3 of Title 15.1 of the Code of Virginia, 1950, as now or hereafter amended, except that he shall not have authority to execute civil process." You ask whether such a special police officer has the authority to enforce duly enacted county ordinances within his geographically limited jurisdiction.

I. Applicable Statutes

Section 19.2-17 authorizes circuit court judges to appoint citizens to serve as special police officers in certain designated areas of a county. Section 15.1-144 provides that special police officers shall be "conservators of the peace in their respective counties."

II. Special Police Officers Have Authority to Enforce County Ordinances

As noted above, special police officers, by statute, are made "conservators of the peace in their respective counties." Special police officers possess the same general powers, authorities and duties as other conservators of the peace. Williams v. Commonwealth, 142 Va. 667, 128 S.E. 572 (1925); 1987-1988 Att'y Gen. Rep. 220, 221. A prior Opinion of this Office concludes that, because county sheriffs are conservators of the peace, they have the power and duty to enforce county ordinances. See 1976-1977 Att'y Gen. Ann. Rep. 257, 258.

It is my opinion, therefore, that the special police officer in the facts you present, who has been appointed for a geographically limited jurisdiction pursuant to § 19.2-17, as a conservator of the peace, has the authority to enforce within his designated jurisdiction all duly enacted county ordinances, in addition to the criminal laws of the Commonwealth.

CRIMINAL PROCEDURE: ENFORCEMENT OF FORFEITURES.
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY.
GAME, INLAND FISHERIES AND BOATING: WILDLIFE AND FISH LAWS.

Means of forfeiture for weapons and vehicles used in hunting violations; initiation of condemnation proceedings to forfeit weapon.

August 16, 1989

The Honorable Franklin J. Jenkins
Judge, Goochland County General District Court

You ask whether a court may enter an order pursuant to § 18.2-310 of the Code of Virginia disposing of and forfeiting a weapon used in violation of § 29.1-523, or whether condemnation proceedings must be instituted pursuant to § 19.2-369 to accomplish the forfeiture, as prescribed by § 29.1-524.

I. Applicable Statutes

The General Assembly has provided statutory authority for the forfeiture of weapons only in limited circumstances. Upon conviction of a person for a criminal offense involving the use of a weapon, a trial court may order the forfeiture of the weapon pursuant to § 18.2-310. Certain hunting violations also provide for the forfeiture of weapons.
See, e.g., §§ 29.1-549 (hunting deer from boats); 29.1-556 (unlawful devices for taking game).

Section 29.1-523 provides, in part:

Any person who kills or attempts to kill any deer between a half hour after sunset and a half hour before sunrise by use of a light attached to any vehicle or a spotlight or flashlight shall be guilty of a Class 2 misdemeanor.

Section 29.1-524 further provides:

Every vehicle, rifle, shotgun, pistol, crossbow, bow and arrow, or speargun used with the knowledge or consent of the owner or lienholder thereof, in killing or attempting to kill deer between a half hour after sunset and a half hour before sunrise in violation of § 29.1-523 . . . shall be forfeited to the Commonwealth. Upon being condemned as forfeited in proceedings under Chapter 22 (§ 19.2-369 et seq.) of Title 19.2, the proceeds of sale shall be disposed of according to law.

Section 18.2-310 provides, in part:

[Weapons used by any person or persons in the commission of a criminal offense may, upon conviction of such person or persons so using the same, be forfeited to the Commonwealth by order of the court trying the case . . . .

II. Specific Language of § 29.1-524 Controls Forfeiture in Facts Presented


A weapon used in killing or attempting to kill a deer in violation of § 29.1-523 appears to be forfeitable pursuant either to the specific provisions of § 29.1-524 or to the more general provisions of § 18.2-310. While both statutes, when read alone, may apply to the facts you present, § 18.2-310 does not apply to a specific crime, nor does § 18.2-310 provide the procedural safeguards in §§ 19.2-369 through 19.2-386, which are expressly referenced in § 29.1-524. It is an accepted principle of statutory construction that a specific statute is controlling over a more general statute. See City of Roanoke v. Land, 137 Va. 89, 119 S.E. 59 (1923); Att'y Gen. Ann. Rep.: 1985-1986 at 291, 292 n.2; 1981-1982 at 240, 241.

In addition, §§ 29.1-523 and 29.1-524 were enacted as part of a complete revision of the game laws in 1987. See Ch. 488, 1987 Va. Acts 660, 697-98 (Reg. Sess.). Section 18.2-310 was in effect at the time of the 1987 reenactment of the game laws, yet the General Assembly still chose to provide a separate and distinct procedure for the forfeiture of weapons used in violation of § 29.1-523. The General Assembly is presumed to know what statutes previously have been enacted. See School Board v. Patterson, 111 Va. 482, 69 S.E. 337 (1910); Att'y Gen. Ann. Rep.: 1985-1986 at 65, 67; 1977-1978 at 77.

Based on the above, it is my opinion that the General Assembly intended § 29.1-524 to control the means of forfeiture for weapons and vehicles used in violation of § 29.1-523. It is further my opinion, therefore, that condemnation proceedings must be
CRIMINAL PROCEDURE: PRELIMINARY HEARING.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

Compliance with filing requirements in § 19.2-187(i)-(ii) not mandatory for admission into evidence of certificate of analysis prepared pursuant to § 18.2-268.

October 17, 1989

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

You ask whether the conditions detailed in § 19.2-187(i) and (ii) of the Code of Virginia for the admission into evidence of a certificate of analysis apply to certificates of breath or blood alcohol/drug content prepared pursuant to § 18.2-268.

I. Applicable Statutes

Section 19.2-187 provides, in part:

In any hearing or trial of any criminal offense, a certificate of analysis . . . shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial and (ii) a copy of such certificate is mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at least seven days prior to the hearing or trial upon request of such counsel.

Section 18.2-268(L) provides:

When any blood sample taken in accordance with the provisions of this section is forwarded for analysis to the Division [of Consolidated Laboratory Services], a report of the results of such analysis shall be made and filed in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the Director of the Division or his designated representative, be admissible in any court, in any criminal or civil proceeding, as evidence of the facts therein stated and of the results of such analysis.

Section 18.2-268(M) provides:

Upon the request of the person whose blood or breath or both blood and breath sample was taken for chemical tests to determine the alcoholic or drug or both alcoholic and drug content of his blood, the results of such test or tests shall be made available to him.

Section 18.2-268(Y) provides, in part:
Any individual conducting a breath test under the provisions of this section and as authorized by the Division shall issue a certificate which... shall be admissible in any court in any criminal or civil proceeding as evidence of the facts therein stated and of the results of such analysis. Any such certificate of analysis purporting to be signed by a person authorized by the Division shall be admissible in evidence without proof of seal or signature of the person whose name is signed to it. The officer making the arrest, or anyone with him at the time of the arrest, or anyone participating in the arrest of the accused, if otherwise qualified to conduct such test as provided by this section, may make the breath test or analyze the results thereof. A copy of such certificate shall be forthwith delivered to the accused.

Section 18.2-268(Z) further provides:

The steps herein set forth relating to the taking, handling, identification, and disposition of blood or breath samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced.

II. Compliance with Conditions of § 19.2-187(i) and (ii) Is Not Required Prior to Admission Into Evidence of Certificate of Analysis Prepared Pursuant to § 18.2-268

Section 19.2-187 provides that a certificate of analysis prepared by personnel of the Division of Consolidated Laboratory Services, the Division's designee, or any one of four federal entities, is admissible in evidence, provided that within seven days of hearing or trial, the certificate is filed with the clerk of the court hearing the case and a copy of the certificate of analysis is forwarded upon request to the defense attorney. Failure to comply with these provisions renders the certificate inadmissible. See Gray v. Commonwealth, 220 Va. 943, 265 S.E.2d 705 (1980); Allen v. Commonwealth, 3 Va. App. 657, 353 S.E.2d 162 (1987).

In contrast, § 18.2-268, Virginia's "implied consent" statute, prescribes detailed procedures for proving the results of blood or breath analysis for the presence of drugs or alcohol. See Stroupe v. Commonwealth, 215 Va. 243, 207 S.E.2d 894 (1974). As such, it is a specific or special statute, the requirements of which supersede the provisions of § 19.2-187 to the extent that their requirements conflict.

Unlike § 19.2-187, a certificate of analysis prepared pursuant to § 18.2-268 does not have to be filed with the clerk prior to trial or hearing. See § 18.2-268(L), (Y). The results of a certificate of breath test prepared by an arresting officer or a qualified individual present at the time of arrest or assisting in the arrest must be "forthwith delivered to the accused." Section 18.2-268(Y). Otherwise, the blood or breath test results are made available upon request. See § 18.2-268(M). Failure to comply with these notice provisions, standing alone, does not render the certificate of analysis inadmissible. See § 18.2-268(Z); Essex v. Commonwealth, 228 Va. 273, 322 S.E.2d 216 (1984); Lutz v. City of Richmond, 205 Va. 93, 135 S.E.2d 156 (1964); Wohlford v. Commonwealth, 3 Va. App. 467, 351 S.E.2d 47 (1986).

It is a fundamental rule of statutory construction that statutes which relate to the same subject matter should, to the extent possible, be read together, the object being to
CRIMINAL PROCEDURE: PRESENTMENTS, INDICTMENTS AND INFORMATIONS — TRIAL AND ITS INCIDENTS.

Misdemeanor defendant's presence at trial may be waived; if counsel appointed, court may try defendant in his absence. Defendant's presence at sentencing may not be waived.

January 23, 1989

The Honorable Lemuel E. DeBerry
Judge, Richmond General District Court, Thirteenth Judicial District

You ask whether a defendant who has been arrested on a charge of driving under the influence, convicted of an identical offense within the past five years, and released by a magistrate under bond to appear on a certain date for trial may be tried and sentenced in his absence to the mandatory jail term, if the defendant is represented by counsel and that counsel is present at the trial and sentencing.

I. Applicable Statutes

Section 19.2-258 of the Code of Virginia provides, in part:

When a person charged with a misdemeanor has been admitted to bail or released upon his own recognizance for his appearance before a court of record having jurisdiction of the case, for a hearing thereon and fails to appear in accordance with the condition of his bail or recognizance, he shall be deemed to have waived trial by a jury and the case may be heard in his absence as upon a plea of not guilty.

Section 19.2-237 further provides, in part:

If, in any misdemeanor case the accused fails to appear and plead, when required the court may either award a capias or proceed to trial in the same manner as if the accused had appeared, plead not guilty and waived trial by jury, provided, that the court shall not in any such case enforce a jail sentence.
II. Presence of Defendant at Trial May Be Waived

Section 19.2-237 clearly permits the trial of a misdemeanor defendant in his absence. In such cases, however, the defendant must have made a knowing and intelligent waiver of counsel or be represented by counsel at the trial held in his absence. Arger-singer v. Hamlin, 407 U.S. 25 (1972); see also 1972-1973 Att'y Gen. Ann. Rep. 152.

It is my opinion, therefore, that if counsel has been appointed for a misdemeanor defendant, the court may proceed to try the misdemeanor defendant in his absence.

III. Presence of Defendant at Sentencing May Not Be Waived

In Head v. Commonwealth, 3 Va. App. 163, 173, 348 S.E.2d 423, 430 (1986), the Court of Appeals of Virginia ruled that a felon, who could be tried in his absence, may not be sentenced in absentia.

The court in Head relied, in part, on § 19.2-237, although that section only pertains to misdemeanants. 3 Va. App. at 172-73, 348 S.E.2d at 429-30. The court recognized that substantial authority for the sentencing of absent defendants exists in other states but stated that the reasons that would permit a trial in the absence of a defendant, such as "the loss or disappearance of witnesses, the difficulty of rescheduling the case, the burden of multiple trials where there are multiple defendants, denying an absent defendant the opportunity to obstruct the course of justice, and other prejudices to the Commonwealth," were not present at the time of sentencing. Id. at 173, 348 S.E.2d at 430. Based on the above, it is my opinion that the sentence of incarceration in the facts you present may not be imposed upon a defendant in the defendant's absence. This conclusion is reinforced by the fact that the defendant must, of course, be apprehended before any jail sentence may be executed.

It is further my opinion, therefore, that a defendant who has been charged with driving under the influence, convicted of an identical offense within the past five years, and released on bond to appear in court on a certain date for trial, may be tried in his absence if counsel has been appointed to represent him and counsel is present at trial. If this misdemeanor defendant is convicted, however, the court may not proceed to sentence the defendant to a term of incarceration without the defendant's presence in court.
You ask whether proceedings to recover costs assessed as a result of criminal or traffic convictions for violations of state statutes are governed by § 19.2-340 or by § 19.2-341 of the Code of Virginia. You state that your question is generated by a perceived differentiation in these statutes concerning the limitation on the enforcement of certain judgments imposed by a general district court.

I. Applicable Statutes

Section 19.2-340 provides:

When any statute prescribes a fine, unless it be otherwise expressly provided or would be inconsistent with the manifest intention of the General Assembly, it shall be to the Commonwealth and recoverable by presentment, indictment, information or warrant. Fines imposed and costs taxed in a criminal prosecution for committing an offense against the State shall constitute a judgment in 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.

II. Section 19.2-340 Governs Proceedings for Recovery of Costs Assessed as Result of Criminal and Traffic Convictions for Violations of State Statutes


As quoted above, § 19.2-340 concerns "[f]ines imposed and costs taxed in a criminal prosecution." (Emphasis added.) Not all traffic violations are criminal in nature. See, e.g., §§ 18.2-8, 46.1-1(40), 46.1-16.01 (distinguishing noncriminal traffic "infractions" from criminal traffic "offenses"). Upon the enactment of § 19.2-340 in its current form, all traffic "offenses" were deemed to be criminal. See § 46.1-16 (Repl. Vol. 1974). Section 46.1-18 provides that fines imposed for all traffic offenses, like fines imposed in criminal cases, must be paid into the Literary Fund. No statute suggests that fines imposed for traffic "infractions" are recoverable in a manner that is different from traffic offenses that are criminal in nature. It is my opinion, therefore, that § 19.2-340 governs fines and costs imposed for traffic infractions, as well as for traffic offenses that are criminal in nature.
It is further my opinion that § 19.2-340 governs proceedings to recover costs assessed as a result of criminal and traffic convictions for violations of state statutes.

In contrast, § 19.2-341 is restricted in its application to "statute[s] prescrib[ing] a monetary penalty other than a fine." (Emphasis added.) "Costs assessed against a person who has been convicted of a crime are not part of his punishment for the crime." *Wright v. Matthews*, 209 Va. 246, 248, 163 S.E.2d 158, 160 (1968). Because costs do not constitute part of a criminal penalty, § 19.2-341 does not apply to costs assessed as a result of criminal and traffic convictions for violations of state statutes. Instead, § 19.2-341 concerns forfeitures and penalties, and their related costs, imposed following a conviction of a crime. See § 19.2-339 (distinguishing fines from "other forfeitures, penalties, costs, amercements or the like").

III. Limitation on Enforcement of Judgments Entered by General District Court Is Ten Years Under Both §§ 19.2-340 and 19.2-341

The conclusion that proceedings to recover costs assessed as a result of criminal and traffic convictions for violations of state statutes are governed by § 19.2-340, and not by § 19.2-341, does not alter the applicable limitation on the enforcement of judgments imposed by a general district court.

Section 19.2-341 specifically provides that no recovery proceedings for judgments under that statute shall be brought except "within ten years if imposed by a general district court."

Section 19.2-340, in contrast, does not specify a limitation on recovery proceedings. Instead, executions on judgments under that statute "may issue thereon in the same manner as upon any other monetary judgment." Section 8.01-251 details the limitations on enforcement applicable to monetary judgments and, in part, provides that "[l]imitations on enforcement of judgments entered in the general district courts shall be governed by § 16.1-94.1." Section 8.01-251(G). Section 16.1-94.1 provides that the limitation on the enforcement of judgments entered in general district court is ten years.

It is my opinion, therefore, that the limitation on the enforcement of judgments entered by a general district court is ten years under both §§ 19.2-340 and 19.2-341.

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**CRIMINAL PROCEDURE: RECOVERY OF FINES AND PENALTIES.**

Accrual of interest on criminal fines and court costs during defendant's post-July 1, 1988, incarceration suspended, regardless of when confinement commenced.

March 23, 1989

The Honorable Rex A. Davis  
Clerk, Circuit Court of the City of Newport News

You ask whether a 1988 amendment to § 19.2-353.5 of the Code of Virginia, which prohibits the accrual of interest on criminal fines and court costs owed by incarcerated defendants, applies to defendants incarcerated prior to the effective date of the amendment.
I. Applicable Statute

Section 19.2-353.5 provides, in part:

No interest shall accrue on any fine or costs imposed in a criminal case or in a case involving a traffic infraction for a period of ninety days from the date of the final judgment imposing such fine or costs, during any period the defendant is incarcerated as a result of that case.\(^1\) [Emphasis added.]

II. Accrual of Interest Is Suspended During Defendant's Post-July 1, 1988, Incarceration, Regardless of When Confinement Commenced

A prior Opinion of this Office concludes that interest on unpaid fines and court costs in criminal cases continues to accrue during the defendant's incarceration. See 1987-1988 Att'y Gen. Ann. Rep. 303, 305. After this Opinion was rendered, the General Assembly amended § 19.2-353.5 to suspend the accrual of such interest "during any period the defendant is incarcerated as a result of that case." Chapter 106, 1988 Va. Acts 114.


Another prior Opinion of this Office concludes that an amendment to the statutory rate of interest payable on unpaid fines and court costs in criminal cases is remedial in nature and, as a result, affects judgments entered prior to the amendment "for interest accruing from the effective date of the amendment until paid." 1982-1983 Att'y Gen. Ann. Rep. 300, 305. The rationale supporting the conclusion of this prior Opinion applies with equal force to your inquiry. It is my opinion, therefore, that the moratorium on the accrual of interest on fines and court costs in criminal cases created by the 1988 amendment to § 19.2-353.5 applies to any period of time a criminal defendant is confined to a state or local correctional facility on and after July 1, 1988, regardless of when he was initially placed in confinement or ordered to pay the fines and court costs. Interest accrued prior to July 1, 1988, of course, is not affected by the amendment to § 19.2-353.5 and is still owed the Commonwealth. See 1982-1983 Att'y Gen. Ann. Rep., supra.

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\(^1\)The emphasized portion of § 19.2-353.5 was enacted by the 1988 Session of the General Assembly. See Ch. 106, 1988 Va. Acts 114.

CRIMINAL PROCEDURE: SEARCH WARRIORS — ARREST — BAIL AND RECOGNIZANCES.

MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL — LICENSING PERSONS ESTABLISHING, ETC., FACILITIES.

Warrantless search to arrest suspected felon permitted in public area of rehabilitation facility; absent consent or exigent circumstances, warrant required to search private premises. Police man or bail bondsman required to identify himself prior to effecting lawful arrest; display of positive identification, such as badge or specific law-enforcement credentials, not required.
April 14, 1989

The Honorable Robert W. Ackerman
Member, House of Delegates

In several circumstances you describe, you ask whether a law-enforcement officer or a bail bondsman is authorized to enter and search for a particular person at a rehabilitation facility located in a jurisdiction you represent. You state that the facility is a private, residential drug and alcohol treatment and rehabilitation facility where some residents are private patients and others are patients pursuant to contracts between the facility and the Virginia Department of Corrections, the local community service board and various federal agencies.

Specifically, you ask whether a law-enforcement officer or a bail bondsman may search this facility for an individual without a search warrant and over the objection of the director of the facility. You also ask whether my conclusion to this question would be different if the law-enforcement officer or bondsman has a capias or an arrest warrant for a person who is either known or suspected to be in the facility. Your final question is whether the director of the facility has the right to require positive identification of a bail bondsman or law-enforcement officer who has the legal authority to search the facility prior to the execution of the search.

I. Applicable Constitutional and Statutory Provisions

Amendment IV of the United States Constitution (the "Fourth Amendment") provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 19.2-59 of the Code of Virginia provides, in part, that "[n]o officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer."

Section 19.2-76 authorizes a law-enforcement officer to "execute within his jurisdiction a warrant or summons issued anywhere in the State."

Section 19.2-81 details the authority of a law-enforcement officer to arrest without a warrant in a public place and provides, in part:

[Law-enforcement officers], 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.

Section 19.2-149 discusses the authority of a bail bondsman, acting as a surety in a recognizance, to arrest his principal and provides:

A surety in a recognizance may at any time arrest his principal and surrender him to the court ... in addition to the above authority, upon the application of the surety, the court, or the clerk thereof ... shall issue a capias for the arrest of such principal, and such capias may be executed by such surety, or his authorized agent, or by any sheriff, sergeant or police officer ....
Section 19.2-128(B) further provides:

Any person charged with a felony offense who willfully fails to appear before any court as required shall be guilty of a Class 6 felony. Any person charged with a misdemeanor offense who willfully fails to appear before any court as required shall be guilty of a Class 1 misdemeanor.

Section 37.1-183.1 requires that a facility such as the one you describe must be licensed by the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services (the "Department"). Section 37.1-84.1(8) requires that a patient in such a facility "[h]ave access to his medical and mental records and be assured of their confidentiality."

State regulations promulgated by the Department concerning clients in such community programs provide for the confidentiality of patient records, which necessarily includes information concerning patient identification:

A community services board or licensed organization shall maintain all records of treatment or requests for treatment with confidentiality.

A. Disclosures of records may be made only with the consent of the client or if applicable his authorized representative, except in emergencies or otherwise required or permitted by law....

Dep't Mental Health, Mental Retardation & Substance Abuse Serv., Rules & Regs. to Assure Rights of Clients in Community Programs § 2.3, at 6-7 (effective Mar. 5, 1986) (the "Virginia Regulations").

Section 2.4 of the Virginia Regulations provides that "[t]he community services board or licensed organization shall ensure any service providing treatment for or diagnosis of substance abuse problems shall comply with applicable federal regulations as well as such provisions contained in these regulations not in conflict with federal law or regulation."

Federal regulations authorize the disclosure of a patient's records, without the consent of the patient, in the following circumstances:

If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor.... Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.


Federal regulations require disclosure of records under the following conditions:

An order of a court of competent jurisdiction entered under this subpart is a unique kind of court order. Its only purpose is to authorize a disclosure or use of patient information which would otherwise be prohibited by 42 U.S.C. 290ee-3, 42 U.S.C. 290dd-3 and these regulations. Such an order does not compel disclosure. A subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order entered under these regulations.

II. Warrantless Search to Arrest Suspected Felon Permitted in Public Area of Facility; Absent Consent or Exigent Circumstances, Warrant Required to Search Private Premises

When a law-enforcement officer has probable cause to believe that a suspect is a felon, no warrant is required to apprehend the suspect in a public place. United States v. Watson, 423 U.S. 411 (1976). See also § 19.2-81. A surety in a recognizance may "at any time" arrest his principal in a public place. Section 19.2-149.

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967) (emphasis added). An entry onto the premises of a business establishment during business hours does not implicate Fourth Amendment protections. United States v. Blalock, 578 F.2d 245, 248 (9th Cir. 1978).

The facility you describe is comparable to a privately owned hospital. Addressing the reasonable expectation of privacy enjoyed by hospital patients, the Supreme Court of Virginia has distinguished between those areas of a hospital generally open to the public and specific rooms assigned to particular patients. A patient has very little expectation of privacy in a hospital emergency room, but is afforded Fourth Amendment protections in the hospital room which has been assigned to and paid for by the patient. Morris v. Commonwealth, 203 Va. 331, 334, 157 S.E.2d 191, 194 (1967). The Supreme Court of Virginia also has held, however, that an invitation to the general public to enter premises for private business purposes is subject to the business operator's "absolute right at any time to terminate or limit this invitation." Prillaman v. Commonwealth, 199 Va. 401, 407-08, 100 S.E.2d 4, 8-9 (1957).

It is my opinion, therefore, that absent exigent circumstances, a law-enforcement officer or bail bondsman may enter without a warrant those areas of the rehabilitation facility that are open to the public during business hours, to arrest the bondsman's principal or any person the law-enforcement officer has probable cause to suspect of having committed a felony, if such person be found within those areas. The director of the facility, however, may limit or terminate the general invitation to enter the premises. If this occurs, it is further my opinion that neither the law-enforcement officer nor the bail bondsman may disregard the director's express denial of consent to search.

III. Arrest Warrant Authorizes Search of Suspect's Residence

An arrest warrant authorizes an entry and search of the residence of the person named in the warrant to effect the arrest. "[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Payton v. New York, 445 U.S. 573, 603 (1980) (emphasis added). An arrest warrant or capias, therefore, authorizes a search of private premises when the person authorized to execute the warrant or capias has a "reasonable belief" that the party sought is present there. United States v. De Parias, 805 F.2d 1447, 1457 (11th Cir. 1986), cert. denied sub nom., Ramirez v. United States, 482 U.S. 916 (1987).

The "reasonable belief" standard "may require less justification than the more familiar probable cause test." United States v. Manley, 632 F.2d 978, 983 (2d Cir. 1980), cert. denied sub nom., Williams v. United States, 449 U.S. 1112 (1981). The premises subject to search on the authority of an arrest warrant need not be the permanent residence of the person named in the warrant, as long as the person authorized to serve the warrant reasonably believes that the suspect is temporarily residing there. Barnes, infra note 4.
An arrest warrant, however, does not authorize an entry or search of private premises of third parties. Absent exigent circumstances, such a search may be authorized only by a search warrant. *Steagald v. United States*, 451 U.S. 204 (1981).

It is my opinion, therefore, that in the facts you present an arrest warrant or capias authorizes a law-enforcement officer or bail bondsman to search that portion of the facility where he reasonably believes the suspect resides. An arrest warrant does not authorize a general search of the facility or a search of rooms where other patients are residing. Unless the law-enforcement officer or bondsman has a reasonable belief that the subject of an arrest warrant is residing in a specific area of the facility, therefore, it is further my opinion that he must seek mandatory disclosure of that information from the facility by producing both the arrest warrant or capias and the court order required by federal regulations. See 42 C.F.R. §§ 2.1(b)(2)(C), 2.61(a).

IV. Police Officer or Bail Bondsman Required to Identify Himself Prior to Effecting Lawful Arrest; Display of Positive Identification Not Required

As quoted above, § 19.2-76 specifies that an "officer" may execute an arrest warrant within his jurisdiction. Section 19.2-149 authorizes a "surety in a recognizance" to arrest his principal or to obtain a capias which may be executed "by such surety, or his authorized agent, or by any sheriff, sergeant or police officer." Neither statute, therefore, expressly requires that an officer or bondsman identify himself prior to the execution of a valid arrest warrant. The Supreme Court of the United States, however, has recognized a common law requirement that a law-enforcement officer must give notice of his authority and purpose prior to the execution of an arrest or search warrant in a dwelling. *Miller v. United States*, 357 U.S. 301, 306-08 (1958). I am aware of no authority, however, which would extend this requirement to the display of positive identification, such as a badge or specific law-enforcement credentials, by the officer or bondsman, whether the entry is to a dwelling or the facility you describe. The facts in each case obviously will differ. In some cases, an officer will recognize that positive identification, although not required, will be prudent. Based on the above, however, it is my opinion that the director of the facility you describe does not have the right to require positive identification from the bondsman or law-enforcement officer prior to a lawful search.


2 "Exigent circumstances" exist when an extraordinary event, such as hot pursuit, occurs which may justify an otherwise unreasonable warrantless entry or search. See *United States v. Santana*, 427 U.S. 38 (1976).

3 A bail bondsman also may arrest, as any other private citizen may, for felonies and breaches of the peace which are committed in his presence, pending the arrival of a police officer. See 1976-1977 Att'y Gen. Ann. Rep. 11, 12, 14, 202. The facts you present, however, suggest that the bail bondsman would be acting in his capacity as a surety in a recognizance, pursuant to § 19.2-149.

4 If an arrest occurs as the result of an unlawful search, the burden remains on the person arrested to show that he had a legitimate expectation of privacy in the place in which he was arrested. *Rakas v. Illinois*, 439 U.S. 128, 130-31 n.1 (1978); *Barnes v. Commonwealth*, 234 Va. 130, 135, 360 S.E.2d 196, 200 (1987), cert. denied, 484 U.S. 1036 (1988) [hereinafter Barnes].

5 A proper search warrant obviously would permit a search of the entire facility. The facts you present, however, demonstrate that the officer does not have a search warrant.

6 This is in contrast to § 19.2-81, which requires an officer to be "in uniform, or displaying a badge of office" to arrest without a warrant.

7 When an arrest is made at a facility similar to the one you describe pursuant to the federal regulations compelling information disclosure, prior identification may be re-
quired to enforce the court-ordered "safeguards against unauthorized disclosure." 42 C.F.R. § 2.1(b)(2)(C). On the other hand, courts consistently have sustained arrests and searches when exigent circumstances justify the failure to give the announcement. *Simons v. Montgomery County Police Officers*, 762 F.2d 30, 32 n.2 (4th Cir. 1985), cert. denied, 474 U.S. 1054 (1986); *United States v. Couser*, 732 F.2d 1207, 1208 (4th Cir. 1984).

**CRIMINAL PROCEDURE: SEARCH WARRANTS — TRIAL AND ITS INCIDENTS.**

**COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER — COUNTY, CITY AND TOWN OFFICERS GENERALLY.**

Limitation of police officer's investigative authority; statutory authority to serve warrants and process, other than search warrants in criminal cases, in contiguous jurisdictions.

January 19, 1989

The Honorable C.W. Phelps
Sheriff for Isle of Wight County

You ask (1) whether a police officer of a town may go more than 1 mile beyond the corporate limits of the town to conduct an independent criminal investigation involving illegal narcotics, and (2) whether the town police officer may execute a search warrant or other criminal process more than 1 mile beyond the corporate limits of the town, if the search warrant or other criminal process is based upon criminal activity occurring more than 1 mile beyond the corporate limits of the town.

**I. Applicable Statutes**

Section 19.2-250 of the Code of Virginia provides that "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."

The 1988 Session of the General Assembly rewrote § 15.1-79 to provide that "[e]very officer to whom any order, warrant, or process may be lawfully directed, shall execute the same within the boundaries of the political subdivision in which he serves and may execute the same in any contiguous county or city in accordance with the provisions of § 19.2-76." Chapter 638, 1988 Va. Acts 823. Section 19.2-76 details the procedure for the execution and return of a warrant or summons.

Section 15.1-131 provides, in part:

Whenever the necessity arises for the enforcement of laws designed to control or prohibit the use or sale of controlled drugs as defined in § 54-524.2 or laws contained in Article 3 (§ 18.2-344 et seq.) of Chapter 8 of Title 18.2 ... the policemen and other officers, agents and employees of any county, city or town ... may ... lawfully go or be sent beyond the territorial limits of such county, city or town ... to any point within or without the Commonwealth to assist in meeting such ... need.

Section 15.1-131.3 provides for reciprocal agreements between counties, cities and towns for cooperation in the provision of police services.

Section 15.1-138 provides that "[e]ach policeman shall endeavor to prevent the commission within the ... town of offenses against the ... ordinances and regulations of the ... town."

Section 15.1-159.7 permits contiguous counties, cities and towns to enter into "mutual aid agreements for the use of their joint police forces ... to maintain peace and good order."

Section 19.2-56 provides that "[e]very search warrant shall be directed to ... the sheriff, sergeant, or any policeman of the county, city or town in which the place to be searched is located."

II. Police Officer's Investigative Authority Limited

Section 19.2-250 restricts a town police officer's jurisdiction to 1 mile beyond the corporate limits of the town. Unless an investigation falls within the coverage of §§ 15.1-131, 15.1-131.3 or 15.1-159.7, the officer may not independently conduct an investigation involving a controlled buy of narcotics beyond the limitation in § 19.2-250. In the facts you present, you do not state that a necessity exists for officer assistance beyond territorial limits in enforcing the controlled drug laws pursuant to § 15.1-131 and you also offer no indication that a reciprocal agreement exists pursuant to § 15.1-131.3 or that a mutual aid agreement exists pursuant to § 15.1-159.7. In the facts presented, therefore, it is my opinion that a town police officer may not independently conduct an investigation involving a controlled narcotics buy beyond 1 mile outside the corporate limits of the town.

III. Statute Authorizes Police Officers to Serve Warrants and Process, Other Than Search Warrants in Criminal Cases, in Contiguous Jurisdictions

A prior Opinion of this Office concludes that § 15.1-79 authorizes a police officer to execute warrants or process in criminal cases, other than search warrants, in any county or city which is contiguous to the jurisdiction regularly served by that officer. See 1987-1988 Att'y Gen. Ann. Rep. 168.

A search warrant, however, presents a different issue. Section 15.1-79 authorizes the execution of a warrant in a contiguous county by an officer to whom it "may be lawfully directed." As quoted above, § 19.2-56 expressly provides that a "search warrant shall be directed to ... the sheriff, sergeant, or any policeman of the county, city or town in which the place to be searched is located," thereby limiting § 15.1-79 in the case of a search warrant. It is my opinion, therefore, that a town police officer is not authorized to execute a search warrant outside the boundaries of the town.

1 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, extends 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. See § 19.2-250.

2 Section 15.1-159.7 gives a police officer, acting pursuant to a mutual aid agreement, the same authority the officer has within his own jurisdiction.

3 As noted above, § 15.1-138 states that an officer shall endeavor to prevent crimes within the town. This clearly limits his authority to the town, except as that authority is expanded by § 19.2-250.
EDUCATION: BOARD OF EDUCATION — PROGRAMS, COURSES OF INSTRUCTION, ETC.

CONSTITUTION OF VIRGINIA: EDUCATION.

Authority of Board of Education to require instruction on contraception, with contextual limitations, as part of family life education curriculum.

July 31, 1989

The Honorable George F. Allen
Member, House of Delegates

You ask two questions concerning the authority of the Board of Education (the "Board") to require instruction on contraception in Virginia's public schools. Specifically, you ask whether the Board acted within its lawful authority to require instruction on contraception as part of the family life education ("FLE") curriculum. You further ask whether there are any limitations on the context in which contraception may be taught in the public schools.


Pursuant to both the Constitution of Virginia and statute, the Board is vested with the authority and responsibility generally to supervise the public school system in the Commonwealth. See Va. Const. Art. VIII, § 4 (1971); Va. Code Ann. § 22.1-8. See also Art. VIII, § 5(e) ("subject to the ultimate authority of the General Assembly, the Board shall have primary responsibility and authority for effectuating the educational policy set forth in this Article, and it shall have such other powers and duties as may be prescribed by law").

Section 22.1-207.1, which provides for the FLE program, provides, in part:

The Board...shall develop by December 1, 1987, standards of learning and curriculum guidelines for a comprehensive, sequential [FLE] curriculum in grades K through 12. Such curriculum guidelines shall include instruction as appropriate for the age of the student in family living and community relationships, the value of postponing sexual activity, human sexuality, human reproduction, and the etiology, prevention and effects of sexually transmitted diseases. All such instruction shall be designed to promote parental involvement, foster positive self concepts and provide mechanisms for coping with peer pressure and the stresses of modern living according to the students' developmental stages and abilities.


The Guidelines provide, in part:

The [FLE] program developed locally shall be comprehensive and sequential and include the following content areas and may include others at the discretion of the local school board:
1. Family living and community relationships;
2. The value of postponing sexual activity until marriage;
3. Human sexuality;
4. Human reproduction and contraception;
5. The etiology, prevention, and effects of sexually transmitted diseases;
6. Stress management and resistance to peer pressure;
7. Development of positive self concepts and respect for others, including people of other races, religions, or origins;
8. Parenting skills;
9. Substance abuse; and

Id. at xvi.

The Guidelines were adopted by the Board following extensive public hearings and then were submitted to the General Assembly on November 30, 1987. At its 1988 Session, the General Assembly funded the Board's FLE program. See Ch. 800, Item 134(5), 1988 Va. Acts 1280, 1345. The legislative history preceding this funding decision by the legislature, including extended debate in the General Assembly prompted by the inclusion of instruction on contraception in the Guidelines, is described in detail in the Report of the Joint Subcommittee Studying Teenage Pregnancy Prevention Pursuant to HJR 280. See 2 H. & S. Docs., H. Doc. No. 35, at 17-20 (1988 Sess.). The requirement that local FLE programs include instruction on contraception remained unchanged during this review process. The FLE curriculum also is incorporated into the statewide Standards of Accreditation promulgated by the Board, effective September 29, 1988. See 4 Va. Regs. Reg., supra.

II. Board Regulation Requiring FLE Instruction on "Contraception" Authorized

It is Important to note that, at the time this program was funded by the General Assembly, and since, the legislature has not repealed or modified the Board's Guidelines. It is a basic rule of statutory construction that the interpretation of public officials charged with the enforcement and implementation of a statute is entitled to great weight. The General Assembly also is presumed to acquiesce in an agency interpretation which it continues without legislative alteration. Peyton v. Williams, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965) (citing Smith v. Bryan, 100 Va. 199, 204, 40 S.E. 652, 654 (1902)); Dan River v. Unemployment Comm., 195 Va. 997, 1002, 81 S.E.2d 620, 623 (1954).

Section 22.1-207.1 details only generalized subject areas which must be included in the FLE program. Instruction on contraception is not prohibited or otherwise addressed. Furthermore, the statute does not limit the discretion inherent in the constitutional authority of the Board. See Art. VIII, §§ 4, 5(e). The General Assembly may, of course, expressly address the issue of instruction on contraception as part of the FLE curriculum. Since the General Assembly has not done so, however, it is my opinion that the Board acted within its lawful authority to require instruction on contraception as part of the FLE curriculum.
III. Contextual Limitations Apply to Teaching Contraception in FLE Programs

Section 22.1-207.1 requires that the FLE program be "comprehensive, sequential," and "appropriate for the age of the student" and, further, that it be "designed to promote parental involvement, foster positive self concepts and provide mechanisms for coping with peer pressure and the stresses of modern living according to the students' developmental stages and abilities." The Board also has required that instruction concerning contraception occur in the context of developing an understanding of, and responsibility for, family planning. See Guidelines § 7.9, at 16; § 9.11, at 22; § 11.8, at 28. Abstinence is to be emphasized as the most effective means of contraception, and abortion is not to be presented as a means of birth control. Id. § 8.11, at 20; § 9.11, at 22; § 10.5, at 23. It is my opinion that these contextual limitations would govern any instruction on contraception in the public schools.

EDUCATION: POWERS AND DUTIES OF SCHOOL BOARDS — PUPILS.

CONSTITUTION OF VIRGINIA: EDUCATION — SCHOOL BOARDS.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY — DRUGS.

CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES.

No statutory prohibition against drug testing prior to readmission of students expelled for drug offenses; application of constitutional considerations.

December 22, 1989

The Honorable R. Edward Houck
Member, Senate of Virginia

You ask whether "the Code of Virginia prohibit[s] local school boards from adopting policies that require periodic drug testing for those students who seek readmission to school following suspension or expulsion as a result of violating school policies or state laws concerning the possession, consumption or distribution of controlled substances."

I. Statutes Do Not Prohibit Drug Testing of Students Suspended or Expelled for Drug Offenses Prior to Readmission

No Virginia statute expressly prohibits a local school board from adopting a policy requiring the periodic drug testing of students who seek readmission to school following their suspension or expulsion for violating school policies or state laws prohibiting the possession, consumption or distribution of controlled substances. On the other hand, no Virginia statute explicitly authorizes drug testing in the facts you present. Nonetheless, local school boards have significant authority over the supervision of schools and the discipline of students. See Va. Const. Art. VIII, § 7 (1971); Va. Code Ann. §§ 22.1-79(1), (5), 22.1-279; 1982-1983 Att'y Gen. Ann. Rep. 448. It is my opinion that this general authority to supervise schools and enforce student discipline authorizes school boards to adopt such policies subject, of course, to constitutional limitations."
II. Local School Board May Adopt Drug Testing Policy for Students Seeking Readmission After Suspension or Expulsion for Drug Violation; Testing Policy Must Satisfy Constitutional Requirements

The Fourth Amendment to the Constitution of the United States, which prohibits unreasonable searches and seizures, generally requires a warrant or a showing of "probable cause" before individual privacy interests are outweighed by governmental interests. Compulsory drug testing implicates privacy interests and constitutes a search for Fourth Amendment purposes. See, e.g., Skinner v. Railway Labor Exec. Assn., 489 U.S. 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989).

The supervision and operation of schools, however, "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." Griffin v. Wisconsin, 483 U.S. 888, 873-74 (1987) (warrantless search of probationer's home by probation officer upheld where founded upon "reasonable grounds" that contraband was present). Search warrants or a showing of "probable cause" is not required of school administrators seeking to maintain order in the public schools. New Jersey v. T. L. O., 469 U.S. 325 (1985). On the other hand, "[a]lthough [the Supreme] Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." Id. at 338. Consistent with the Fourth Amendment, therefore, individual privacy interests may be overcome, in the interest of school discipline, when there is a reasonable basis for suspecting that school rules are being violated. Id. The Supreme Court of the United States held in New Jersey v. T. L. O. that

[we] join the majority of courts that ... the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' Terry v. Ohio, 392 U. S., at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' ibid. Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the questions of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

Id. at 341-43 (footnotes omitted).
The reasonableness of any search necessarily is dependent upon the facts of each particular case. See 1986-1987 Att'y Gen. Ann. Rep. 189. As the Supreme Court also acknowledged in New Jersey v. T. L., O., "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341.

Based on the above, it is my opinion that a local school board may adopt a drug testing policy for students who are seeking readmission after suspension or expulsion for a violation of school policies or state laws concerning controlled substances. Any such policy must, of course, be drafted and implemented to satisfy the constitutional principles discussed above. In accord with those principles, it is further my opinion that a general policy of compulsory drug testing of all students seeking re-enrollment solely because of a prior drug offense in the school would be vulnerable to constitutional attack. See, e.g., Odenheim v. Carstadt–East Rutherford R. Sch., 211 N.J. Super. 54, 510 A.2d 709 (1985) (school's policy of requiring all students to submit urine samples for drug testing held unconstitutional); Anable v. Ford, 663 F. Supp. 149 (W.D. Ark. 1985) (school's policy of mandatory drug testing of all students held unconstitutional). In order to avoid such an attack, therefore, any policy decision to require the drug testing of a student as a condition of re-enrollment should be made on a case-by-case basis and be based upon a review of the individual student's disciplinary problems and a reasonable belief that the compulsory testing will reveal the continuing use of drugs by that student in violation of the law or school regulations. See In re William G., 40 Cal. 3d 550, 221 Cal. Rptr. 118, 709 P.2d 1287 (1985) (individualized suspicion is a requirement of "reasonable suspicion" to conduct a lawful school search).

1 The General Assembly has provided expressly for the drug testing of persons who are charged with a first drug offense and placed on probation. See Va. Code Ann. § 18.2-251. The General Assembly also has provided, in some circumstances, for the use of drug testing as an aid in determining appropriate conditions for the release of accused persons pending disposition of criminal charges. See § 19.2-123.


3 I am aware that some courts have upheld the use of dogs in schools to detect drugs, particularly in lockers, on the theory that this was not a search within the meaning of the Fourth Amendment or that students had no legitimate expectation of privacy in school lockers. See, e.g., Horton v. Goose Creek Ind. School Dist., 690 F.2d 470 (5th Cir.), reh'g denied, 693 F.2d 524 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983); Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981). These decisions were rendered prior to the decision of the Supreme Court of the United States in New Jersey v. T. L., O., however, and do not involve as intrusive a search as blood or urine testing of students for drugs.

4 A reasonable suspicion of the continuing possession or distribution of controlled substances obviously is relevant in the context of the student's continuing use of these substances, since drug testing will not be helpful in determining whether a student continues to distribute these substances, or simply possesses them for distribution.

EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC.

Family life opt-out provision.

March 31, 1989
The Honorable Stephen H. Martin
Member, House of Delegates

You ask whether the "opt-out" provision of the Family Life Education guidelines adopted by the Board of Education permits a parent or legal guardian to absent their child from all or any part of the family life education program, and not just those parts of the program deemed to be sensitive by a local school board.

I. Applicable Statute and Guidelines Provision


The Guidelines expressly require that "[a]n 'opt-out' procedure shall be provided to ensure communication with the parent or guardian for permission for students to be excused from all or part of the program." (Emphasis added.) See Guidelines § III(H), at xv.

II. Guidelines Provision Applies to All or Part of Family Life Program

The "opt-out" provision of the Guidelines, quoted above, clearly and without exception authorizes a parent or legal guardian to excuse his child from all or any part of the family life education program. It is my opinion, therefore, that this provision permits a parent or legal guardian to absent their child from all or any part of this program and not just those portions of the program deemed to be sensitive by a local school board.1

1This result also is in accord with the letter you have received from E.B. Howerton Jr., Dep. Supt. Curriculum Instr. & Personnel Serv., Va. Dep't Educ. (Mar. 24, 1989).

EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC.
CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

Family life curriculum guidelines adopted by locality do not offend U.S. Constitution's Establishment Clause; do not violate religious freedoms guaranteed by federal or state constitutions or statute.

August 24, 1989

The Honorable Harry J. Parrish
Member, House of Delegates

You ask two questions concerning the local guidelines developed by the Manassas School Board for its Community Involvement Team as part of the development of the family life education ("FLE") program in the Manassas public schools. Specifically, you ask (1) whether the first local guideline violates the First Amendment to the Constitution of the United States and (2) whether any of the remaining local guidelines violate the Constitution of the United States, the Constitution of Virginia, or § 22.1-208 of the Code of Virginia?
1. Facts

You state that the City of Manassas School Board has adopted 12 guidelines for the development of an FLE program. These guidelines provide, in part, that the family life learning objectives shall:

1. ... be based upon the Judeo-Christian values of our nation's founding fathers.

2. ... teach the foundational values of honesty, love, patience, courtesy, courage, cheerfulness, abstinence, self-control and modesty.

3. ... contain no sexually explicit material for the elementary grades.

4. ... not include instruction on masturbation or any techniques for stimulating or practicing sexual orgasms.

5. ... provide that the teaching of any sexually explicit material shall be taught in sexually segregated classes by a teacher of the same sex as the students.

6. ... provide that the teaching of sex should be totally abstinence based and taught with an underlying theme of modesty and chastity.

7. ... adhere to the philosophy that abstinence in fact means abstaining as opposed to contraception and that contraception not be taught as an alternative or as being in compliance with an abstinence based program.

8. ... teach that homosexuality and sexual promiscuity are unacceptable lifestyles.

9. ... reinforce the traditional family structure and emphasize parental authority and honor of parents and other adults.

10. ... recommend adoption as an alternative to child rearing not abortion as an alternative to birth.

11. [provide t]hat the EGI Model San Marcos, California, be thoroughly reviewed and those elements representing the most conservative viewpoint be interwoven into the learning objectives in order to accomplish the most conservative program possible. These elements are to specifically include the subjects of courtesy, punctuality, etc. under the 'Be Successful' subject matter.

12. ... be developed and implemented in such a fashion so as to comply with the laws of the Commonwealth of Virginia but yet be as conservative and nonintervening as possible. Also that all material dealing with sexuality be introduced in the highest grade level possible.

The local guidelines are preceded by a preamble describing their "underlying philosophy":

For centuries philosophers and statesmen have recognized that basic Judeo-Christian principles provide for an orderly society and a functional governing process, thus benefiting all of society. Also, this nation is a nation of religious based origins and a strong thread of religious principles runs
throughout our history in our laws and our sense of values. Any program that must be developed for a broad based application in our society cannot and should not ignore these basic principles that have been the basis for our society for all of our years. These basic values that I referred to need not necessarily be referred to as religious principles but rather as universal values generally deemed desirable in any society. These values that should be addressed are respect for others, consideration for others, self respect, sound moral principles, etc. The teaching of these values or principles can only serve to benefit individuals passing through our school system... [It would seem logical that we should adopt a conservative program that would reinforce these basic values. [Emphasis added.]

II. Applicable Constitutional, Statutory and Regulatory Provisions

The First Amendment to the Constitution of the United States prohibits laws "respecting an establishment of religion."

Section 22.1-208, which you reference in your request, provides: "The entire scheme of instruction in the public schools shall emphasize moral education through lessons given by teachers and imparted by appropriate reading selections."

The FLE program is mandated in all Virginia public school divisions. See Op. to Hon. Steven H. Martin, H. Del. Mbr. (Mar. 31, 1989). A required provision for every FLE program is "[a]n 'opt-out' procedure ... to ensure communication with the parent or guardian for permission for students to be excused from all or part of the program." Board Educ.'s Response to H.B. No. 1413, infra note 1, at xv. See also 4 Va. Regs. Reg. S 7.21, at 2831 (Aug. 29, 1988).

III. Guideline Incorporating Secular Values of Our Founding Fathers Is Facially Constitutional

A statute, regulation or practice which touches upon religion is nonetheless constitutionally permissible if it has a secular, nonreligious purpose, its principal or primary effect neither advances nor inhibits religion, and excessive entanglement with religion is not fostered. Lemon v. Kurtzman, 403 U.S. 602 (1971). It is well-settled, however, that the content of the public school curriculum may not be used as a vehicle to promote religious belief. See Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating "Creationism Act" because it endorsed religion as its purpose); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (holding unconstitutional Alabama's moment-of-silence statute because it was "enacted ... for the sole purpose of expressing the State's endorsement of prayer activities"); Stone v. Graham, 449 U.S. 39 (1980) (invalidating the posting of the Ten Commandments on the walls of the public schools); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating state sponsored prayer in public schools).

In the course of adjudicating specific cases, [the Supreme Court of the United States] has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.


In the facts presented, it is my opinion that the first local guideline and its reference to "Judeo-Christian" are intended by the City of Manassas School Board to be an endorsement of time-honored basic values of our nation. This interpretation is supported, not only by the preamble to the guidelines, but also by the second local guideline, which provides that "the learning objectives teach the foundational values of honesty, love, patience, courtesy, courage, cheerfulness, abstinence, self-control and modesty." After a review of the material you provide, I cannot conclude that the first local guideline is designed to promote religious dogma in the public schools. If this were the case, the local guideline would be constitutionally infirm. The mere fact that these recognized secular values may harmonize with sectarian belief or creed, however, does not, by itself, establish a violation of the Establishment Clause. See Lemon, 403 U.S. at 612. Based on the above, it is further my opinion that the first local guideline is constitutional on its face.

IV. Remaining Guidelines Do Not Facialy Violate Constitutional or Statutory Requirements

A response to your second inquiry is difficult because of its broadness and absence of specific facts. A review of the remaining local guidelines indicates that they do not, on their face, violate the religious freedoms guaranteed by the federal or state constitutions, or § 22.1-208. As discussed above, care must be taken to ensure that the local guidelines are applied in a manner that respects individual constitutional rights. The "opt-out" procedure mandated for the FLE program is one safeguard; but due respect for, and accommodation of, religious freedom is essential.

The local guidelines additionally must be implemented in compliance with the Board of Education's ("State Board's") guidelines promulgated pursuant to § 22.1-207.1, which governs the FLE program. The State Board's guidelines provide, in part:

A. The Family Life Education program developed locally shall be comprehensive and sequential and include the following content areas and may include others at the discretion of the local school board:

1. Family living and community relationships;
2. The value of postponing sexual activity until marriage;
3. Human sexuality;
4. Human reproduction and contraception;
5. The etiology, prevention, and effects of sexually transmitted diseases;
6. Stress management and resistance to peer pressure;
7. Development of positive self concepts and respect for others, including people of other races, religions, or origins;
8. Parenting skills;
9. Substance abuse; and

Board Educ.'s Response to H.B. No. 1413, infra note 1, at xvi.

Section B-12 of the guidelines of the State Board provides that the "local curricu-
lum plan shall use as a reference the Family Life Education Standards of Learning objec-
tives approved by the Board of Education and shall provide age-appropriate instruction in
relation to students' developmental stages and abilities." Id. at xvii. The State Board's
guidelines detail several learning objectives for the elementary grades. In part, these
guidelines call for appropriate and sequential instruction on puberty development, human
anatomy and function. Sensitive to concerns of age and gender, these guidelines permit a
"plan for teaching sensitive content in sex-separated classes [which] shall be announced
publicly." Id.

The third guideline of the Manassas School Board provides that the family life
learning objectives must "contain no sexually explicit material for the elementary
grades." It is unclear what is meant or intended by "sexually explicit material." While the
prohibition of materials depicting lewd or explicit sex acts certainly would be proper,
this local guideline may not be applied in a manner which prevents the realization of the
learning objectives for the elementary grades established by the State Board. Parents
who find these learning objectives objectionable, whether in sex-separated classes or not,
may exercise their right to "opt out" of all or part of the family curriculum, as provided
by the State Board's guidelines.

1The Board of Education guidelines governing family life education provide:
"1. A community involvement team shall be identified and should include individuals
such as a person from the central office, an elementary school principal, a middle school
principal, a high school principal, teachers, a school board member, parents, one or more
members of the clergy, a member of the medical profession, and others in the
community.

"2. There must be evidence of broad-based community involvement and an annual
opportunity for parents and others to review curriculum and instructional materials prior
to the beginning of actual instruction." Bd. Educ.'s Response to H.B. No. 1413, Family

2Caution must be exercised, however, to ensure that the local guidelines are not
applied to violate the First Amendment.

EDUCATION: PUPIL TRANSPORTATION.

Factual considerations necessary in determining whether age bona fide occupational
qualification for school bus drivers in Commonwealth.

April 19, 1989

The Honorable Peter H. Luke
Commonwealth's Attorney for Rappahannock County

§ 623(a)(1) (1985), a portion of the federal Age Discrimination in Employment Act of
1967 ("ADEA").1
I. Applicable State and Federal Statutes

Section § 22.1-178 details the qualifications for school bus drivers in the Commonwealth and provides:

A. No school board shall hire, employ, or enter into any agreement with any person for the purposes of operating a school bus transporting pupils unless the person proposed to so operate such school bus shall:

* * *

(5) Have reached the age of sixteen and not have reached the age of seventy on the first day of the school year.

Title 29 U.S.C.A. § 623(a) (1985) provides, in part:

It shall be unlawful for an employer--

(1) to fail or refuse to hire ... any individual ... because of such individual's age.

II. ADEA Prohibits Age Discrimination Unless Age Is Bona Fide Occupational Qualification

The ADEA generally prohibits employers from discriminating on the basis of age against employees who are above the age of forty with regard to the terms and conditions of their employment, except when age is shown to be a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of the particular business. See 29 U.S.C.A. §§ 623(f)(1), 631(a) (West 1985 & Supp. 1989).

III. Insufficient Facts Presented to Determine BFOQ Issue

A. Two-Pronged Test Used to Determine Whether Age Is BFOQ

The courts have adopted a two-pronged test for determining when age is a BFOQ. Under this test, an employer must first prove the existence of job qualifications "reasonably necessary to the essence of [its] business." E.E.O.C. v. Com. of Pa., 768 F.2d 514, 518 (3d Cir. 1985). The employer next must prove that he has reasonable cause, i.e., a factual basis, for believing that either (a) all or substantially all persons in the excluded age group would be unable to perform safely and efficiently the duties of the job involved, or (b) that it is impossible or impractical to make individualized determinations of the capabilities of persons in the excluded group. Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).

Whether age is a BFOQ for a given occupation, therefore, is a question of fact to be determined on a case-by-case basis. See 29 C.F.R. § 1625.8(a) (1988). The fact that one court or state has determined that age is a BFOQ for bus drivers does not relieve another from the need to provide the facts necessary to satisfy the federal requirement. Calvin v. State of Vermont, 598 F. Supp. 144 (D.C. Vt. 1984). The two-pronged test is designed to allow age to be used as a BFOQ only in light of a particularized factual showing with regard to each element of the test. Johnson v. Mayor & City Council of Baltimore, 472 U.S. 353 (1985).

B. Certain Factual Considerations Necessary

The Supreme Court of the United States has indicated that certain factual considerations are necessary in a BFOQ determination, including:
1. the nature of the tasks required by the job;
2. the physiological and psychological traits required to perform those tasks;
3. the availability of those traits among persons in the targeted age group;
4. the actual capabilities of persons in the targeted group; and
5. the ability to detect disease or a precipitous decline in the faculties of employees in the targeted group.


The majority of the foregoing factual determinations can be established only with the aid of competent medical evidence. In the absence of this expert factual evidence, or any information on whether the necessary facts were considered by the General Assembly in its enactment of § 22.1-178(A)(5), I am unable to determine, as a matter of law, whether age is a BFOQ for school bus drivers in the Commonwealth. For this reason, I also am unable to determine whether § 22.1-178(A)(5) violates 29 U.S.C.A. § 623(a)(1).

2Air Line Pilots Ass'n v. Trans World Airlines, 713 F.2d 940, 954 (2d Cir. 1983).

EDUCATION: SCHOOL BOARDS; SELECTION, ETC.
COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER — GENERAL.

Police captain considered employee rather than officer; eligible for appointment to school board.

January 10, 1989

The Honorable William C. Wampler Jr.
Member, Senate of Virginia

You ask whether a police captain in the City of Bristol (the "City") is eligible to be appointed to, or to serve as a member of, the school board of the City.


Section 22.1-30 of the Code of Virginia provides, in part, that "[n]o state, county, city or town officer, no deputy of any such officer, no member of the governing body of a county, city or town . . . may, during his term of office, be appointed or serve as a member of the school board for such county, city or town."

Section 54 of the Charter for the City of Bristol (the "Charter") authorizes the City Council to appoint the members of the school board. See Ch. 62, 1977 Va. Acts 82, 84-85. Section 4(33) of the Charter authorizes the City to maintain a police department. See Ch. 581, 1954 Va. Acts 737, 744. Section 71 sets out the powers of policemen serving the City. See Ch. 57, 1985 Va. Acts 70, 72-73.
II. In Facts Presented, Police Captain Is Employee, Rather Than Officer, of City; Eligible for Appointment to School Board

The question presented by your inquiry is whether a police captain is an officer of the City within the prohibition of § 22.1-30.

A prior Opinion of this Office construing § 22.1-30 and its predecessor statutes recognizes that the term "officer" is used in these statutes "to distinguish between an officer of government and an employee of government in applying the prohibition against public officers serving on school boards, with employees being allowed to serve if they are otherwise qualified." 1984-1985 Att'y Gen. Ann. Rep. 276. For purposes of § 22.1-30,

[a]n officer is distinguished from an employee in the greater importance and independence of the position and by the authority to direct and supervise; a public office is a position created by the Constitution or by statute, with a fixed term ... being a frequent characteristic; and, where the position is created by administrative action, it does not rise to the level of an office.


Applying these criteria, prior Opinions conclude that the state director of a federal program and a state forest warden are not officers for the purposes of § 22.1-30. See Att'y Gen. Ann. Rep.: 1982-1983 at 392 (State Director of federal Community Services Block Grant Program); 1974-1975 at 373 (state forest warden). Other Opinions conclude that a county social services board member, a local welfare board member, and a city attorney are officers subject to the prohibition of § 22.1-30. See Att'y Gen. Ann. Rep.: 1981-1982 at 294 (county social services board member); id. at 322 (local welfare board member); 1972-1973 at 471 (city attorney).


In this instance, the Charter authorizes the maintenance of a police department and specifies the powers and duties of policemen. See also §§ 15.1-13, 15.1-131.7, 15.1-138. No provision of the Charter, however, authorizes the direct appointment by the City Council of police captains, nor does the Charter provide for the position of police captain or for any term of office. In these circumstances, it is my opinion that a police captain is an employee, rather than an officer, of the City for purposes of § 22.1-30. It is further my opinion, therefore, that a police captain of the City is eligible to be appointed to, and to serve on, the school board of the City.

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1The Charter was first enacted in Ch. 309, 1920 Va. Acts 432, and has been amended repeatedly since its original enactment.

2See former §§ 22-69, -92.
Board of supervisors holds title to school property; school board has constitutional supervisory responsibility over school property for school purposes; board of supervisors otherwise may manage school property.

February 9, 1989

The Honorable Robert E. Russell Sr.
Member, Senate of Virginia

You ask whether the Chesterfield County Board of Supervisors (the "board of supervisors") or the Chesterfield County School Board (the "school board") has the final authority and control over the use of school property in Chesterfield County during periods when school-related programs are not being conducted.


Article VIII, § 7 of the Constitution of Virginia (1971) provides that "[t]he supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."

Section 22.1-125(A) of the Code of Virginia provides, in part, that "[t]he title to all school property, both real and personal, within a school division shall be vested in the school board." Section 22.1-131, pertaining to the use of school property, provides, in part:

A school board may permit the use, upon such terms and conditions as it deems proper, of such school property as will not impair the efficiency of the schools. The school board may authorize the division superintendent to permit use of the school property under such conditions as it deems proper. The division superintendent shall report to the school board at the end of each month his actions under this section.

Section 22.1-132, pertaining to conditions which school boards may impose on the use of school property, provides:

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

Chesterfield County's charter was enacted by the 1987 Session of the General Assembly. Chapter 12, 1987 Va. Acts 21 (Reg. Sess.). Section 8.2 of Chapter 8 of the charter, pertaining to public education, provides:

The administration of the public school system shall remain the responsibility of the school board in accordance with the Constitution and general laws of the Commonwealth. The superintendent shall be appointed by a majority vote of the school board members. The superintendent of schools shall be responsible for providing in a timely fashion to the county administrator all financial documents, long-term projections and other materials that the county administrator and the board deem necessary to make appropriate decisions regarding budget and appropriation decisions by the board of supervisors. The County of Chesterfield shall receive state aid for education in the same manner as existed prior to the adoption of the charter. Title to all real property of the school system shall be vested in the County of Chesterfield. [Emphasis added.]
Section 3.5 of Chapter 3 of the charter details the authority of the board of supervisors and provides, in part:

The board of supervisors shall be the policy determining body of the county and shall be vested with all rights and powers conferred on governing bodies by general law not inconsistent with this chapter. All powers vested in the county by this charter, and to counties generally by the Code of Virginia, shall be exercised by the board collectively except as otherwise provided in this charter, or in the Constitution of Virginia. In addition to the foregoing, the board shall have the following powers:

a. To control and manage the fiscal affairs of the county and all property, real and personal, belonging to the county.

II. Board of Supervisors Holds Title to School Property; School Board Has Constitutional Supervisory Responsibility Over School Property for School Purposes; Board of Supervisors Otherwise May Manage School Property

Article VIII, § 7, in plain language, vests in the local school board the "supervision of schools." "In such supervision it is an essential function of the local board to determine whether a particular property is needed for school purposes and the manner in which it shall be used." Howard v. School Board, 203 Va. 55, 58, 122 S.E.2d 891, 894 (1961).

Although § 22.1-125(A) provides that "title to all school property ... shall be vested in the school board," § 8.2 of the Chesterfield County charter vests title to all real property of the school system in the County of Chesterfield, and § 3.5 of the charter gives the board of supervisors the authority "[t]o control and manage ... all property, real and personal, belonging to the county." When 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 construed, if reasonably possible, to allow both to stand and to give force and effect to each. Scott v. Lichford, 164 Va. 419, 422-23, 180 S.E. 393, 394 (1935); Kirkpatrick v. Bd of Supervisors, 146 Va. 113, 125, 136 S.E. 186, 190 (1926). See also Att'y Gen. Ann. Rep.: 1986-1987 at 40, 41; 1983-1984 at 212, 213; 1982-1983 at 657, 659; 1976-1977 at 102, 104. It is my opinion, therefore, that the provisions of § 8.2 of the Chesterfield County charter are an exception to the general rule in § 22.1-125(A) concerning who holds title to the real estate of the public school system. Pursuant to § 8.2 of the Chesterfield County charter, the board of supervisors holds title to school property.

It is possible, however, to reasonably construe the general and special provisions of law with respect to the management and use of this school property to allow both to have force and effect in Chesterfield County. The school board has the constitutional responsibility to supervise the public schools in the county and to determine whether school property is needed for school purposes, and, if so, the manner in which the school property will be used. See Va. Const. Art. VIII, § 7; Howard, 203 Va. at 58, 122 S.E.2d at 894.
If the school board determines that school property is not needed for school purposes and that the use of that property will not interfere with the normal operation of the public schools in the county, it is my opinion that §§ 3.5 and 8.2 of the Chesterfield County charter grant the authority to manage this school property, titled in the name of the county, to the board of supervisors.

EDUCATION: SCHOOL PROPERTY — POWERS AND DUTIES OF SCHOOL BOARDS — PUBLIC SCHOOL FUNDS.

CONSTITUTION OF VIRGINIA: EDUCATION - SCHOOL BOARDS.

COUNTIES, CITIES AND TOWNS: BUILDINGS, MONUMENTS AND LANDS GENERALLY.

Once school board determines real property in county necessary for school purposes, board of supervisors may not interfere with constitutional responsibility of board and vote to reject conveyance of property to county; statutory requirements concerning transfer of property merely formal. Attorney retained by school board may conduct closings; school board may condemn real property for school purposes.

September 7, 1989

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

You ask several questions concerning the acquisition of real property by the Chesterfield County School Board (the "school board"). Specifically, you ask (1) whether the Chesterfield County Board of Supervisors (the "board of supervisors") may vote to accept or reject the deed to real property acquired by the school board and, if so, upon what grounds the deed may be rejected; (2) whether an attorney retained by the school board may conduct closings; school board may condemn real property for school purposes.


Article VIII, § 7 of the Constitution of Virginia (1971) provides that "[t]he supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."

Although § 22.1-125(A) of the Code of Virginia generally provides, in part, that "[t]he title to all school property, both real and personal, within a school division shall be vested in the school board," § 8.2 of Chapter 8 of the Chesterfield County Charter provides that "[t]he title to all real property of the school system shall be vested in the County of Chesterfield." Chapter 12, 1987 Va. Acts 21, 31 (Reg. Sess.).

Section 15.1-286 provides, in part:

Every deed purporting to convey real estate to a county shall be in a form approved by the county attorney for the county to which such conveyance is made .... No such deed shall be valid unless accepted by the county, which acceptance shall appear on the face thereof and shall be executed by a person authorized to act on behalf of the county pursuant to a resolution duly adopted by the governing body of such county ....
Section 22.1-82 authorizes a local school board to retain legal counsel. Section 22.1-128 further provides that "[w]henever any school board purchases real estate or acquires title thereto, the title to such real estate shall be certified in writing by a competent and discreet attorney-at-law selected by the school board . . . ."

Section 22.1-127 provides, in part:

A school board shall have the power to exercise the right of eminent domain and may condemn land or other property or any interest or estate therein . . . necessary for public school purposes pursuant to the provisions of Chapter 1.1 (§ 25-46.1 et seq.) of Title 25 of this Code.

II. Once School Board Determines Property Necessary for School Purposes, Supervisors May Not Reject Conveyance; Statutory Requirements Are Merely Formal

A prior Opinion of this Office concludes that the school board has the constitutional responsibility to supervise the public schools in the county, and to determine whether school property is needed for school purposes and, if so, the manner in which the school property will be used. See Op. to Hon. Robert E. Russell Sr., Va. Sen. (Feb. 9, 1989). "In such supervision it is an essential function of the local [school] board to determine whether a particular property is needed for school purposes and the manner in which it shall be used." Howard v. School Board, 203 Va. 55, 58, 122 S.E.2d 891, 894 (1961). See also Bristol Virginia School Board v. Quarles, 235 Va. 108, 119, 366 S.E.2d 82, 88 (1988) (school board has constitutional and statutory mandate to supervise schools in local school division).

The provision of § 15.1-286 requiring the acceptance by the county of real estate conveyances, on its face, appears to conflict with the constitutional, supervisory responsibility of school boards for the location of public school property. It is an accepted rule of statutory construction that, when a statute is fairly susceptible to more than one interpretation, the interpretation most consistent with constitutionality should be adopted. Waterman's Assoc. v. Seafood Inc., 227 Va. 101, 314 S.E.2d 159 (1984).

As quoted above, § 15.1-286 provides that deeds conveying real estate to the county must be approved by the county attorney as to form and must show an "acceptance" by the county on the face of the deed. Once the school board has determined that certain real estate in the county is necessary for school purposes, it is my opinion that the board of supervisors may not interfere with this constitutional responsibility of the school board and vote to reject the conveyance of the property to the county. It is further my opinion that the requirements in § 15.1-286 that the form of a deed be approved by the county attorney and that the conveyance be accepted by the county, in these circumstances, merely are formal rather than substantive legal requirements for the transfer of school property to the county.

III. School Board Attorney May Conduct Closing on School Property; School Board Has Statutory Authority to Condemn Property

Section 22.1-82(A) clearly authorizes the school board to employ legal counsel "to advise it concerning any legal matter," "[n]otwithstanding any other provision of law." The mere fact that the county attorney approves the deed for any conveyance of land to the county as to form in no way precludes the school board attorney from conducting the closing on real property acquired by the school board for school purposes. Based on the above, it is my opinion, that an attorney retained by the school board may conduct the closing on real property acquired by the school board.
Section 22.1-127 also is clear in its authorization for a local school board to condemn real estate. It is my opinion, therefore, that the school board may condemn real property for school purposes.

I assume, for purposes of this Opinion, that the property acquisition is supported by a budget appropriation. Section 22.1-91 provides, in part, that "[n]o school board shall expend or contract to expend, in any fiscal year, any sum of money in excess of the funds available for school purposes for that fiscal year without the consent of the governing body or bodies appropriating funds to the school board."

EDUCATION: STANDARDS OF QUALITY — TEACHERS, OFFICERS AND EMPLOYEES.

PROFESSIONS AND OCCUPATIONS: NURSING.

CONSTITUTION OF VIRGINIA: EDUCATION.

Authority to approve nursing programs in public schools lies with Board of Nursing, provided said programs meet general educational requirements established by Board of Education.

June 22, 1989

The Honorable Shirley F. Cooper
Member, House of Delegates

You ask whether it is the responsibility of the State Board of Education or the Virginia State Board of Nursing to approve nursing programs offered through public schools in the Commonwealth.

I. Applicable Constitutional and Statutory Provisions

A. Board of Education

Article VIII, § 4 of the Constitution of Virginia (1971) provides that the general supervisory authority of the public school system in the Commonwealth is vested in the Board of Education. Article VIII, § 5(e) further provides that, "[s]ubject to the ultimate authority of the General Assembly, the Board [of Education] shall have primary responsibility and authority for effectuating the educational policy set forth in this Article, and it shall have such other powers and duties as may be prescribed by law."

The Board of Education has been granted the statutory authority to set public school accreditation standards which establish requirements and guidelines for instructional programs. See § 22.1-253.13:3(B) of the Code of Virginia. The Board of Education is further authorized to prescribe requirements for the certification of public school teachers. See §§ 22.1-253.13:3(C), 22.1-298, 22.1-299.

B. Board of Nursing

In addition to having the general statutory powers and duties for health regulatory boards set forth in $ 54.1-2400, the Board of Nursing has been granted the following specific powers and duties in $ 54.1-3005:
1. To prescribe minimum standards and approve curricula for educational programs preparing persons for licensure under this chapter [Chapter 30 of Title 54.1];

2. To approve programs that meet the requirements of this chapter and of the Board [of Nursing];

* * *

5. To deny or withdraw approval from educational programs for failure to meet prescribed standards . . .

Section 54.1-3013 provides, in part:

An institution desiring to conduct a nursing education program to prepare professional or practical nurses shall apply to the Board [of Nursing] and submit evidence that:

1. It is prepared to meet the minimum standards prescribed by the Board [of Nursing] for either a professional nursing curriculum or a practical nursing curriculum; and

2. It is prepared to meet such other standards as may be established by law or by the Board [of Nursing].

. . . If, in the opinion of the Board [of Nursing], the requirements necessary for approval are met, [the institution] shall be approved as a nursing education program for professional or practical nurses.

Section 54.1-3014 provides, in part:

If the Board [of Nursing] determines that any approved nursing education program is not maintaining the required standards, notice in writing specifying the deficiencies shall be immediately given to the institution conducting the program.

A program which fails to correct these deficiencies to the satisfaction of the Board [of Nursing] shall be discontinued after a hearing in which such facts are established.

II. Approval of Public School Nursing Program Is Shared Responsibility

It is clear from the statutes quoted above that the General Assembly generally has authorized the Board of Education to set standards for educational programs offered in the public schools of the Commonwealth and to establish certification requirements for public school teachers. The specific authority to prescribe standards for, and to approve, nursing education programs in Virginia's public schools, however, has been granted to the Board of Nursing. The approval process about which you inquire, therefore, has been structured by the General Assembly as a shared responsibility. Based on the above, it is my opinion that public school nursing education programs must meet whatever general educational requirements are established by the Board of Education for nursing programs, in addition to obtaining approval from the Board of Nursing for the curriculum and other matters outlined in §§ 54.1-3005 and 54.1-3013.
Public officer may not be removed for acts of misconduct committed during prior term; evidence of prior term acts of misconduct may be admissible in evidence in connection with charges of misconduct brought against officer during present term.

January 25, 1989

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

You ask several questions concerning the operation of Article 1.1, Chapter 6 of Title 24.1, §§ 24.1-79.1 through 24.1-79.10 of the Code of Virginia ("Article 1.1").

I. Applicable Statutes

Article 1.1 establishes a uniform procedure for the removal of all state and local officers, elected or appointed, except those officers whose removal from office specifically is provided for in the Constitution of Virginia. See § 24.1-79.1. Section 24.1-79.5 provides:

Upon a petition, filed with a circuit court, such court may remove from office any state, county, city, town and district officers who are elected or who have been appointed to fill an elective office; when such officer resides within the jurisdiction of the court, and §§ 24.1-79.2, 24.1-79.3 and 24.1-79.4 are not applicable to such officer; for incompetency, neglect of duty or misuse of office when such incompetency, neglect of duty or misuse of office has a material adverse effect upon the conduct of such office. Such petition must be signed by a number of registered voters who reside within the jurisdiction of such officer which is equal to ten per centum of the total number of votes cast for such office which the officer holds when he was last elected.

Section 24.1-79.7 provides, in part:

Such petitions, as provided for in §§ 24.1-79.5 and 24.1-79.6, shall state with reasonable accuracy and detail the grounds or reasons for removal of the officer against whom the petition is filed and shall be signed by the person or persons making it under penalties of perjury. As soon as the petition is filed with the court, the court shall forthwith cause a rule to be issued, requiring the officer complained of to show cause, if he can, why he should not be removed from office, the rule alleging in general terms the cause or causes for such removal.

Section 24.1-79.9 provides that, in such a removal proceeding, the Commonwealth's attorney shall represent the Commonwealth.

Article 1.1 does not provide for any penalty other than removal. An officer removed under § 24.1-79.5 is not disqualified from serving in the same or another office if the officer is elected or appointed to a subsequent term.
II. Supreme Court of Virginia Has Adopted Strict Construction of Prior Removal Statute

You first ask whether an act of misconduct by a public officer during a prior term of office may be used as evidence in charges brought against the officer during his current term.

Section 24.1-79.5 authorizes the removal of a public officer "for incompetency, neglect of duty or misuse of office when such incompetency, neglect of duty or misuse of office has a material adverse effect upon the conduct of such office." This statute does not expressly provide for the relevancy of evidence indicating acts of misconduct committed during a prior term to charges brought against a public officer during a present term.

In Virginia, reported decisions involving the removal of officers generally involve alleged acts of misconduct committed during the officer's present term. See, e.g., Commonwealth v. Malbon, 195 Va. 368, 369, 78 S.E.2d 683, 685 (1953); Warren v. Commonwealth, 136 Va. 573, 576, 118 S.E. 125, 126 (1923); Cutchin v. Roanoke, 113 Va. 452, 476, 74 S.E. 403, 408 (1912). In Barbee v. Murphy, 149 Va. 406, 417, 141 S.E. 237, 240 (1928), the Supreme Court of Virginia affirmed the removal of a county sheriff. In reaching its decision, however, the Court stated that the trial court should have sustained the defendant's demurrer because the removal petition, as originally filed, did not allege that the acts of misconduct occurred during the sheriff's present term of office. 149 Va. at 413, 141 S.E. at 239. The error was cured by the filing of an amended petition specifying that the acts of misconduct occurred during the sheriff's present term. Id. By implication, therefore, the Court adopted a strict construction of the then-existing removal statute requiring that official misconduct establishing a basis for removal must have occurred during the officer's present term. Accord State ex rel. Turner v. Earle, 295 So. 2d 609 (Fla. 1974) (public officer may not be disciplined or removed for misconduct occurring during prior term).

III. Evidence of Acts of Misconduct During Prior Term May Be Admissible for Limited Purposes in Connection with Charges Brought Against Officer During Present Term, Depending upon Particular Facts

As a basis for removal, § 24.1-79.5 specifies incompetency, neglect of duty, or misuse of office when the alleged misconduct has a material adverse effect upon the conduct of the office. Giving § 24.1-79.5 the required strict construction, and considering the rule adopted by implication in Barbee, as well as other relevant authorities, it is my opinion that acts of official misconduct committed during a prior term may not serve as the basis for removing an officer during a subsequent term. It is further my opinion, however, that acts of misconduct committed during a prior term may be admissible in evidence in a removal proceeding in a subsequent term in the appropriate factual context.

The manifest purpose of Article 1.1 is to protect the public by providing a means to maintain the integrity and efficiency of public offices. An officer may be removed only for specified types of misconduct when such misconduct has a material adverse effect upon the conduct of the office. Given the plethora of factual situations that can arise in a removal proceeding, it is impossible to conclude that acts of misconduct committed during a prior term could never be relevant to a court's determination of whether acts committed during a present term, or acts which continue to have effect in a present term, establish a material adverse effect on the conduct of the office. The court in such a proceeding, of course, will be guided by applicable rules of evidence concerning the particular facts before it. See Smith v. Godby, 154 W. Va. 190, 174 S.E.2d 165 (1970) (conduct in prior term admissible to show general course or pattern of conduct).
IV. Registered Voters Not Required to Sign Removal Petition Under Penalties of Perjury

You next ask whether the charges of misconduct stated in a removal petition must be signed under penalties of perjury by the registered voters who sign the petition.

Section 24.1-79.5 requires that a removal petition must be signed by a number of registered voters equal to ten percent of the votes cast for the office held by the officer when last elected. Section 24.1-79.7 first requires that a removal petition must "state with reasonable accuracy and detail the grounds or reasons for removal of the officer." Section 24.1-79.7 also requires that the person or persons making the petition sign the petition under penalties of perjury. The question presented by your inquiry, therefore, is whether the registered voters signing a removal petition pursuant to § 24.1-79.5 are persons "making" the petition within the meaning of § 24.1-79.7.

The statutory process detailed in §§ 24.1-79.5 and 24.1-79.7 outlines three distinct requirements concerning a removal petition. It is my opinion that the registered voter signature requirement is intended to ensure that there is a substantial level of public knowledge of, and credence given to, the removal petition and the grounds stated in the petition. The requirement in § 24.1-79.7 that the removal petition contain an accurate and detailed statement of the grounds for removal is intended to ensure that both the officer who is the subject of the petition and the public are provided a specific statement of the grounds for removal so that the officer may respond adequately to the charges, and members of the public may determine whether to support the petition by adding their signatures. The final requirement in § 24.1-79.7, that the removal petition be signed under penalties of perjury "by the person or persons making it," in my opinion, is intended to protect the officer against frivolous or unsubstantiated charges.

The language in § 24.1-79.7 requiring the statement of the grounds for removal to be verified by the person or persons making the petition is inconsistent with the application of the verification requirement to all registered voters who sign the petition. Section 24.1-79.7 expressly contemplates that a single person may verify the petition. Additionally, applying the verification requirement to all registered voters who sign a removal petition would effectively foreclose the possible use of the removal procedure, because it would be extraordinarily unlikely that the required number of signatures could be collected if every person signing the petition were required to comply with the verification requirement. It is further my opinion, therefore, that the language of § 24.1-79.7 concerning the person or persons making a removal petition refers to the person or persons responsible for drafting the statement of the grounds for removal. This conclusion is consistent with the language of § 24.1-79.7 and operates to protect officers from frivolous or unsubstantiated charges by potentially subjecting the person or persons responsible for making such charges to prosecution for perjury. It is further my opinion, therefore, that registered voters who sign a removal petition are not required to do so under penalties of perjury.

V. Circuit Court Which Receives Removal Petition May Refer Petition to Grand Jury Where Statement of Grounds for Removal Indicates Alleged Official Miseonduct That Involves or Tends to Promote Criminal Activity

Your final question is whether a court which receives a removal petition may refer the petition to a grand jury.

Article 1.1 does not expressly provide for the referral of a removal petition to a grand jury. Sections 24.1-79.7 through 24.1-79.9 do provide for specific procedures, including the precedence of a removal proceeding over all other cases on the docket of the court.
Section 19.2-191 specifies the functions of a grand jury, which include the investigation and report on any condition that involves or tends to promote criminal activity by any governmental authority, agency or official. See § 19.2-191(2). Section 19.2-200 further specifies the duties of a grand jury to include inquiries into violations of penal laws. Section 19.2-206 authorizes a circuit court to impanel a special grand jury. I am unaware of any statute that expressly authorizes a grand jury to investigate the noncriminal conduct of a public officer or to embark on investigations of noncriminal matters. See generally 3 H. & S. Dox., Report of the Virginia State Crime Commission on the Grand Jury System in Virginia (Interim Report), S. Doc. No. 37 (1975 Sess.).


In Cutchin v. Roanoke, the Supreme Court of Virginia affirmed the removal of a municipal mayor. 113 Va. at 478, 74 S.E. at 409. In Cutchin, the removal proceeding was initiated after a special grand jury made a report tending to show misfeasance, malfeasance, and gross neglect of duty on the part of the mayor. The appellant asserted that the grand jury had transcended its duty in reporting on the mayor's conduct. The Court dismissed this assertion of error and affirmed the propriety of the grand jury proceeding. In reaching its decision, the Court relied on the common law authority of a grand jury to make inquiries into potential instances of misfeasance in office. Id.

It is my opinion, however, that the decision of the Court in Cutchin should not be read as generally authorizing a grand jury investigation into noncriminal matters related to an official's conduct in office. In Cutchin, the Court specifically relied on a grand jury's authority to investigate misfeasance in office, potentially a criminal offense. Section 19.2-191(2) authorizes a grand jury to investigate official conduct which involves or promotes criminal conduct. In my opinion, however, § 19.2-191(2) does not authorize a grand jury to investigate the noncriminal conduct of a public officer who is the subject of a removal petition. It is my opinion, therefore, that a circuit court receiving a removal petition may refer the petition to a grand jury for investigation and report when the statement of the grounds for removal indicates that the official misconduct alleged involves or tends to promote criminal activity by the officer who is the subject of the petition.

ELECTIONS: FAIR ELECTIONS PRACTICES ACT.

Application of Act's financial reporting requirements to committees that promote or oppose ballot questions. Requirements imposed by Act on ballot question advocacy groups constitutional.

June 1, 1989

The Honorable Madison E. Marye
Member, Senate of Virginia

You ask whether the Fair Elections Practices Act, §§ 24.1-251 through 24.1-263 of the Code of Virginia (the "Act"), applies to civic groups that support or oppose referenda submitted to the people by local governments. Your specific concern is whether civic groups engaged in supporting or opposing referendum questions are subject to the financial reporting requirements of the Act.
Section 24.1-255 provides, in part:

Any committee, as defined in § 24.1-254.1, (i) which expends any funds in excess of $500 for a statewide election or $100 for any one other election for the purpose of influencing the outcome of any election, or (ii) which publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate, or for the purpose of promoting or opposing a referendum, proposition, constitutional amendment, or other question submitted to the voters, shall maintain records and report all such receipts and disbursements of moneys, services, or other things of value over $100 pursuant to this chapter [Chapter 9 of Title 24.1]. [Emphasis added.]

Section 24.1-254.1(a) provides:

The term 'committee' as used herein shall include each person, association, organization, group of individuals, political action committee, or other committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding $100, but shall not include a candidate's campaign committee or a political party committee. Each committee shall file with the State Board of Elections a statement of organization, within 10 days after its organization or, if later, 10 days after the date on which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of $100. Each such committee in existence on July 1, 1975, shall file a statement of organization with the secretary of the Board at such time as he prescribes.

Section 24.1-257.1 details the schedule pursuant to which reports of contributions and expenditures must be filed by committees, as that term is defined in § 24.1-254.1(a). Section 24.1-257.2(A) provides that these committees must file these reports with the State Board of Elections. Section 24.1-258 details the form of the required reports of contributions and expenditures.

II. Section 24.1-255 Expressly Provides for Application of Act's Financial Reporting Requirements to Committees That Promote or Oppose Ballot Questions

Section 24.1-255 expressly requires that committees engaged in specified political activities "for the purpose of promoting or opposing a referendum, proposition, constitutional amendment, or other question submitted to the voters" maintain records and report receipts and disbursements over $100 pursuant to the Act. Section 24.1-254.1 defines the term "committee" as any person or group which anticipates receiving contributions or making expenditures exceeding $100 during the calendar year. The Act does not limit the contributions that a committee may receive or the expenditures that a committee may make, but only requires the disclosure of contributions and expenditures over $100. Based on the express language in § 24.1-255, therefore, it is my opinion that the Act's reporting requirements apply to civic groups that support or oppose referenda submitted to the voters by local governments, when these civic groups anticipate receiving contributions or making expenditures during a calendar year exceeding $100 for the purpose of promoting or opposing such referenda.
III. Prior Opinion Concludes Application of Financial Reporting Requirements to Ballot Question Advocacy Groups Unconstitutionally Abridges Protected Associational Freedoms

The Act was amended in 1975 to extend the reporting requirements to committees receiving contributions or making expenditures for the purpose of promoting or opposing ballot questions. See Ch. 515, 1975 Va. Acts 1042, 1068. A prior Opinion of this Office (the "Mahan Opinion") concludes that the application of the reporting requirements to these committees would violate the First Amendment of the Constitution of the United States. See 1976-1977 Att'y Gen. Ann. Rep. 64. The conclusion reached in the Mahan Opinion was based upon an extension of the principles established shortly prior to the Opinion by the Supreme Court of the United States in Buckley v. Valeo, 424 U.S. 1 (1976).

Since the Buckley decision was rendered, however, numerous courts have considered the application of financial reporting requirements to groups supporting or opposing local ballot questions. The decisions of these courts call into question the conclusion reached in the Mahan Opinion concerning the constitutionality of § 24.1-255 as this statute applies to committees that promote or oppose ballot questions. For the reasons discussed below, it is my opinion that the reporting requirements imposed by the Act on ballot question advocacy groups are constitutional, and the Mahan Opinion, therefore, is hereby overruled.

IV. Weight of Authority Supports Constitutionality of Financial Reporting Requirements Imposed on Ballot Question Advocacy Groups

The rights of persons to make political contributions and expenditures for political purposes are associational freedoms protected by the First Amendment. See Buckley, 424 U.S. at 25. The compelled disclosure of political contributions and expenditures infringes upon this protected associational right. Id. at 64. An infringement on protected associational rights in this context is subject to exacting judicial scrutiny and requires that a state demonstrate a sufficiently important interest and employ means closely drawn to avoid the unnecessary abridgment of associational freedoms. Id. at 25. In the context of financial disclosure requirements, the Constitution requires that there be a "substantial relation" between the identified governmental interest and the information required to be disclosed. Id. at 64. See also Michigan State Chamber of Commerce v. Austin, 832 F.2d 947, 949 (6th Cir. 1987); Let's Help Florida v. McCrory, 621 F.2d 195, 199 (5th Cir. 1980), aff'd mem. sub nom. Firestone v. Let's Help Florida, 454 U.S. 1130 (1982). Sufficiently important governmental interests supporting the compelled disclosure of contributions and expenditures will outweigh the potential infringement of protected associational rights. See Buckley, 424 U.S. at 66. See also Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 298-99 (1981).

In considering challenges to statutes restricting or requiring the disclosure of contributions and expenditures, courts have identified the governmental interests furthered by such statutes to include (1) preserving voter confidence in the integrity of the electoral and referendum process; (2) protecting against the deception of voters; (3) informing voters of the source of support or opposition to a referendum issue; (4) enabling voters to evaluate the information provided by, and arguments of, advocates of a particular position; and (5) promoting an alert and aware electorate. See generally Citizens Against Rent Control, 454 U.S. at 302-03 (Blackmun and O'Connor, JJ., concurring); First National Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1978); Austin, 832 F.2d at 949; N.J. El. Law Enf. Com'n v. Citizens, 107 N.J. 380, 386, 526 A.2d 1069, 1072 (1987); Iowans for Tax Relief v. Camp. Fin. Dis. Com'n., 331 N.W.2d 862 (Iowa), appeal dismissed, 464 U.S. 879 (1983).

State-imposed limits on contributions to groups formed to support or oppose ballot questions have been held to be an unconstitutional infringement upon protected associ-
national rights. See, e.g., Citizens Against Rent Control, 454 U.S. at 298-99; Austin, 832 F.2d at 950. The weight of authority, however, upholds the validity of statutory disclosure requirements imposed on these advocacy groups. See N.J. Election v. Citizens to Make Mayor-Coun., 208 N.J. Super. 583, 506 A.2d 773 (1986), revd on other grounds, 107 N.J. 380, 526 A.2d 1069 (1987); Iowa ns for Tax Relief, 331 N.W.2d 862. In addition, the Supreme Court of the United States has indicated unmistakably that disclosure requirements applied to ballot question advocacy groups do not necessarily unconstitutionally abridge protected First Amendment rights. See Citizens Against Rent Control, 454 U.S. at 299-300; First National Bank of Boston, 435 U.S. at 792 n.32. See also Austin, 832 F.2d at 950; Let's Help Florida, 621 F.2d at 200-01; C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir. 1978). But compare New York Civil Liberties U., Inc. v. Acito, 459 F. Supp. 75 (S.D.N.Y. 1978) (disclosure requirements applicable to ballot question advocacy groups unconstitutional on the grounds of substantial overbreadth).1

V. Application of Financial Reporting Requirements of Act to "Committees" That Promote or Oppose Ballot Questions Does Not Unconstitutionally Abridge Protected Associational Freedoms

It is well established that civic groups have a protected associational right to support or oppose referendum questions submitted to the voters by local governments. The right of these groups to receive contributions and to make expenditures, as well as the right of persons to contribute to these groups, is equally well established. The compelled disclosure of contributions and expenditures has been found to infringe upon these protected associational rights.

As discussed above, however, courts that have considered this issue generally have concluded that disclosure requirements serve important governmental interests related to the effective operation of the electoral process and that disclosure requirements are a closely drawn means to further these identified governmental interests. Absent a showing that the disclosure of contributions will expose contributors to harassment, the courts generally have held that the governmental interests furthered by the disclosure requirements outweigh the abridgment of protected associational freedoms.

The reporting requirements imposed by the Act on ballot question advocacy groups, in my opinion, are substantially related to the governmental interests that generally have been accepted by the courts. The Act does not limit contribution or expenditure amounts but requires only that contributions and expenditures over $100 be disclosed. The Act does not provide for an exception for groups that may be able to show that the disclosure of its contributors will expose the persons identified to harassment. The Supreme Court, however, has held that a blanket exemption for minor political parties is not required in order for a statute compelling the disclosure of contributors to survive a constitutional challenge. See Buckley, 424 U.S. at 72-74.

Based on the above, it is my opinion that the reporting requirements imposed by the Act on "committees" that promote or oppose ballot questions do not unconstitutionally abridge the protected associational freedoms of such committees, their members or their contributors.

1 The Supreme Court, however, has indicated that the application of disclosure requirements to certain groups may be unconstitutional when such groups can establish a reasonable probability that the compelled disclosure of contributors will subject those persons identified to harassment. See Brown v. Socialist Workers '74 Camp. Comm., 459 U.S. 87 (1982); Buckley v. Valeo, 424 U.S. at 68. See also Iowa ns for Tax Relief, 331 N.W.2d at 869; Messerli v. State, 626 P.2d 81, 89 (Alaska 1980); New York Civil Liberties U., Inc., 459 F. Supp. at 88. In the appropriate circumstances, therefore, the appli-
cation of the Act's reporting requirements to ballot question advocacy groups could be held unconstitutional if a group could demonstrate a reasonable probability that any contributors identified would be subject to harassment because of the disclosure of their contributions.

ELECTIONS: QUALIFICATIONS OF VOTERS AND REGISTRATION.

Registration of ill or disabled persons at place of abode. Certification of applicant's illness or disability by accredited religious practitioner.

November 2, 1989

The Honorable Jack Kennedy
Member, House of Delegates

You ask several questions concerning the operation of § 24.1-49.1 of the Code of Virginia.

I. Applicable Statute

Section 24.1-49.1 provides, in part:

Any person who is unable to apply to register in person at the office of the general registrar due to continuing illness or physical disability may request that the registrar or an assistant registrar come to his place of abode for the purpose of taking his application for registration. His request shall be in writing and accompanied by a statement signed in the presence of two subscribing witnesses that he is unable to leave his place of abode for the purpose of applying for registration and that such illness or disability has existed continuously for at least thirty days. Such statement shall be on a form prescribed by the State Board of Elections and signed by his physician or his accredited religious practitioner. [Emphasis added.]

II. Term "Accredited Religious Practitioner" Refers to Person Trained in Healing Arts and Accredited by Religious Order

You first ask whether § 24.1-49.1 permits a minister to execute the statement of illness or disability as an "accredited religious practitioner."

The focus of § 24.1-49.1 is on the physical disability or continuing illness of an applicant for voter registration. Section 24.1-49.1 was enacted by the 1982 Session of the General Assembly and does not define the term "accredited religious practitioner." In a contemporaneous interpretation dated July 15, 1982, the State Board of Elections advised general registrars that the statement referenced in § 24.1-49.1 "[m]ust be signed by the applicant's physician or, if the applicant's religious beliefs do not permit him to be attended by a physician, by an accredited religious practitioner." The same language appears in Chapter A-X of the General Registrar's Handbook at A-X-1 (rev. 1987).

Several religious orders, including Christian Scientists, rely on spiritual healing, rather than on the traditional practice of medicine. This practice of spiritual healing is exempted from otherwise applicable regulations governing the practice of medicine and other healing arts. See § 54.1-2901(14). Christian Scientists, for example, have institutionalized the practice of spiritual healing through religious, educational and accreditation requirements. See 2 C. Lippy & P. Williams, Encyclopedia of the American Religious

As noted above, the eligibility for at-home voter registration is conditioned on the continuing illness or physical disability of the applicant. This continuing illness or physical disability must be certified by the applicant's physician or accredited religious practitioner. Section 24.1-49 uses the term "accredited religious practitioner"; the statute does not refer to ordained ministers or other persons authorized to conduct religious ceremonies or rituals. It is my opinion that the reference to the term "accredited religious practitioner" refers to a person who has been trained in spiritual healing or the other healing arts and has been accredited by a formal religious order. It is further my opinion, therefore, that a minister, ordained or otherwise, who has not been trained in spiritual healing or the other healing arts and who is not so accredited by a formal religious order, is not an "accredited religious practitioner" within the meaning of § 24.1-49.1.

III. Section 24.1-49.1 Establishes No Preference Between Physicians or Accredited Religious Practitioners for Certification of Applicant's Physical Condition

You next ask whether § 24.1-49.1 establishes a preference between a physician or an accredited religious practitioner for the purpose of certifying the continuing illness or physical disability of an applicant for at-home registration.

Section 24.1-49.1 uses the word "or" and, therefore, refers to physicians and accredited religious practitioners in the disjunctive. In my opinion, this reference establishes no preference between physicians or accredited religious practitioners. It is my opinion, therefore, that if an applicant for at-home voter registration is being treated by both a physician and an accredited religious practitioner, either may certify the continuing illness or physical disability of the applicant.

1Ch. 650, 1982 Va. Acts 1195, 1200 (Reg. Sess.).

FAIR LABOR STANDARDS ACT.

Rescue workers may not volunteer services to public agency for which they work on regular basis.

August 29, 1989

The Honorable William J. Howell
Member, House of Delegates

You ask whether the federal Fair Labor Standards Act of 1985, 29 U.S.C.A. §§ 201 through 219 ("FLSA") prohibits rescue workers, who are paid by a county to augment the existing volunteer rescue companies in the county, from serving as volunteers in these companies during their off-duty hours.

I. Applicable Federal Statutes

The FLSA requires that all covered and nonexempt employees be paid a minimum wage of $3.35 an hour. 29 U.S.C.A. § 206 (West 1978). The FLSA also provides that employers compensate their employees "not less than one and one-half times the regular rate at which he is employed" for all hours worked over 40 in a workweek. 29 U.S.C.A. § 207(a)(2) (West 1989).
The term 'employee' does not include any individual who volunteers to per-
form services for a public agency which is a State, a political subdivision of
a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid expenses, reasonable
benefits, or a nominal fee to perform the services for which the individual
volunteered; and

(ii) such services are not the same type of services which the individual is
employed to perform for such public agency.


II. Employee's Volunteer Services for Public Agency May Not Be Same
as Services for Which Employee Is Paid by Same Public Agency

Under the FLSA, a rescue worker employed by a public agency may not be both a
paid employee, and an unpaid volunteer after usual work hours, if he is volunteering the
same type of services which he performs as an employee of that same agency. See 29 U.S.C.A. § 203(e)(4)(A)(ii) (West Supp. 1989); 29 C.F.R. §§ 553.101(d), 553.102(a) (1988). It is my opinion, therefore, that the rescue workers in the facts you present may not serve as "volunteers" (1) if their "volunteer" work is the same as the duties for which they are paid and (2) if this work is performed for the same employer. Ginsburg, Abra-
haps & Boyd, Fair Labor Standards Handbook for States, Local Governments and Schools
126, 126-27 (1989). If either of these two conditions does not exist, the rescue workers
may be considered "volunteers," and not "employees," when they serve the volunteer res-
cue squad on their own time. Id. at 127, 213-14; 29 C.F.R. § 553.105 (1988).

III. Insufficient Facts Presented to Determine Whether
Public Agency or Same Employer Is Involved

Whether volunteer rescue companies are public agencies within the meaning of the
FLSA and, if so, whether all of the companies in a particular county constitute the same
public agency or employer, rather than separate public agencies, must be determined on
a case-by-case basis. One important factor in this determination is how the companies
are treated for statistical purposes by the Census of Governments issued by the Bureau
of the Census, United States Department of Commerce. See 29 C.F.R. § 553.102(b)
(1988). Other factors to be considered include (1) how the rescue companies' boards of
directors are elected or, if these boards are not elected, how they are appointed and
whether they are subject to removal by the governing body of the county, (2) whether the
companies own their own equipment, and (3) whether the companies' organizational
structure and physical location are subject to county approval. See Ginsburg, Abra-
haps & Boyd, supra 127.

Insufficient facts have been presented to make these determinations. As a result, I
am unable to conclude, as a matter of law, whether the volunteer rescue companies at
issue constitute public agencies within the meaning of the FLSA and, if so, whether these
companies are a single employer.

GAME, INLAND FISHERIES AND BOATING: BOATING LAWS.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE ADMINISTRATION OF
JUSTICE — IN GENERAL.
Violation of court order issued pursuant to § 29.1-738.4 punishable as contempt; random, warrantless search of motorboat or other vessels not authorized.

August 29, 1989

The Honorable James H. Harvell III
Judge, Seventh Judicial District

You ask what the penalty is for operating a watercraft or motorboat after having been ordered not to do so, in violation of § 29.1-738.4 of the Code of Virginia. You also ask whether law-enforcement officers randomly may stop and board watercraft to conduct document and safety inspections pursuant to § 29.1-745.

I. Applicable Statutes

Chapter 7 of Title 29.1, §§ 29.1-700 through 29.1-746, details Virginia's boating laws. Section 29.1-738.4 provides, in part:

In addition to any other penalties authorized by law, upon conviction of any person for violation of any provision of § 29.1-738 [operating boat or manipulating water skis, etc., in reckless manner or while intoxicated], the court shall order such person not to operate a watercraft or motorboat which is underway upon the waters of the Commonwealth for a period of twelve months from the date of a first conviction or for a period of three years from the date of a second or subsequent conviction within ten years of the first conviction.

Section 29.1-746 imposes a Class 4 misdemeanor penalty for any violation of Chapter 7 and for a violation of any regulation adopted pursuant to Chapter 7.

Section 29.1-745 further provides:

Every ... law-enforcement officer of the Commonwealth and its subdivisions shall have the authority to enforce the provisions of this chapter and shall have authority to stop, board and inspect any vessel subject to this chapter after having identified himself in his official capacity. Except for enforcement of § 29.1-738 and the requirement of having the registration certificate on board, the provisions of this section shall not apply to any vessel of twenty-six feet or more in length on which is displayed a current valid United States Coast Guard or United States Coast Guard Auxiliary inspection decal.

II. Violation of § 29.1-738.4 Is Punishable as Contempt

No statute expressly provides a penalty for violating a court's order not to operate a watercraft or motorboat, in violation of § 29.1-738.4. Section 29.1-746 does provide a Class 4 misdemeanor penalty for violations of Chapter 7, as well as for violations of regulations adopted pursuant to Chapter 7. This statute, however, does not extend these misdemeanor penalties to the violation of a court order under § 29.1-738.4. Violation of a judicial order, however, is punishable as contempt. Nicholas v. Commonwealth, 186 Va. 315, 321, 46 S.E.2d 306, 309-10 (1947). Section 18.2-456 authorizes a court to issue an attachment for contempt and punish summarily for disobedience of any lawful court order. Section 18.2-458 extends this authority to district court judges.

It is my opinion, therefore, that a court may punish a violation of its order issued pursuant to § 29.1-738.4 as contempt.
III. Section 29.1-745 Does Not Authorize Random, Warrantless Search of Motorboat or Other Vessels


For law-enforcement authorities merely to approach a vessel does not constitute a seizure, and thus is permissible upon "nothing more than curiosity." United States v. Cortes, 588 F.2d 105, 110 (5th Cir. 1979). Following this approach, if the officer observes facts that constitute probable cause to believe that a crime has been or is being committed, it is beyond question that the officer may stop and search the vessel. United States v. Warren, 578 F.2d 1058 (5th Cir. 1978).

Whether the random, warrantless stop of a vessel to conduct a safety or document inspection is permissible, however, is not as clear. Random stops of automobiles for license checks are unconstitutional. Delaware v. Prouse, 440 U.S. 648 (1979). Courts have viewed boats in much the same light as automobiles. See United States v. Villamonte-Marquez, 462 U.S. at 593 (boarding of vessel by customs officials in waters providing access to open sea without suspicion of wrongdoing is permissible); United States v. Piner, 608 F.2d 358 (5th Cir. 1979) (random stop of vessel for safety and registration inspection not justified after dark); United States v. Cortes, 588 F.2d at 111 (assumes random stops of vessels are not constitutional); United States v. Warren, 578 F.2d at 1070 (warrantless stops by Coast Guard permissible); Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973) (statute allowing inspection of any boat at any time on inland waters held unconstitutional).

In Simmons v. Commonwealth, Rec. No. 880954 (June 9, 1989), the Supreme Court of Virginia invalidated a conviction arising from a roadblock established to check motor vehicle registration and equipment on the ground that the decision to establish the roadblock, as well as its location and direction, was solely within the discretion of the officers conducting it. The Court distinguished its ruling in Simmons from its decision in Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985), cert. denied, 475 U.S. 1084 (1986), and from the U.S. Supreme Court's decision in Delaware v. Prouse, because of the lack of an "objective, nondiscretionary procedure" in Simmons for determining the location of the roadblock. Both the Lowe and Prouse decisions approved the use of roadblocks, as opposed to random spot checks, because of the limited discretion provided to the checking officer. In Simmons, however, the Court held that, in order for a roadblock to be constitutional, absent an emergency or exigent circumstances, it must be undertaken pursuant to an "explicit plan or practice which uses neutral criteria and limits the discretion of the officers conducting the roadblock." Slip op. at 5.

"[N]o reasonable claim can be made that permanent checkpoints would be practical on waters ... where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do." United States v. Villamonte-Marquez, 462 U.S. at 589. In light of the Virginia Supreme Court's ruling in Simmons, routine stops only should be undertaken pursuant to an explicit plan or practice that uses neutral criteria and limits the discretion of the law-enforcement officers conducting the stops. Based on the above, it is my opinion that such a plan is required as a prerequisite to the validity of any routine stop of a watercraft or motorboat for documentation or an equipment check. It is further my opinion that a routine stop of a watercraft or motorboat pursuant to such a plan will satisfy the Fourth Amendment criteria discussed in this Opinion.
The punishment for a Class 4 misdemeanor conviction is a fine of not more than $100. See § 18.2-11(d).

GAME, INLAND FISHERIES AND BOATING: LICENSES.

Conviction for hunting, trapping, fishing without license; payment of license fee.

July 10, 1989

The Honorable John F. Ewell
Judge, Page County General District Court

You ask what procedures the district court clerk should use to collect the funds necessary to purchase a license to hunt, trap, or fish for a defendant who is convicted of hunting, trapping, or fishing without the required license pursuant to § 29.1-335 of the Code of Virginia. You also ask how the clerk should properly expend and account for these funds.

I. Applicable Statutes

Section 29.1-335 provides, in part, that "[n]o person shall hunt, trap, or fish without having obtained a license when such a license is required. Any person who violates this section shall be guilty of a Class 3 misdemeanor and shall pay any additional amount necessary to purchase the required license." Former § 29-76, the predecessor statute to § 29.1-335, provided, in part:

Any person convicted of hunting, trapping, or fishing without license, when license is required, shall pay a fine of not less than $10 nor more than $100 and such additional amount as is necessary to purchase the license which he should have had, with which amount the license shall be purchased, and it shall be discretionary with the court as to whether such license is delivered to the offender or revoked.

Circuit court clerks, in addition to agents designated by the Board of Game and Inland Fisheries (the "Board"), are authorized to issue hunting, trapping, and fishing licenses. See §§ 29.1-323, 29.1-327. The net license fees collected are then forwarded to the Department of Game and Inland Fisheries. See § 29.1-332(A).

II. Court May Develop Procedure to Ensure License Fee Is Paid

The language in present § 29.1-335 does not substantively change the requirement in former § 29-76 that a defendant convicted of hunting, trapping, or fishing without a license pay an additional amount to purchase the required license. Only the provision concerning the delivery or revocation of the license was deleted in the present statute. Neither present § 29.1-335 nor former § 29-76 specifies the procedure to be followed to collect this license fee. In the absence of specific statutory direction, it is my opinion that the court has inherent authority to develop an appropriate procedure to ensure that this additional license fee, in fact, is paid by a defendant and the appropriate license is purchased. One method of accomplishing this is to require the defendant to purchase the hunting, trapping, or fishing license from the circuit court clerk or other designated agent of the Board and to provide evidence of this purchase to the court. This method does not require accounting by the district court clerk for the funds used to purchase the license, since the defendant, and not the district court clerk, purchases the license.
GRIEVANCE PROCEDURES.

Department of Corrections' grievance procedure permits award of money to adult state inmate for injury proximately caused by negligent or wrongful act or omission of state employee while acting within scope of employment.

February 10, 1989

The Honorable Joseph V. Gartlan Jr.
Member, Senate of Virginia

You ask whether the inmate grievance procedure of the Virginia Department of Corrections (the "Department") permits the award of money damages to an adult state inmate for an injury proximately caused by the negligent or wrongful act or omission of any state employee while acting within the scope of his employment.

Paragraph 10-2.8 of the Department's grievance procedure (dated February 13, 1987) details certain specific remedies for inmate grievances that include a "monetary payment equal to the value of property" to an inmate for the loss of property within the custody and control of the Department. Although there is no specific authorization for a monetary award for personal injury to an inmate, the paragraph quoted above does provide that the remedies expressly detailed in paragraph 10-2.8 of the grievance procedure are not exclusive. Since paragraph 10-2.8 provides that the Department's "grievance procedure shall afford a successful grievant a meaningful remedy" and, in the proper case, a meaningful remedy well may include the payment of damages for an inmate's personal injuries, it is my opinion that the Department's grievance procedure currently permits the award of money to an adult state inmate for an injury proximately caused by the negligent or wrongful act or omission of a state employee while acting within the scope of his employment.

HEALTH: REGULATION OF MEDICAL CARE FACILITIES - EMERGENCY MEDICAL SERVICE VEHICLES.

COMMISSIONS, BOARDS AND INSTITUTIONS: ADMINISTRATIVE PROCESS ACT.

Division of Emergency Medical Services not authorized to extend existing emergency medical technician certificates beyond limitations in existing regulations of State Board of Health.

November 7, 1989

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

You ask whether the recommendation of the Joint Subcommittee Studying Emergency Medical Services Personnel Training and Certification contained in Senate Joint Resolution No. 208 ("S.J.R. No. 208"), passed by the 1989 Session of the General Assembly, is being implemented "accurately and appropriately" by the Division of Emergency Medical Services (the "Division") of the Department of Health. You also ask whether all current first responder or emergency medical technician ("EMT") certificates could be extended for an additional year, regardless of the date of issuance of the EMT certificate.
I. Applicable Statute

The certification of emergency medical services personnel is governed by § 32.1-153 of the Code of Virginia, which provides:

A. The [State] Board [of Health] shall prescribe by regulation the qualifications required for certification of emergency medical care attendants.

B. Each person desiring certification as emergency medical services personnel shall apply to the [State Health] Commissioner upon a form prescribed by the Board. Upon receipt of such application, the Commissioner shall cause the applicant to be examined and if the Commissioner determines that the applicant meets the requirements of such regulations [promulgated pursuant to subsection A], the Commissioner shall issue a certificate to the applicant. An emergency medical services personnel certificate so issued shall be valid for a period prescribed by the Board. The certificates may be renewed after successful reexamination of the holder.

C. The Commissioner may issue a temporary certificate with or without examination when the Commissioner finds that such will be in the public interest. A temporary certificate shall be valid for a period not exceeding ninety days.

II. Division Not Authorized to Issue EMT Certificates Except Through State Health Commissioner in Accordance with State Board of Health Regulations

Section 32.1-153 grants the State Board of Health (the "Board") regulatory authority governing the certification of emergency medical services personnel. The Division has no such authority. Although S.J.R. No. 208 directs the Division "to extend the certification period for First Responders and Emergency Medical Technicians from three to four years," the Division has no current statutory authority to do so in the absence of regulations prescribed by the Board. See infra note 1, p. 2323.


Based on the above, the Division is not authorized to extend existing EMT certificates beyond the limitations in the existing Board regulations. As quoted above, § 32.1-153 authorizes only the State Health Commissioner to issue EMT certificates. Consistent with this discretionary authority in § 32.1-153(C), the Commissioner has responded to the recommendation in S.J.R. No. 208 by allowing the issuance of EMT certificate extensions on and after July 1, 1989, before the final adoption of the amended regulations.

It is my opinion, therefore, that the Division, to the extent of its current statutory authority, has implemented the recommendation in S.J.R. No. 208 by submitting proposed amended regulations to the Board. It is further my opinion that the Division presently has
no authority to extend to four years the period of certification for EMT certificate holders subject to recertification prior to July 1, 1989.

1See 1989 Va. Acts 2322 (Reg. Sess.).
2The General Assembly could have shortened this regulatory process by providing the Board with a statutory exemption from the public procedures of Art. 2 of the Administrative Process Act, but did not do so. See § 9-6.14:4.1(C)(4)(a).

HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD, ETC.

CIVIL REMEDIES AND PROCEDURE: RECEIVERS, GENERAL AND SPECIAL.

COURTS OF RECORD: GENERAL PROVISIONS.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES.

PROPERTY AND CONVEYANCES: DISPOSITION OF UNCLAIMED PROPERTY.

Circuit court clerk or general receiver may not receive compensation for condemnation funds deposited with court by Transportation Commissioner pursuant to certificate of take.

November 2, 1989

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

You ask several questions concerning funds that have been deposited with a circuit court clerk or a general receiver by the Transportation Commissioner in highway condemnation cases. Specifically, you ask (1) whether the clerk or general receiver may charge the fee authorized by § 8.01-589 of the Code of Virginia on funds deposited pursuant to § 33.1-120, including interest earned, and commissions on interest distributed to the landowner pursuant to § 33.1-124; (2) whether the certificate of take and the order of disbursal in the condemnation proceeding are required to be included in the trust fund order book described in § 17-28.1; (3) what procedure or time limit should be used by the clerk or general receiver when funds are deposited with the court pursuant to a certificate of take and no condemnation suit subsequently is filed; and (4) if funds are deposited with the court pursuant to § 33.1-120, whether the clerk or general receiver is required to deposit the funds into an interest-bearing account.

I. Applicable Statutes

Section 8.01-582 authorizes a circuit court to

appoint a general receiver of the court, who may be the clerk of the [circuit] court, who shall hold his office at its pleasure. The general receiver's duty shall be, unless it be otherwise specially ordered, to receive, take charge of, hold or invest in such manner as the court orders, all moneys paid into the court, or into a bank or other place of deposit, to the credit of the court.

Section 8.01-589(A) provides that a general receiver may receive reasonable compensation, in the court's discretion, for establishing files and accounting records "at
receipt of the originating court order", and for disbursing such funds. Section 8.01-589(B) further provides that, if the general receiver also is the clerk of the circuit court and the court allows compensation in a particular matter, "it shall be fee and commission income to the office of such clerk in accordance with § 14.1-143.2."

Section 14.1-143.2 establishes the annual salary for circuit court clerks based on the population of the jurisdiction to be served by the clerk, and further provides that the circuit court may, pursuant to § 8.01-589, provide further compensation to the office of the circuit court clerk for serving as a general receiver.

There are two procedures by which the Transportation Commissioner may take actual possession of real property before an award is made pursuant to the provisions of Chapter 1.1 of Title 25. First, § 33.1-120 provides that the Commissioner, based upon a bona fide appraisal, may pay into court the sum that he estimates to be the fair market value of property taken, or interest therein, and the damage to the residue of the remainder of the parcel or interest not taken. In actual practice, the Commissioner refers to this procedure as filing a "certificate of take."

The second procedure is similar to this practice, but the Commissioner proceeds under § 33.1-121. Under the second procedure, the Commissioner makes the same determination of value as required in § 33.1-120. Instead of depositing actual funds with the clerk of the circuit court, however, the Transportation Commissioner files a certificate of deposit with the clerk, certifying that the sum of money designated in the certificate will be paid pursuant to order of the circuit court. Section 33.1-121 provides that this certificate "shall be deemed and held" by the clerk as "payment into the custody" of the court. The Commissioner, in actual practice, refers to this procedure as the filing of a "certificate of deposit."

The terms "certificate of take" and "certificate of deposit" are not found in the Code. In fact, § 33.1-120 does not mention the requirement that the Commissioner file a certificate if he deposits the money pursuant to that section. It is only in § 33.1-124, which details the procedure for the distribution of funds deposited with the court, that any reference to a certificate is made in conjunction with § 33.1-120.

Your inquiry is directed solely at the provisions of § 33.1-120, involving "certificates of take," and not at those in § 33.1-121, involving "certificates of deposit." As a result, this Opinion addresses only those procedures pursuant to § 33.1-120, and it is with reference to § 33.1-120 that the phrase "certificate of take" will be used.

Section 17-28.1 requires that a trust fund order book be maintained by the circuit court clerk for the recordation of "all reports, orders and decrees concerning moneys received . . . by general receivers pursuant to § 8.01-582 and by clerks pursuant to § 8.01-600." Section 8.01-600 authorizes a circuit court clerk to hold certain funds on deposit, and further provides that the court may order these funds to be deposited in an interest-bearing account.

II. Clerk or General Receiver May Not Charge Fee Authorized by § 8.01-589 on Funds Deposited Pursuant to § 33.1-120

Section 8.01-589 authorizes reasonable compensation for holding and disbursing funds pursuant to court order. Condemnation funds deposited by the Transportation Commissioner with the circuit court pursuant to § 33.1-120 are not deposited by order of a court, but by the operation of the statute itself. See 1987-1988 Att'y Gen. Arn. Rep. 81, 82. Because § 8.01-589, when read together with § 8.01-582, authorizes certain fees and commissions only for funds deposited pursuant to a court order, it is my opinion that the circuit court clerk or general receiver may not charge fees based upon § 8.01-589 on funds deposited pursuant to § 33.1-120.1

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III. Certificate of Take and Order of Disbursal Are Not Required to Be Included in Trust Fund Order Book Unless Order Directs that Funds Be Paid to Clerk or General Receiver

As discussed above, § 17-28.1 requires that the trust fund order book contain "all reports, orders and decrees concerning moneys received or to be received by general receivers pursuant to § 8.01-582 and by clerks pursuant to § 8.01-600." (Emphasis added.)

In Part II of this Opinion, I noted that funds paid by the Transportation Commissioner into a circuit court pursuant to § 33.1-120 are not paid to a clerk or to a general receiver pursuant to a court order. Funds paid to property owners pursuant to § 33.1-124, although paid by court order, typically are not received by the general receiver or clerk but by the property owners themselves. The requirements of § 17-28.1, therefore, have not been met in these circumstances, since no funds have been received either by the clerk or by the general receiver.

I recognize that there are occasions when a portion of the funds disbursed pursuant to § 33.1-124 are paid to a clerk, or to a general receiver, by court order for property owners whose whereabouts are unknown or who have various legal disabilities. In such instances, these funds are received by a circuit court clerk or general receiver by order of court. Based on the above, it is my opinion that a certificate of take is not required to be recorded in the trust fund order book. It is further my opinion that an order of disbursement is not required to be recorded in the trust fund order book unless all or a portion of the disbursement is paid to the circuit court clerk or to the general receiver for the benefit of one or more of the property owners.

IV. No Obligation or Time Limitation to Transfer Funds Held Pursuant to § 33.1-120

Your third inquiry concerns the possible interplay between § 55-210.9:2 and the responsibility of a clerk or general receiver to maintain and report funds. Section 55-210.9:2, a portion of The Uniform Disposition of Unclaimed Property Act, §§ 55-210.1 through 55-210.30, requires the circuit court clerk or general receiver to identify funds held by them which have remained unclaimed and to petition the circuit court to remit these funds to the State Treasurer. This statute expressly provides, however, that "[t]here shall be no obligation to report or remit funds deposited as compensation and damages . . . pursuant to § 33.1-120." I am aware of no statute other than § 55-210.9:2 that requires any action by circuit court clerks or general receivers concerning condemnation funds or establishes any time limitations for the disposition or transfer of these funds. It is my opinion, therefore, that a clerk or general receiver is under no obligation or time limitation to transfer funds held pursuant to § 33.1-120, and not by court order, to the Treasurer of Virginia under § 55-210.9:2.

V. Funds Deposited Pursuant to § 33.1-120 Are Not Required to Be Deposited in Interest-Bearing Account

Your fourth inquiry is whether funds deposited pursuant to § 33.1-120 are required to be deposited in an interest-bearing account. As discussed above, § 8.01-600 authorizes a circuit court clerk to maintain certain funds held by the clerk pursuant to court order, and further provides that the court may order that these funds be deposited in an interest-bearing account. I am aware of no other statute that applies to the issue you present. Because funds deposited with the court or circuit court clerk pursuant to § 33.1-120 are not held by virtue of a court order, it is my opinion that neither § 8.01-600 nor any other statute requires that the clerk deposit these funds in an interest-bearing account.

1This conclusion is supported by § 33.1-126, which details certain fees to be charged by clerks in condemnation proceedings when certificates of take are filed, and further
provides that "[n]otwithstanding any other law to the contrary, the clerk of the court wherein any such certificate is filed shall receive [these] fees, and no other." (Emphasis added.)

HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD, ETC.

TAXATION: STATE RECORDATION TAX.

Board’s discretion to allocate improvement and construction funding for both U.S. Route 58 and U.S. Route 58-A in Southwest Virginia.

April 4, 1989

The Honorable Jack Kennedy
Member, House of Delegates

You ask whether the Commonwealth Transportation Board ("the Board") has the authority pursuant to Chapter 286, 1989 Va. Acts 377 (Reg. Sess.) ("Chapter 286") to expend money from the U.S. Route 58 Corridor Development Fund to accelerate highway improvements and construction on both U.S. Route 58 and U.S. Route 58-A in Southwest Virginia.

I. Applicable Statutes

Section 33.1-12(1) and (2) of the Code of Virginia provides general authority to the Board to locate routes and to award contracts for road construction and improvement. Chapter 286, enacted by the 1989 Session of the General Assembly and signed by the Governor on March 20, 1989, establishes the U.S. Route 58 Corridor Development Program and Fund to provide "an adequate, modern, safe, and efficient highway system, generally along Virginia's southern boundary." See new § 33.1-221.1:2(A). This legislation adds new §§ 33.1-221.1:2 and 58.1-815 to the Code and, in new § 33.1-221.1:2(E), provides that "[the] Board is encouraged to utilize the existing four-lane divided highways, available rights-of-way acquired for additional four-laning, bypasses, connectors, and alternate routes." The U.S. Route 58 Corridor Development Fund is created as a part of the existing Transportation Trust Fund in new § 58.1-815.

II. Board Has Discretion to Designate Funding for Both Route 58 and Route 58-A

Chapter 286 complements § 33.1-12(1) and (2) to provide broad discretion to the Board to expend money from the U.S. Route 58 Corridor Development Fund for both U.S. Route 58 and U.S. Route 58-A. The Board is authorized to allocate funds from the Transportation Trust Fund or other appropriate sources for the improvement of any roads in the Commonwealth. Compare § 33.1-23.1 with § 33.1-23.03:1.

Although the use of the U.S. Route 58 Corridor Development Fund to upgrade both U.S. Route 58 and U.S. Route 58-A would improve a parallel highway corridor in far Southwest Virginia, there is nothing in Chapter 286 to prohibit such improvements from being made. As discussed above, new § 33.1-221.1:2(A) and (B) provides for the improvement of a "highway system" to connect the communities, businesses, places of employment, and residents of Southwest Virginia. (Emphasis added.) A highway system clearly includes more than a single highway. Further, since new § 33.1-221.1:2(E) provides that the Board "is encouraged to utilize ... alternate routes," it is my opinion that this legislation was intended to accomplish more than merely the improvement of U.S. Route 58.
Based on the above, it is further my opinion that Chapter 286 authorizes the Board, in its discretion, to allocate improvement and construction funds for both U.S. Route 58 and U.S. Route 58-A in Southwest Virginia.

HIGHWAYS, BRIDGES AND FERRIES: FERRIES, BRIDGES AND TURNPIKES – CHESAPEAKE BAY BRIDGE AND TUNNEL DISTRICT.

Statutory amendment to authorize free passage across Chesapeake Bay Bridge-Tunnel facility to sheriffs and deputy sheriffs from adjacent counties would not violate Trust Indenture between District and bondholders.

August 11, 1989

The Honorable William E. Fears
Member, Senate of Virginia

You ask whether the Chesapeake Bay Bridge and Tunnel District (the "District") may permit free passage across the Chesapeake Bay Bridge-Tunnel facility ("Bridge-Tunnel facility") to sheriffs and deputy sheriffs from the adjacent counties of Accomack and Northampton without violating Section 502 of the Trust Indenture agreement between the District and certain holders of bonds issued by the District.

I. Applicable Statutes and Trust Indenture Provision


Section 33.1-252(A)(14) authorizes "[s]heriffs and their deputies" to use all toll bridges in Virginia without the payment of a toll upon the presentation of a toll pass issued by the State Highway and Transportation Commission (now the Commonwealth Transportation Board). Section 33.1-252(D) provides that, notwithstanding the provisions of § 33.1-252(A), only those persons enumerated in § 33.1-252(D) may use the Bridge-Tunnel facility without the payment of a toll. The classes of persons enumerated in § 33.1-252(D) do not include sheriffs or their deputies.1

Section 502 of the Trust Indenture provides, in part:

The [Chesapeake Bay Bridge and Tunnel] Commission further covenants that no free passage will be permitted over the Existing Ferry Service or the Project except to members, officers and employees of the Commission while in the discharge of their official duties and to any fire department and the police officers of the State of Virginia and the United States Government while in the discharge of their official duties .... [Emphasis added.]

II. Section 33.1-252(D) Does Not Authorize Sheriffs or Deputy Sheriffs to Use Bridge-Tunnel Facility Without Payment of Toll

You first ask whether, absent an amendment to the present statutes, the District may allow sheriffs and deputy sheriffs from the counties of Accomack and Northampton to use the Bridge-Tunnel facility without the payment of a toll.

Section 33.1-252(D) provides that only those persons enumerated in the subsection may use the Bridge-Tunnel facility without the payment of a toll. Sheriffs and their deputies are not among those persons detailed in § 33.1-252(D). Applying the clear language
of § 33.1-252(D), it is my opinion that the District may not allow sheriffs or deputy sheriffs to use the Bridge-Tunnel facility without the payment of a toll.

III. Section 33.1-252(D) May Be Amended to Authorize Free Passage for Sheriffs and Their Deputies Without Violating Sec. 502 of Trust Indenture

You next ask whether Section 502 of the Trust Indenture would permit sheriffs and their deputies to use the Bridge-Tunnel facility without the payment of a toll while in the discharge of their official duties.

Section 502 of the Trust Indenture provides that free passage will be permitted to the "police officers of the State of Virginia" while in the discharge of their official duties. The question presented by your inquiry, therefore, is whether sheriffs and deputy sheriffs are police officers of the State of Virginia within the meaning of Section 502 of the Trust Indenture.

The District's Executive Director has asserted that Section 502 of the Trust Indenture authorizes free use of the Bridge-Tunnel facility by the Virginia State Police only. I do not agree with this conclusion. Section 502 of the Trust Indenture does not refer to the Virginia State Police. Rather, the provision refers to "any fire department and the police officers of the State of Virginia." (Emphasis added.) The drafters of the Trust Indenture did not use the more restrictive language that existed in former § 33-11, limiting the free use of toll bridges and ferries to the Department of State Police and certain other individuals not relevant to your inquiry. See Ch. 572, 1952 Va. Acts 937.²

In my opinion, the reference to "police officers of the State of Virginia" in Section 502 of the Trust Indenture is not a designation of only the Department of State Police. I can discern no policy reason for authorizing the Department of State Police to use the Bridge-Tunnel facility without the payment of the toll while denying the same privilege to local law-enforcement officers actually engaged in law-enforcement activities. It is my opinion, therefore, that the reference to "police officers of the State of Virginia" in Section 502 of the Trust Indenture refers to duly authorized law-enforcement officers under the laws of the Commonwealth rather than a designation of the Department of State Police. It is further my opinion, therefore, that § 33.1-252(D) may be amended to include free passage across the Bridge-Tunnel facility for sheriffs and deputy sheriffs from the adjacent counties of Accomack and Northampton without violating Section 502 of the Trust Indenture.


²§ 33-11. Free use of toll bridges, etc., by certain State officers and employees.—The State Highway Commissioner, the Commissioner of the Division of Motor Vehicles, the Superintendent of State Police, members of the State Highway Commission and all officers, agents and employees of the Department of Highways, * the Division of Motor Vehicles and the Department of State Police when actually engaged in the performance of their duties as such and having and exhibiting the certificates * hereinafter mentioned, may use all toll bridges and toll ferries in this State without the payment of toll." 1952 Va. Acts, supra (emphasis added).
HOUSING: HOUSING AUTHORITIES LAW.

COUNTIES, CITIES AND TOWNS: COUNTIES GENERALLY.

Housing Authorities Law implicitly authorizes housing authority to distribute substantial assets to local governments in geographical area served by authority.

June 29, 1989

The Honorable W. Henry Maxwell
Member, House of Delegates

You ask several questions concerning a proposed distribution of assets by the Regional Redevelopment and Housing Authority of Hampton and Newport News (the "Authority").

I. Facts

The Authority was created by the joint resolutions of the Boards of Supervisors of the Counties of Warwick and Elizabeth City in 1942. Both of these counties subsequently were annexed by, or consolidated with, the Cities of Hampton and Newport News. The Authority is governed by three commissioners: one commissioner is appointed by the City Council of Newport News, one by the City Council of Hampton, and the third by the other two commissioners.

The Authority proposes to make a substantial distribution of its assets to Hampton and Newport News. The Authority has approved a resolution providing for the distribution of most of its assets, together with associated liabilities, with the understanding that the assets would be used in the public interest by both cities. The resolution provides for the Authority to retain approximately $1,500,000 in cash, as well as its existing office facilities and equipment, and to continue to pursue affordable housing for low-income citizens.

The majority of the Authority's assets are held as securities, cash, notes receivable, and real property and improvements. The total asset value exceeds $30,000,000. The distribution formula calls for Hampton to receive approximately $17,000,000 and Newport News to receive approximately $15,000,000.

The Authority has current liabilities of approximately $16,000. An additional $620,000 is held in escrow, but this escrow balance will not be affected by the distribution.

The Authority has two bond issues outstanding which totaled $7,250,000 at the date of issue. Pursuant to the terms of the bond agreements, the Authority has no direct obligation resulting from the issuance of the indebtedness. The bonds are secured by land, buildings and improvements at private business locations, and title to the secured property is vested in those private businesses. No assets or revenues of the Authority are pledged to secure the bonded indebtedness.

The proposed distribution of the Authority's assets will not result in any assumption of bonded indebtedness by the cities.

The Authority has obtained a legal opinion from its counsel that applicable statutes permit a distribution of assets that would result in a substantial reduction in the Authority's assets. This opinion further advises that the Authority should remain in existence and continue to maintain at least a minimum level of operations.
The Authority also has obtained a legal opinion from its special tax counsel that the proposed distribution of assets will not adversely affect the tax-exempt status of the outstanding bonds and that the financing documents do not require the consent of the holders of outstanding bonds in connection with the distribution.

Newport News has obtained the legal opinion of its bond counsel that the Constitution of Virginia and applicable statutes do not require that the holders of outstanding bonds consent to the proposed distribution of assets. This opinion further advises that the Authority must remain in existence as obligor or that the Authority's obligations must be acceded to by another appropriate governmental entity.

II. Applicable Statutes

The Authority operates pursuant to the Housing Authorities Law, §§ 36-1 through 36-55.6 of the Code of Virginia. Regional and consolidated housing authorities operate pursuant to §§ 36-40 through 36-47.2. A regional housing authority has the same powers and duties as a single jurisdiction housing authority. See § 36-46. A regional housing authority is governed by its commissioners. See §§ 36-12, 36-45. Section 36-19 details the general powers of housing authorities. Pursuant to these powers, an authority's commissioners have general control over the authority's property, including the power to dispose of property in various contexts in furtherance of public purposes. See, e.g., §§ 36-19(1), (4), §§ 36-25, 36-49(6), 36-49.1(4).

III. Housing Authorities Law Implicitly Authorizes Authority to Distribute Substantial Assets to Cities of Hampton and Newport News

You first ask whether the proposed asset distribution by the Authority is within its statutory authority and whether the resulting asset distribution is valid.

A prior Opinion of this Office concludes that the Authority is a regional redevelopment and housing authority notwithstanding the changes in the form of government in its area of operation since the Authority's creation. See 1954-1955 Att'y Gen. Ann. Rep. 132. A housing authority is a political subdivision of the Commonwealth that is created and operates to carry out a specific governmental function. See generally City of Charlottesville v. DeHaan, 228 Va. 578, 323 S.E.2d 131 (1984); VEPCO v. Hampton Red. Authority, 217 Va. 30, 225 S.E.2d 364 (1976); Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940). See also 1977-1978 Att'y Gen. Ann. Rep. 181, 183. A political subdivision is a distinct legal entity that serves as more than a mere auxiliary to the local governments that created the political subdivision or participate in its operation. See Hampton Rds. San. Dist. Comm. v. Smith, 193 Va. 371, 377, 68 S.E.2d 497, 500 (1952). On the other hand, the Supreme Court of Virginia has recognized the local nature of most political subdivisions' activities and the close relationship between the local government and political subdivisions that operate within the locality's boundaries. See Prendergast v. Park Authority, 227 Va. 190, 194, 313 S.E.2d 399, 401 (1984); VEPCO, 217 Va. at 32-33, 225 S.E.2d at 367. For some purposes, a political subdivision is considered a municipal corporation. See VEPCO, 217 Va. at 33-34, 225 S.E.2d at 367-68; Richmond v. Metropolitan Authority, 210 Va. 645, 172 S.E.2d 831 (1970).

No provision of the Housing Authorities Law expressly authorizes a housing authority to distribute its assets to the local government(s) that created it and within whose boundaries the authority operates. Any statutory authority for a housing authority to make a general distribution of assets, therefore, must be implied from existing statutes if such authority exists. Questions of implied statutory authority are resolved based on the review of existing statutes and the underlying purpose of the legislation. See Gordon v. Fairfax County, 207 Va. 827, 832-33, 153 S.E.2d 270, 275 (1967) (county has implied authority to lend money to airport authority for start-up costs). See also 1987-1988 Att'y Gen. Ann. Rep. 184.
The specific purposes underlying the Housing Authorities Law are provided in § 36-2. These purposes include the clearance, replanning and reconstruction of areas in which unsafe housing conditions exist and the provision of safe and sanitary housing for low-income residents. The control of a housing authority's property is vested in its commissioners. A housing authority has broad powers to acquire property. See, e.g., §§ 36-6, 36-19, 36-19.5. A housing authority has express powers to dispose of property in various contexts. See, e.g., §§ 36-19.4, 36-25, 36-49(6), 36-49.1(4). See also Mumpower, 176 Va. at 456, 11 S.E.2d at 744. A housing authority is expressly authorized to receive donations or loans from a local government. See §§ 15.1-511.1, 36-6, 36-7.

As a general rule, a municipal corporation has the power to dispose of property which it has a right to acquire. See 10 E. McQuillin, The Law of Municipal Corporations § 28.37 (1981). This rule is particularly applicable when a municipal corporation disposes of property for a public use. Id. at § 28.43.

The Housing Authorities Law contains no provision that requires the retention of funds or assets by a housing authority. Compare Armstrong v. Henrico County, 212 Va. 66, 75-76, 182 S.E.2d 35, 41-43 (1971) (sanitary district required to maintain sinking fund; net systems revenues must be directed to sinking fund for payment of bonds).

In this instance, the Authority has determined that a substantial portion of its assets are not required for the future operations of the Authority and has resolved to transfer those assets to the cities. The proposed asset distribution will be to the cities which are, of course, municipal corporations with general governmental powers. The distributed assets, therefore, presumptively will be devoted to appropriate public uses. It is my opinion, therefore, that the proposed asset distribution would not constitute an abuse of the Authority's discretion or be in violation of a public trust impressed upon the Authority's assets. See Gordon, 207 Va. at 834, 153 S.E.2d at 276 (county loan to airport authority promotes legitimate governmental functions, violated no public trust, and did not constitute an abuse of discretion). In addition, the Authority will continue to exist as the issuer of outstanding bonds and the rights of holders of those bonds will not be infringed by the proposed asset distribution.

Based on the above, it is further my opinion that the Housing Authorities Law implicitly authorizes the Authority to distribute substantial assets to the cities when, in the judgment of the Authority, such a distribution will promote the governmental purposes, and the contemporary needs and mission, of the Authority.

IV. Housing Authorities Law Does Not Require Third-Party Consent to Proposed Asset Distribution

You next ask who is required to consent to the proposed asset distribution. You specifically ask whether the holders of outstanding bonds issued by the Authority must consent to the proposed asset distribution.

You have not provided copies of the financing documents to this Office. As noted above, however, the Authority has obtained the legal opinion of its special tax counsel that the financing documents do not require the consent of the holders of the outstanding bonds in connection with the asset distribution. I assume, for the purpose of this Opinion, that the proposed distribution will not include any rights vested in the Authority with respect to property which secures the obligations created by the outstanding bonds.

No provision of the Housing Authorities Law expressly requires the consent of any third party prior to the disposal of property by the Authority. See, e.g., §§ 36-19(4), 36-49(6), 36-49.1(4). In the event the geographical area of a housing authority is decreased by excluding a county, the consent of the holders of outstanding bonds is required
by § 36-42. In this instance, however, the Authority's geographical area of operations will not be decreased nor will the rights of the holders of outstanding bonds be affected. In addition, the Authority will continue to exist as the issuer of the outstanding bonds.

It is my opinion, therefore, that the Housing Authorities Law does not require that any third party, including the holders of the Authority's outstanding bonds, must consent to the proposed asset distribution by the Authority.

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**HOUSING: VIRGINIA FAIR HOUSING LAW.**

Law complements federal fair housing program; does not prohibit exclusion of persons based on familial status from housing for older persons.

June 16, 1989

The Honorable Robert T. Andrews  
Member, House of Delegates

You ask the effect of a recent amendment to the Virginia Fair Housing Law on rental apartment projects developed solely for persons 62 years of age or older and financed under the "Section 202 program" of the Department of Housing and Urban Development.

1. Applicable Statutes and Regulations

A. Federal Law

The federal government's fair housing law was enacted as part of the Civil Rights Act of 1968. See 42 U.S.C.A. §§ 3601-3619 (West 1977 & Supp. 1989). This federal law was amended substantially by the Fair Housing Amendments Act of 1988 (the "1988 federal Act"), Public Law No. 100-430, which became effective on March 12, 1989.

The 1988 federal Act extended the federal fair housing law protection against discrimination to certain persons based upon their "familial status." 42 U.S.C.A. § 3604 (West Supp. 1989). The phrase "familial status" includes a person who is under the age of 18 and resides with a parent or other person who has legal custody of that individual. See 42 U.S.C.A. § 3602(k) (West Supp. 1989). The 1988 federal Act, however, did not extend the familial status protections to the provisions of federal law pertaining to housing for older persons:

(b)(1) . . . Nor does any provision in this subchapter [42 U.S.C.A. §§ 3602-3619] regarding familial status apply with respect to housing for older persons.

(2) As used in this section, 'housing for older persons' means housing--

(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or

(B) intended for, and solely occupied by, persons 62 years of age or older . . . .

B. Virginia Law


The Commonwealth's fair housing policy is detailed in § 36-87(A), which, effective July 1, 1989, adds the "familial status" of individuals as a basis for protection from discriminatory housing practices. See 1989 Va. Acts, supra. This legislation deleted the following language from § 36-88: "Notwithstanding the foregoing provisions, it shall not be an unlawful discriminatory housing practice to operate an all-adult or all-elderly housing community, or to maintain all-adult or all-elderly sections of a housing community." Additionally, however, the following language was added as part of § 36-87(C): "Nothing in this chapter [Chapter 5 of Title 36] shall abridge or be construed inconsistently with the federal Fair Housing Act of 1968, as amended, (42 U.S.C. § 3601 et seq.)," 1989 Va. Acts, supra, at 132 (amendatory language emphasized in original).

II. Virginia Fair Housing Law Complements Federal Fair Housing Program

Prior to July 1, 1989, § 36-88 provided that "it shall not be an unlawful discriminatory housing practice to operate an all-adult or all-elderly housing community, or to maintain all-adult or all-elderly sections of a housing community." All-adult or all-elderly housing communities, therefore, were expressly authorized in Virginia. The 1988 federal Act added "familial status" as a protected class, but further provided that the provisions relating to familial status did not apply to housing for older persons. See 42 U.S.C.A. § 3607(b)(2)(B) (West Supp. 1989). Prior to July 1, 1989, therefore, § 36-88 would not have provided familial status protection to a broader range of housing communities than the 1988 federal Act authorized, since the provisions of the state statute grandfathering all-adult or all-elderly housing communities remain in the statute. The federal law provides, however, that any state law that would "permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C.A. § 3615 (West 1977). As a result and as noted in Part I(B) of this Opinion, the Virginia provisions concerning all-adult or all-elderly housing were deleted from § 36-88 by the 1989 Session of the General Assembly, effective on July 1, 1989. 1989 Va. Acts, supra.

As discussed above, the General Assembly also amended § 36-87 specifically to provide that "nothing in this chapter shall abridge or be construed inconsistently with the federal Fair Housing Act of 1968, as amended (42 U.S.C. § 3601 et seq.)." The effect of this 1989 amendment to § 36-87(C) is that any practice which is authorized by federal law in this area also is authorized pursuant to Virginia law. It is my opinion, therefore, that the Virginia Fair Housing Law does not prohibit the exclusion of persons based on familial status from housing for older persons, since this practice is presently authorized by federal law.

The rental apartment projects about which you inquire are developed solely for persons 62 years of age or older. These projects are authorized by the 1988 federal Act in 42 U.S.C.A. § 3607(b) and the implementing federal regulations. See 54 Fed. Reg. 3,290 (1989) (to be codified at 24 C.F.R. § 100.303). To the extent that these projects are
authorized pursuant to federal statute, it is my opinion that they are authorized under the Virginia Fair Housing Law.

INSURANCE: NEUROLOGICAL INJURY COMPENSATION ACT.

HEALTH: DEPARTMENT OF MEDICAL ASSISTANCE SERVICES.

Virginia Birth-Related Neurological Injury Compensation Program not "third party" within meaning of federal Medicaid statute. No federal law prohibiting statutory exclusions in Act; Medicaid funds primary benefits source when Medicaid-eligible infant qualifies to receive benefits from Program's Fund; Department of Medical Assistance Services need not seek to recover funds expended for Medicaid benefits from Program or Fund.

December 29, 1989

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask several questions concerning the Virginia Birth-Related Neurological Injury Compensation Act, §§ 38.2-5000 through 38.2-5021 of the Code of Virginia (the "Act"). You first ask whether any federal statute, regulation or case law exists to contravene what you describe as the Act's "manifest intent to make Medicaid the primary benefits source where a Medicaid-eligible infant is also qualified to receive similar benefits from the... Act's compensation fund." You also ask whether the Department of Medical Assistance Services (the "Department") is authorized to recover from the Birth-Related Neurological Injury Compensation Fund (the "Fund") funds expended for Medicaid coverage when a Medicaid-eligible infant receiving Medicaid benefits subsequently is determined to be eligible for similar benefits pursuant to the Act.

I. Applicable State and Federal Statutes

The Act was passed by the 1987 Session of the General Assembly to create a no-fault procedure for the compensation of severe birth-related injuries to infants. The Virginia Birth-Related Neurological Injury Compensation Program (the "Program") is established in § 38.2-5002. The funds used to administer the Program and to provide compensation pursuant to the Act are obtained from four sources described in § 38.2-5020.

Section 38.2-5009(1) of the Act provides that an award for a birth-related neurological injury shall not include:

a. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the federal government except to the extent prohibited by federal law;

b. Expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or other private insuring entity;

c. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or federal government except to the extent prohibited by federal law and

d. Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to
the provisions of any health or sickness insurance policy or other private insurance program.

The federal Medicaid statutes comprise Subchapter XIX of Chapter 7 of the Social Security Act. See 42 U.S.C.A. §§ 1396-1396s (West 1983 & Supp. 1989). Medicaid is a jointly funded federal-state program that pays for necessary medical care for eligible indigent individuals. See 42 U.S.C.A. § 1396 (West Supp. 1989). The states administer Medicaid's day-to-day operations, and the federal government pays a portion of this cost pursuant to an arrangement that results in the Secretary of Health and Human Services (the "Secretary") reimbursing the states for expenditures covered by the Medicaid statute. See 42 U.S.C.A. § 1396b (West Supp. 1989). If the Secretary disallows certain expenditures on audit, the money paid for those expenditures is withheld from subsequent reimbursements. See § 1396b(d). The federal Medicaid statute detailing the requirements for state Medicaid plans provides "that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services available under the plan." 42 U.S.C.A. § 1396a(a)(25)(A) (West Supp. 1989) (emphasis added).

The Department administers the state plan for the delivery of Medicaid services in the Commonwealth. See § 32.1-325. Section 32.1-325.2(B) provides that the Department "will be the payor of last resort to any health care insurance carrier which contracts to pay health care costs for persons eligible for medical assistance in the Commonwealth." (Emphasis added.)

II. Program Is Not "Third Party" Within Meaning of Federal Medicaid Statute

Medicaid often is referred to as the "payor of last resort" because of the requirement in 42 U.S.C.A. § 1396a(a)(25)(A), quoted above, that the state agency administering the Medicaid program "take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services available under the plan." See also § 32.1-325.2 (describing the Department as the "payor of last resort to any health insurance carrier"). The term "third parties" is not defined in the federal Medicaid statutes.

The United States Court of Appeals for the First Circuit has held that a Massachusetts Department of Education program designed to provide educational services to mentally retarded persons in intermediate care facilities was not a "third party," as the term is used in § 1396a(a)(25)(A), to the Massachusetts Department of Public Welfare, the state agency that administers the Medicaid program in Massachusetts. The Court further held that "[b]oth agencies ... are subdivisions of the Commonwealth of Massachusetts, which brought them into being to serve complementary social welfare goals." Com. of Mass. v. Secretary of H.H.S., 816 F.2d 796, 803 (1st Cir. 1987), aff'd in part, rev'd in part sub nom. Bowen v. Massachusetts, 487 U.S. __, 101 L. Ed. 2d 749, 108 S. Ct. 2722 (1988).

Just as the Massachusetts Department of Education and its Department of Public Welfare both are "subdivisions" of that state, "brought ... into being to serve complementary social welfare goals," the same can be said of the Department and the Program in the Commonwealth. id. The Department is the state agency established to administer the Medicaid program in the Commonwealth. See §§ 32.1-323 to 32.1-330. The Program was enacted by the General Assembly for the complementary purpose of assuring "the lifetime care of infants with birth-related neurological injuries, fostering an environment that will increase the availability of medical malpractice insurance at a reasonable cost for physicians and hospitals providing obstetrical services, and promoting the availability of obstetrical care to indigent and low-income patients." Plan of Operation, Virginia Birth-Related Neurological Injury Compensation Program at 3 (rev. May 1989). See §§ 38.2-5000 to 38.2-5021; 1987-1988 Att'y Gen. Ann. Rep. 397, 398.
Based on the above, it is my opinion that the Program is not a "third party" within the meaning of 42 U.S.C.A. § 1396a(a)(25)(A). As a result, I am aware of no federal law that prohibits the exclusions in § 38.2-5009(1)(a) and (c) of the Act. It is further my opinion, therefore, that Medicaid funds, rather than the Program's Fund, constitute the primary benefits source when a Medicaid-eligible infant also qualifies to receive benefits from the Program's Fund. Since I conclude that Medicaid funds are the primary benefits source for these payments, the Department would have no occasion to seek to recover funds expended for Medicaid benefits from the Program or the Fund.


I am aware that federal regulations adopted pursuant to the Medicaid statutes define the term "third party" as "any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan." 42 C.F.R. § 433.136 (1988). This regulation was in effect at the time of the federal appellate court's decision in Com. of Mass. v. Secretary of H.H.S. As the First Circuit Court of Appeals noted, no authority exists for a regulatory interpretation that contravenes the federal statute that the regulation is intended to implement. 816 F.2d at 804.

LABOR AND EMPLOYMENT: PROTECTION OF EMPLOYEES.

Requirement that employee repay a portion of wages upon failure to complete training constitutes forfeiture prohibited by statute.

March 30, 1989

The Honorable Thomas B. Hoover
Commonwealth's Attorney for New Kent County

You ask whether an employment arrangement you describe violates § 40.1-29 of the Code of Virginia.

I. Facts

You state that a private employer in your jurisdiction requires new employees to sign an agreement which provides that the employee will be paid $7.50 per hour during an initial sixty-day training period. If the employee does not complete the sixty-day training period, however, the agreement provides that the employer will recalculate the employee's wages at $3.35 an hour for the initial sixty-day period and requires the employee to repay the difference to the employer.

II. Applicable Statutes

Section 40.1-29(c1) provides that "[n]o employer[1] shall require any employee, except executive personnel, to sign any contract or agreement which provides for the forfeiture of the employee's wages for time worked as a condition of employment or the continuance therein, except as otherwise provided by law."

III. Return of Wages Constitutes "Forfeiture" in Facts Presented; Agreement Violates § 40.1-29(c1)

In the facts you present, an employer is requiring employees, other than executive personnel, to sign an agreement which requires an employee who does not complete an initial sixty-day training period to return certain wages for time worked by the employee
as a condition of his initial employment. The question presented by your inquiry is whether the requirement that these employees return a portion of their pay if they fail to complete sixty days of work, constitutes a "forfeiture."

A prior Opinion of this Office notes that "[the term 'forfeit' can have several meanings, depending on the context in which the term is used. Among the accepted meanings of 'forfeit' is '[t]o incur a penalty; to become liable to the payment of a sum of money, as the consequence of a certain act." 1987-1988 Att'y Gen. Ann. Rep. 480, 482 (citation omitted). A "forfeiture" is defined, in part, as "[a] deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition." Black's Law Dictionary 584-85 (5th ed. 1979).

The agreement you describe requires the employee to repay $4.15 for each hour the employee has worked, if the employee fails to complete the initial sixty-day training period. It is my opinion, therefore, that this contractual requirement constitutes a "forfeiture," as that term is used in § 40.1-29(c1) and, as a result, violates the prohibitions of that statute.

The term "employer" is defined as "an individual, partnership, association, corporation, legal representative, trustee, or trustee in bankruptcy doing business in or operating within this Commonwealth who employs another to work for wages, salaries, or on commission and shall include any similar entity acting directly or indirectly in the interest of an employer in relation to an employee." Section 40.1-2.

2A prior Opinion of this Office concludes that a sheriff may withhold the final paycheck of a deputy sheriff, who has left employment with the sheriff's department, for the repayment of the training expenses of the deputy, when the deputy has executed a written agreement consenting to the repayment under certain conditions. See 1987-1988 Att'y Gen. Ann. Rep. 401, 403. A sheriff's department is a "public body," however, and, as a result, is not subject to the provisions of § 40.1-29(c1).

MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL.

Community services board may designate hospital or other facility, other than state hospital or Veterans Administration Hospital, physically located outside political subdivision it serves; such designation binding on court.

July 26, 1989

The Honorable Hunter B. Andrews
Member, Senate of Virginia

You ask whether a community services board is authorized to designate a hospital or other facility, which is not a state hospital or Veterans Administration Hospital and is physically located outside the political subdivision it serves, as the placement for a person meeting the involuntary commitment criteria in § 37.1-67.3 of the Code of Virginia. If such authority exists, you also ask if this designation is binding on the court.

I. Applicable Statutes

Section 37.1-67.3 provides, in part, that, if a judge finds that a person who is subject to involuntary commitment procedures meets the commitment criteria detailed in this statute and that there is no less restrictive alternative to institutional confinement and treatment, "the judge shall by written order and specific findings so certify and order
that the person be placed in a hospital or other facility for a period of treatment not to exceed 180 days from the date of the court order." Section 37.1-67.3 further provides, in part:

Such placement shall be in a hospital or other facility designated by the community services board which serves the political subdivision in which the person was examined as provided in this section. If the community services board does not provide a placement recommendation at the commitment hearing, the person shall be placed in a hospital or other facility designated by the Commissioner [of Mental Health, Mental Retardation and Substance Abuse Services].

Section 37.1-67.3 defines the term "facility" as "[a] state or private hospital, training center for the mentally retarded, psychiatric hospital, or other type of residential and ambulatory mental health or mental retardation facility and when modified by the word 'state' it means a facility under the supervision and management of the Commissioner."

Section 37.1-67.3 provides, in part, that "[h]ospital' or 'hospitals' when not modified by the words 'state' or 'private' shall be deemed to include both state hospitals and private hospitals devoted to or with facilities for the care and treatment of the mentally ill or mentally retarded."

II. Community Services Board May Designate Hospital or Other Facility, Other Than State Hospital or Veterans Administration Hospital, Physically Located Outside Political Subdivision Which It Serves

If the judge finds that the person meets the involuntary commitment criteria in § 37.1-67.3, an order "shall" be entered requiring that the person be placed "in a hospital or other facility designated by the community services board which serves the political subdivision in which the person was examined." Section 37.1-67.3. Neither the term "hospital" nor the term "facility" is modified in this statute by the word "state" and, therefore, may include either a state or a private facility. See § 37.1-1. It is my opinion, therefore, that the community services board may recommend that the placement be made in a private hospital or facility rather than in a state hospital or Veterans Administration Hospital.

The phrase "which serves the political subdivision in which the person was examined" in § 37.1-67.3 describes the community services board with responsibility to make the placement recommendation and does not modify "hospital or other facility." Similar phrases are contained in the preceding paragraph of § 37.1-67.3, which provides that the judge shall request "from the community services board which serves the political subdivision where the person resides a prescreening report," as well as the subsequent paragraph, which requires "[t]he community services board which serves the political subdivision in which the person was examined" to designate specific programs for outpatient treatment. It is my opinion, therefore, that the community services board may designate placement in a hospital or other facility outside the political subdivision in which the person was examined.

III. Designation of Placement Is Binding on Court

Section 37.1-67.3 requires the judge to make certain findings after observing the person and obtaining the necessary positive certification and other relevant evidence. Once these findings are made, however, the judge is required by the statute to enter a written order placing the person in a hospital or other facility for a period of treatment not to exceed 180 days. The statute provides that "[u]ch placement shall be in a hospital or other facility designated by the community services board." (Emphasis added.) Use of
the word "shall" in a statute generally indicates that its procedures are intended to be mandatory, rather than permissive or directive. See Att'y Gen. Ann. Rep.: 1986-1987 at 154, 155; id. at 300; 1985-1986 at 119, 120; 1977-1978 at 64.

It is my opinion, therefore, that the community services board may designate either a private or state facility or hospital, or a Veterans Administration Hospital, physically located outside the political subdivision the board serves, to provide treatment for persons who meet the commitment criteria and, further, that the court is bound by the designation of the community services board.

MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL.

Proceedings conducted by special justices pursuant to S 37.1-67.1 not compensable under S 37.1-89.

March 16, 1989

The Honorable William W. Sweeney
Judge, Circuit Court of Bedford County

You ask whether a proceeding conducted by a special justice pursuant to S 37.1-67.1 of the Code of Virginia is compensable under S 37.1-89.

I. Applicable Statutes

Section 37.1-88 authorizes the appointment of special justices and provides:

The chief judge of each judicial circuit may appoint one or more special justices, for the purpose of performing the duties required of a judge by this title [Title 37.1]. At the time of appointment each such special justice shall be a person licensed to practice law in this Commonwealth, shall have all the powers and jurisdiction conferred upon a judge by this title and shall serve under the supervision and at the pleasure of the chief judge making the appointment. Special justices shall collect the fees prescribed in this title for such service and shall retain fees unless the governing body of the county or city in which such services are performed shall provide for the payment of an annual salary for such services, in which event such fees shall be collected and paid into the treasury of such county or city.

Section 37.1-89 governs the payment of fees and expenses to special justices and provides, in part:

Any special justice as defined in § 37.1-88 and any district court substitute judge . . . [1] shall receive a fee of twenty-five dollars [2] for each preliminary hearing, each commitment hearing, each certification hearing and each order under § 37.1-134.2 ruling on competency or treatment and his necessary mileage.

Your question concerns the applicability of this statute to § 37.1-67.1, which governs the issuance and execution of orders of temporary detention and provides, in part:

Any judge as defined in § 37.1-1,[3] or a magistrate upon the advice of a person skilled in the diagnosis or treatment of mental illness, may, upon the sworn petition of any responsible person or upon his own motion based upon
probable cause, issue an order requiring any person within his jurisdiction alleged or reliably reported to be mentally ill and in need of hospitalization to be brought before the judge. If such person cannot be conveniently brought before the judge, the judge or magistrate may issue an order of temporary detention.

II. Proceedings Conducted by Special Justices Pursuant to § 37.1-67.1 Are Not Compensable Under § 37.1-89

Statutes which grant compensation to public officers ordinarily are strictly construed. See 1986-1987 Att'y Gen. Ann. Rep. 89. Compensation for a special justice is expressly authorized by § 37.1-89 and the 1988-1990 Appropriations Act only for preliminary hearings, commitment hearings, certification hearings and orders entered pursuant to § 37.1-134.2 concerning competency and treatment. Preliminary hearings are hearings that are conducted pursuant to § 37.1-67.2. Commitment hearings are hearings conducted pursuant to § 37.1-67.3. Certification hearings are hearings conducted pursuant to § 37.1-65.1. Rulings on competency and treatment result from proceedings held pursuant to § 37.1-134.2. Neither § 37.1-89 nor the 1988-1990 Appropriations Act contains authorization for compensation for proceedings conducted pursuant to § 37.1-67.1.

It is a basic principle of statutory construction that, when a statute creates a specific grant of authority, the authority exists only to the extent plainly granted by the statute. Further, the mention of one thing in a statute implies the exclusion of another. See 1980-1981 Att'y Gen. Ann. Rep. 209, 210. Combining these basic principles with the required strict construction of § 37.1-89, it is my opinion that § 37.1-89 does not authorize compensation to a special justice for proceedings conducted pursuant to § 37.1-67.1.

This conclusion is supported by § 16.1-246(H), which provides that a child may be taken into custody "[w]ith a temporary detention order issued in accordance with § 37.1-67.1 by a special justice appointed pursuant to § 37.1-88, who shall receive no fee, or by a magistrate." (Emphasis added.) It cannot be assumed that the General Assembly intended to prohibit compensation in certain proceedings under § 37.1-67.1, while authorizing compensation in other identical proceedings. It is my opinion, therefore, that a proceeding conducted by a special justice pursuant to § 37.1-67.1 is not compensable under § 37.1-89.

1The phrase omitted here, which reads "who presides over hearings pursuant to the provisions of §§ 37.1-65.1, 37.1-67.1 through 37.1-67.4 or § 37.1-134.2," modifies the phrase "any district court substitute judge" and does not modify "any special justice as defined in § 37.1-88." It should be noted, however, that this language creates no distinction between the compensation of special justices and the compensation of substitute district court judges. The reference in this phrase to "§ 37.1-67.1 through 37.1-67.4" is a general reference to the involuntary commitment proceedings as a whole. Proceedings conducted pursuant to § 37.1-67.1 are not considered "hearings."

2The 1988-1990 Appropriations Act, Ch. 800, Item No. 17, 1988 Va. Acts 1280, 1290, raises this rate of compensation to $28.75 "for each preliminary hearing, commitment hearing, certification hearing, or order under a § 37.1-134.2 ruling on competency or treatment."

3The definition of the term "judge" in § 37.1-1 includes "the special justices authorized by § 37.1-88."
"Scrap metal processor" may qualify as "demolisher" when processor demolishes or reduces vehicle to state no longer considered vehicle.

August 23, 1989

The Honorable G. Steven Agee
Member, House of Delegates

You ask whether a person or business that qualifies as a "scrap metal processor," as defined in § 46.1-550.6 of the Code of Virginia, also may be a "demolisher," as that term is defined in the same statute.

I. Facts

You state that a company buys used vehicles to shred them into scrap metal. You further state that the company only shreds the vehicles and that it does not crush, flatten, or bale any vehicle. All shredding takes place at a fixed location. When the shredding is complete, the scrap metal is trucked to another location for remelting into steel billets. You conclude that the company meets the definition of a "scrap metal processor" in § 46.1-550.6, but ask whether the company also would qualify as a "demolisher," considering the last phrase of the definition of "demolisher," which provides that a demolisher's business is, among other things, to "reduce a vehicle to a state where it can no longer be considered a vehicle."

II. Applicable Statutes

Chapter 7.1 of Title 46.1, §§ 46.1-550.6 through 46.1-550.15 ("Chapter 7.1") concerns the disposition of salvage motor vehicles. Section 46.1-550.6 defines the terms "demolisher" and "scrap metal processor" as follows:

'Demolisher' shall mean any person, firm, or corporation whose business is to crush, flatten, or otherwise reduce a vehicle to a state where it can no longer be considered a vehicle;

'Scrap metal processor' shall be any person engaged in the business of buying vehicles to process into scrap metal for remelting purposes who, from a fixed location, utilizes machinery and equipment for processing and manufacturing ferrous or nonferrous metallic scrap into prepared grades, and whose principal product is metallic scrap. No scrap metal processor shall sell vehicle components or parts.

III. Statute Contemplates Circumstances When "Scrap Metal Processor" Also May Be "Demolisher"

In construing the meaning of words in a statute, the primary object is to ascertain and give effect to legislative intent. Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). It is a basic rule of statutory construction that, in considering the object and purpose of a statute, a reasonable construction should be given to promote the end for which the statute was enacted. Ambroggi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982). When construing statutes on the same subject, each section should be considered in conjunction with every other section to produce a harmonious result. Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953).
A review of Chapter 7.1 demonstrates that a primary purpose of these statutes is to ensure that the Department of Motor Vehicles ("DMV") maintains accurate and complete title records on all motor vehicles in the Commonwealth. DMV must be able to document the chain of title on any motor vehicle from the time the vehicle is purchased as a new vehicle until the time it is demolished and processed into scrap metal. This documentation is designed, in part, to combat the illegal activity of stealing motor vehicles, stripping parts off those vehicles, using the parts to rebuild other vehicles, and then reselling the rebuilt vehicles, after using the vehicle identification number of the stolen vehicles to obtain a new title.

All salvage dealers, salvage pools, and rebuilders must be licensed by DMV. See § 46.1-550.7:1(A). All demolishers must obtain a certificate of registration from DMV. See § 46.1-550.7:1(B). Any insurance company that pays a claim for a total loss on a motor vehicle must obtain from DMV a certificate of title designating the vehicle as a salvage vehicle which the insurance company then may assign to any purchaser of the vehicle. See § 46.1-550.8(A). If a salvage vehicle is sold by a salvage dealer to anyone other than a "demolisher" or a "scrap metal processor," the salvage dealer must obtain from DMV a certificate of title. If the salvage dealer purchases the salvage vehicle for parts only, or to be processed by a demolisher or scrap metal processor, the salvage dealer must forward the title to DMV for cancellation. See § 46.1-550.8(B). Rebuilders also must have certificates of title on every vehicle in their inventory available for resale. Like the salvage dealer, if the rebuilder uses the vehicle only for parts, the title to the vehicle must be forwarded to DMV for cancellation. See § 46.1-550.9. Any demolisher acquiring a late model vehicle for processing also must follow certain procedures in forwarding the title to DMV to demonstrate that the vehicle, in fact, was destroyed. See § 46.1-550.8(C). The requirements of these statutes demonstrate the importance the General Assembly has placed upon maintaining an accurate and complete record of the chain of title on a vehicle until the vehicle ultimately is demolished.

I note that there are no similar reporting and titling requirements for scrap metal processors in Chapter 7.1. If a scrap metal processor purchases a previously demolished vehicle from a demolisher or salvage dealer, it is not necessary for the scrap metal processor to forward the certificate of title to DMV, because this would already have been done by the demolisher or salvage dealer. See § 46.1-550.8(B)-(C). If a scrap metal processor purchased a vehicle not yet demolished solely to be shredded, however, no statute currently requires the scrap metal processor to forward the certificate of title to DMV, even though a demolisher must do so when he similarly "reduce[s] a vehicle to a state where it can no longer be considered a vehicle." Section 46.1-550.6. Unless the scrap metal processor also may be considered a "demolisher" when a vehicle is shredded under these circumstances, a break in the chain of title of the vehicle occurs for which DMV has no record and in which an illegal activity potentially could flourish. The General Assembly could not have intended this result.

Based on the above, it is my opinion that a "scrap metal processor" also may qualify as a "demolisher," as those terms are defined in § 46.1-550.6, when the scrap metal processor is, in essence, demolishing, or otherwise "reduce[ing] a vehicle to a state where it can no longer be considered a vehicle."

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1 For purposes of this Opinion, I assume that the used vehicles have not yet been demolished, crushed, or flattened by a "demolisher."

2 Although § 46.1-550.8(C) is limited to late model vehicles, § 46.1-555.8 requires a demolisher to surrender to DMV the certificate of title or sales receipt after demolition or processing of the vehicle, without limiting this requirement to late model vehicles.
Habitual offender may petition circuit court for early restoration of driving privilege when adjudication based in whole or in part, but not necessarily dependent upon, finding of not innocent as juvenile of underlying offense.

February 27, 1989

The Honorable J. Randolph Smith Jr.
Commonwealth's Attorney for the City of Martinsville

You ask whether a person who has been adjudged an habitual offender may petition a circuit court for the reinstatement of his driver's license pursuant to § 46.1-387.2(d) of the Code of Virginia when the abstract of the person's driver's record from the Department of Motor Vehicles contains a juvenile finding of not innocent for an underlying offense, in addition to sufficient adult convictions which themselves would support the habitual offender adjudication. You also ask whether, for purposes of § 46.1-387.2(d), the habitual offender adjudication must be dependent upon the juvenile offense for the habitual offender to petition for the early restoration of his driver's license.

I. Facts

On January 23, 1986, the Department of Motor Vehicles certified to the Commonwealth's attorney's office four convictions on a particular driver's record which would support an habitual offender adjudication. The four convictions were (1) driving while intoxicated at age sixteen, (2) driving while intoxicated at age eighteen, (3) driving while intoxicated, second offense, at age twenty, and (4) driving while intoxicated, third offense, at age twenty-three. By order dated April 22, 1986, the defendant was declared an habitual offender, but the order did not indicate upon which three of the four convictions the habitual offender adjudication was based. The defendant now seeks restoration of his privilege to drive pursuant to § 46.1-387.2(d).

II. Applicable Statutes

The Virginia Habitual Offender Act (the "Act"), §§ 46.1-387.1 through 46.1-387.12, establishes the policy and penalties applicable to those motor vehicle operators whose convictions bring them within the definition of an "habitual offender." More particularly, §§ 46.1-387.3 and 46.1-387.5 provide, in part, that the court in which an attorney for the Commonwealth files an information against such person shall enter an order requiring the person named in the information to show cause why he should not be adjudged an habitual offender.

Section 46.1-387.2(d) provides that "[a]ny person twenty-one years of age, or older who has been adjudged an habitual offender based in whole or in part on findings of not innocent as a juvenile may petition the court for restoration of his privilege to operate a motor vehicle in this Commonwealth." (Emphasis added.)

Section 46.1-387.9:1 also provides that

[any person who has been found to be an habitual offender where such adjudication was based in part upon and dependent on a conviction of § 46.1-387.2(a)(5) [operating a motor vehicle without a license], now repealed, shall have the right to petition the court for restoration of his privilege to operate a motor vehicle in this Commonwealth. [Emphasis added.]
Section 46.1-387.9:2 further provides:

Any person who has been found to be an habitual offender where such adjudication was based in part and dependent on a conviction as set out in § 46.1-387.2(a)(2) [driving under the influence of intoxicants or drugs] and (3) [driving while impaired], the latter subdivision now repealed, may, after the expiration of five years from the date of such adjudication, petition the court . . . for restoration of his privilege to operate a motor vehicle in this Commonwealth. [Emphasis added.]

Section 46.1-387.9:3 provides:

Any person who has been found to be an habitual offender, where such adjudication was based in whole or in part and dependent upon a conviction as set out in § 46.1-387.2(a)(4) [driving on a suspended or revoked license], may, after five years from the date of such adjudication, petition the court . . . for restoration of his privilege to operate a motor vehicle in this Commonwealth. [Emphasis added.]

III. When Abstract Shows Juvenile Adjudication and Subsequent Order Does Not Indicate upon Which Offenses Habitual Offender Determination Is Based, Offender May Petition Court for Early Restoration of Driving Privilege Pursuant to § 46.1-387.2(d)

When the Act first was enacted by the General Assembly in 1968, no provision was made for the early restoration of the habitual offender's driving privileges. In 1974, the General Assembly added §§ 46.1-387.2(d) and 46.1-387.9:1, both of which permit a petition to the circuit court for the restoration of an habitual offender's driving privileges prior to the expiration of ten years. Sections 46.1-387.9:2 and 46.1-387.9:3, which also pertain to the early restoration of driving privileges, were enacted in 1976 and 1984, respectively.

Section 46.1-387.2(d), quoted above, authorizes an habitual offender to petition the court for the early restoration of his driving privilege when he is twenty-one years of age or older and has been adjudged an habitual offender "based in whole or in part on findings of not innocent as a juvenile." In contrast, §§ 46.1-387.9:1 through 46.1-387.9:2 contain the additional requirement that the adjudication be "dependent on" a conviction of a particular underlying offense for an habitual offender to petition for the early restoration of his driving privilege. Section 46.1-387.9:3, for example, requires that the adjudication be "based in whole or in part and dependent upon" certain underlying convictions.

The primary objective of statutory interpretation is to give effect to the legislative intent behind its enactment. Vollins v. Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976); Bott v. Hampton Roads San. Comm., 190 Va. 775, 783, 58 S.E.2d 306, 309-10 (1950). It is an accepted rule of statutory construction that, when construing statutes on the same subject, each section should be considered in conjunction with every other to produce an harmonious result. Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953). It is my opinion that the result of the application of these rules to the facts you present is that, for an habitual offender to petition the circuit court for the early restoration of his driving privilege pursuant to § 46.1-387.2(d), the habitual offender adjudication must be based, at least in part, upon a finding of not innocent as a juvenile. The habitual offender adjudication, however, is not required to be dependent upon such a juvenile offense. While the habitual offender order in the facts you present may have been "based upon" the juvenile offense as well as the three adult offenses, it was not "dependent upon" the juvenile offense because the three adult offenses alone would support the habitual offender order. See § 46.1-387.2(a)(2). Dependency is a requirement of other restoration statutes, but it is conspicuously absent in § 46.1-387.2(d).
It cannot be assumed that the dependency requirement is merely superfluous language in §§ 46.1-387.91 through 46.1-387.93.

In the facts you present, therefore, it is my opinion that the habitual offender is eligible to petition the court pursuant to § 46.1-387.2(d) for the restoration of his driving privilege.

When the abstract from the Department of Motor Vehicles shows a juvenile finding of not innocent of an offense which is not essential to the habitual offender adjudication, the result reached in this Opinion may be avoided if the circuit court specifies in its order the underlying driving offenses upon which it relies. If the court expressly provides in its order that it relies solely upon the adult convictions, the habitual offender adjudication would not be based "in whole or in part" upon a juvenile finding of not innocent and the habitual offender could not rely upon § 46.1-387.2(d) to petition for the early restoration of his privilege to drive.

4Even though I conclude that the habitual offender in the facts you present is eligible to petition the court for the restoration of his driving privilege pursuant to § 46.1-387.2(d), the court obviously is not required to grant the petition. As quoted above, § 46.1-387.9:2 authorizes a court to consider specific evidence on an habitual offender's drug or alcohol dependency prior to its determination concerning the restoration of such driving privilege.

MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY - LOADS AND CARGOES.

Agricultural and forestry products excluded from requirements of covered truck law.

October 10, 1989

The Honorable John C. Watkins
Member, House of Delegates

You ask whether § 46.2-1156(B) of the Code of Virginia requires that sod and turf crops, trees, shrubs, and ground cover grown as nursery crops, and line bark, hardwood bark, and saw dust sold to consumers as mulch or as a soil additive must be covered when these items are hauled by truck.

I. Applicable Statute

Section 46.2-1156(B)

Until July 1, 1993, the loads of all trucks, trailers and semitrailers, carrying gravel, sand or other nonagricultural and nonforestry products on interstate, primary, or secondary highways or roads maintained by cities, counties or incorporated towns shall be either (i) secured to the vehicle in which they are being transported or (ii) covered. Public service company vehicles, pickup trucks, coal trucks, and emergency snow removal equipment while engaged in snow removal operations shall be excluded from the provisions of this subsection.
II. Statute Does Not Require That All Loads Be Covered

Prior Opinions of this Office consistently conclude that the language of § 46.2-1156(B), quoted above, 'does not require that the loads of all trucks, trailers and semitrailers be covered. The statute, by its terms, applies only to those trucks, trailers and semitrailers "carrying gravel, sand or other nonagricultural and nonforestry products on interstate, primary or secondary highways or roads maintained by cities, counties or incorporated towns." Public service company vehicles, pickup trucks, coal trucks and emergency snow removal equipment while engaged in snow removal operations are excluded from the requirements of the statute. [Footnote omitted.]

If the load of a truck, trailer or semitrailer to which this statute applies is not covered—that is, overspread with a material so that the load will be confined inside or to the vehicle—the load of that truck, trailer or semitrailer must be secured inside or to the vehicle.'


III. Agricultural and Forestry Products, Including Products in Facts Presented, Are Excluded from Operation of § 46.2-1156(B)

A prior Opinion of this Office also concludes that agricultural and forestry products are excluded from the operation of this statute. An "agricultural product" includes:

'[t]hings which have a situs of their production upon the farm and which are brought into condition for uses of society by labor of those engaged in agricultural pursuits as contradistinguished from manufacturing or other industrial pursuits. That which is the direct result of husbandry and the cultivation of the soil.'

1987-1988 Att'y Gen. Ann. Rep. 423, 426-27 (citation omitted). This prior Opinion further concludes that "forestry products' include such products as 'logs, lumber, timber, poles [and] ties,' but exclude 'stumps and other forest debris--brush, limbs, leaves, etc.' which, although produced in the forest "are not 'produced' for the use of society but, rather, are hauled away from the site and disposed of." Id. at 427 (citation omitted).

Based on the above, it is my opinion that (1) sod and turf crops and (2) trees, shrubs, and ground cover grown as nursery crops constitute "agricultural products" and, therefore, are excluded from the requirements of § 46.2-1156(B). Sod and turf crops clearly are "agricultural products" because they are the direct result of the cultivation of the soil. Trees, shrubs, and ground covers grown as nursery crops also constitute "agricultural products" because they are "brought into condition for uses of society by labor of those engaged in agricultural pursuits as contradistinguished from manufacturing or other industrial pursuits." Id. at 426-27.

It is further my opinion that the pine bark, hardwood bark, and sawdust in the facts you present constitute "forestry products," and, therefore, are excluded from the requirements of § 46.2-1156(B). Since you state that the bark and sawdust will be sold to consumers for use as mulch or as a soil additive for agricultural or horticultural purposes, this material is not merely an unwanted forestry by-product to be "hauled away from [a] site and disposed o" as debris. 1987-1988 Att'y Gen. Ann. Rep., supra, at 427.
MOTOR VEHICLES: MOTOR VEHICLE DEALERS.

Department of Motor Vehicles not authorized to enforce dealer advertising statutes against either out-of-state motor vehicle dealer whose only contact with Virginia is through advertisement in Virginia-based communications medium or communications medium which publishes advertisement for Virginia or out-of-state motor vehicle dealer.

October 20, 1989

Mr. Donald E. Williams
Commissioner, Department of Motor Vehicles

You ask two questions concerning the authority of the Commissioner of the Department of Motor Vehicles ("DMV") to enforce the Commonwealth's motor vehicle dealer advertising statutes, §§ 46.2-1580 through 46.2-1582 of the Code of Virginia ("dealer advertising statutes") against (1) an out-of-state motor vehicle dealer or (2) a Virginia-based communications medium (television, radio, newspaper) which publishes an advertisement that is violative of these statutes.¹

I. Applicable Statutes

Chapter 15 of Title 46.2, §§ 46.2-1500 through 46.2-1582 ("Chapter 15"), contains an extensive regulatory scheme administered by DMV with regard to motor vehicle dealers, manufacturers, distributors, factory branches and their representatives. The dealer advertising statutes are one portion of the complete regulatory mechanism created by Chapter 15.

Section 46.2-1500 defines a "motor vehicle dealer" or "dealer" as a person who:

(1) For commission, money, or other thing of value, buys, sells, exchanges, either outright or on conditional sale, bailment lease, chattel mortgage, or otherwise or arranges or offers or attempts to solicit or negotiate on behalf of others a sale, purchase, or exchange of an interest in new motor vehicles, new and used motor vehicles, used motor vehicles alone, or trailers or semitrailers, whether or not the motor vehicles, trailers, or semitrailers are owned by him . . . .

The legislative findings supporting the dealer advertising statutes are contained in § 46.2-1580, which provides, in part:

whereas, it is in the interest of the consuming public and legitimate motor vehicle dealers to insure that the advertising of the sale of motor vehicles is honest, fair, and clear, the General Assembly of Virginia hereby finds that deceptive or misleading advertising of the retail sales of motor vehicles should be prohibited. The General Assembly further finds that the Commissioner of the Department of Motor Vehicles has the expertise and experience in licensing of motor vehicle dealers and, therefore, the Commissioner shall be solely responsible for the enforcement of this act. The authority granted in this article shall be in addition to and not a substitute for the powers and authority granted pursuant to the provisions of the Virginia Consumer Protection Act (§ 59.1-196 et seq.).

Section 46.2-1581 then details the prohibited advertising practices considered to constitute an "unfair, deceptive, or misleading act or practice." Section 46.2-1582 further provides, in part:

In addition to any other sanctions or remedies available to the Commissioner under this chapter, the Commissioner may assess a civil penalty not to exceed $1,000 for any single violation of this article [Article 9]. Each day that a violation continues shall constitute a separate violation.

II. DMV Has No Enforcement Authority Against Out-of-State Motor Vehicle Dealer Who Advertises in Violation of § 46.2-1581

You first ask whether DMV has authority to enforce the Commonwealth's dealer advertising statutes against an out-of-state motor vehicle dealer who advertises in a manner that violates § 46.2-1581 in a Virginia-based communications medium.

To be subject to the regulatory scheme of Chapter 15, a dealer must be a "motor vehicle dealer," as defined in § 46.2-1500, and also must be licensed with DMV as a Virginia dealer pursuant to § 46.2-1508. A prior Opinion of this Office concludes that "[e]ngaging in the business of selling motor vehicles in Virginia is prohibited, without first having obtained a license" as required by § 46.2-1508. 1981-1982 Att'y Gen. Ann. Rep. 254 (emphasis added).

It is my opinion that an out-of-state motor vehicle dealer whose sole act in the Commonwealth is to advertise in a Virginia-based communications medium would not fall within the definition of a "motor vehicle dealer" in § 46.2-1500. The motor vehicle sale neither is negotiated nor consummated in Virginia, and the dealership is not physically located in Virginia. In this situation, the out-of-state dealer simply is attempting to entice Virginia residents to come to the out-of-state dealership to purchase a motor vehicle rather than purchasing the vehicle from a Virginia-based dealer.

A prior Opinion of this Office concludes that the Commonwealth's dealer licensing statutes do not apply to a factual situation similar to the facts you present. See 1965-1966 Att'y Gen. Ann. Rep. 216. In this prior Opinion, an out-of-state motor vehicle dealer sent its salesman into Virginia to call upon prospective customers. The dealer was physically located and operated within the State of Tennessee. Vehicles sold were delivered in Tennessee, no demonstrations of the vehicles took place in Virginia, and the final paperwork was signed in Tennessee.

The prior Opinion relied, in part, upon the definition of the phrase "motor vehicle dealer" in former § 46.1-516(a), which did not include the act of a dealer attempting or offering to "solicit" a sale of a motor vehicle. The word "solicit," among other language, was added by the General Assembly in 1974. It is my opinion, however, that this 1974 amendment to former § 46.1-516(a) did not make these statutes applicable to the facts you present. As demonstrated in the United States Supreme Court cases cited in the prior Opinion, as well as in more recent Supreme Court cases decided by that Court, the Commerce Clause would prevent a state from imposing a license fee or tax on a business whose only contact with that state is the solicitation or delivery of orders. See, e.g., Dunbar-Stanley Studios v. Alabama, 393 U.S. 537, 540 (1969). Considering the above, the General Assembly could not have intended that the word "solicit" in § 46.2-1500 would bring an out-of-state motor vehicle dealer within the definition of "dealer" when its sole act in Virginia is to advertise in a Virginia-based communications medium. As the prior Opinion of this Office correctly notes, "by its own terms, former § 46.1-523 [now § 46.2-1508] has application only to business conducted in this State." 1965-1966 Att'y
It is my opinion that the same rationale applies to the applicability of the dealer advertising statutes.

Furthermore, DMV could not, as a practical matter, enforce the dealer advertising statutes against an out-of-state dealer. The primary enforcement weapon which DMV has available to insure compliance with the provisions of Chapter 15, including the dealer advertising statutes, is its authority to deny, suspend, or revoke the license or certificate of registration of any licensee or registrant pursuant to the provisions of §§ 46.2-1574 through 46.2-1579. The out-of-state dealer in the facts you present does not have a license or certificate of registration.

Section 46.2-1582 does provide, in part, that "[i]n addition to any other sanctions or remedies available to the Commissioner under this chapter," he may also assess a civil penalty up to $1,000. "[U]nder this chapter," however, refers to Chapter 15 and, pursuant to Chapter 15, DMV regulates, among others, motor vehicle dealers who are or should be licensed pursuant to § 46.2-1508. It is a general principle of administrative law that administrative agencies, in the exercise of their powers, may only act within the authority conferred upon them by statute. *Pump and Well Company v. Taylor*, 201 Va. 311, 316, 110 S.E.2d 525, 529 (1959). If DMV is not authorized to enforce Chapter 15 against out-of-state dealers who only advertise in a Virginia-based communications medium, it is also my opinion that DMV is not authorized to enforce the dealer advertising statutes, which are part of Chapter 15, against such dealers.

III. DMV Has No Enforcement Authority Against Media Advertising in Violation of § 46.2-1581

You also ask whether DMV is authorized to enforce the dealer advertising statutes against a Virginia-based communications medium that publishes a prohibited advertisement either for a Virginia motor vehicle dealer or an out-of-state motor vehicle dealer.

For the same reasons discussed in Part II of this Opinion, it is my opinion that DMV has no regulatory authority to enforce the dealer advertising statutes against the media. Pursuant to Chapter 15, DMV regulates specified entities and persons, not including the media. This lack of regulatory authority, however, should not prevent DMV from educating the print and broadcast media concerning the requirements of Chapter 15.

IV. Summary

Based on the above, it is my opinion that DMV is not authorized to enforce the dealer advertising statutes against either (1) an out-of-state motor vehicle dealer whose only contact with Virginia is that he advertises in a Virginia-based communications medium or (2) the communications medium that publishes the advertisement either for a Virginia or an out-of-state motor vehicle dealer.

1Your questions do not address other potential bases for reaching deceptive automobile dealer advertising by an out-of-state motor vehicle dealer or a Virginia-based communications medium that are enforceable by entities other than the Commissioner of DMV. See, e.g., § 46.2-1597 (violation of Ch. 15 of Tit. 46.2 constitutes Class 1 misdemeanor); §§ 59.1-196 to 59.1-207 (Virginia Consumer Protection Act).


3"If, for example, a license tax were imposed on the acts of engaging in soliciting orders or making deliveries, conflict with the Commerce Clause would be evident because these are minimal activities within a State without which there can be no interstate commerce." *Dunbar–Stanley Studios*, 393 U.S. at 540.

4Although not within the authority of DMV, other enforcement remedies may be pursued. See *supra* note 1.
At least one court has held that a "[n]ewspaper has no duty to investigate each of the advertisers who purchases space in its publication." Pressler v. Dow Jones & Co., 88 A.D.2d 928, 450 N.Y.S.2d 884 (1982); see also Goldstein v. Garlick, 65 Misc. 2d 538, 318 N.Y.S.2d 370 (1971).

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MOTOR VEHICLES: MOTOR VEHICLE SAFETY RESPONSIBILITY ACT.

CIVIL REMEDIES AND PROCEDURE: PROCESS - WHO TO BE SERVED.

Enforcement of driving on suspended or revoked license offenses should not be deterred because Department of Motor Vehicles has no record of notification pursuant to § 46.1-441.2. State trooper or police officer may give written notice of suspension or revocation.

June 23, 1989

Colonel R.L. Suthard
Superintendent, Department of State Police

You ask two questions concerning notification to a driver of the suspension or revocation of his driver's license pursuant to § 46.1-441.2 of the Code of Virginia.

I. Applicable Statutes

Until July 1, 1989, § 46.1-441.2(A) provides:

Whenever it is provided in this title that a driver's license may or shall be suspended or revoked either by the Commissioner of the Department of Motor Vehicles or by a court, notice of such suspension or revocation or any certified copy of the decision or order of the Commissioner may be sent by the Department by certified mail to the last known address supplied by such driver and on file at the Department.... In the event the Department's records indicate that someone other than such driver has signed the return receipt or that the return receipt is unsigned, then service may be made as provided in § 8.01-296. Such service shall be made by a sheriff or deputy thereof in the county or city wherein is such address....

The 1989 Session of the General Assembly amended § 46.1-441.2(A), effective July 1, 1989, to provide:

Whenever it is provided in this title that a driver's license may or shall be suspended or revoked either by the Commissioner of the Department of Motor Vehicles or by a court, notice of such suspension or revocation or any certified copy of the decision or order of the Commissioner may be sent by the Department by certified mail, return receipt requested, to the driver at the last known address supplied by such driver and on file at the Department.... To be effective, notice by mail shall be signed for by the driver. If notice by mail is not received and signed for by the driver, then service may be made as provided in § 8.01-296, which service on the driver shall be made by delivery in writing to the driver in person in accordance with subdivision 1 of § 8.01-296 by a sheriff or deputy thereof in the county or city wherein is such address....

Section 8.01-296 provides, in part:

Process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:

1. By delivering a copy thereof in writing to the party in person; or

2. By substituted service in the following manner:
   a. If the party to be served be not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older; or
   b. If such service cannot be effected under subitem a of subdivision 2, then by posting a copy of such process at the front door of such place of abode.

II. Enforcement of Driving on Suspended or Revoked License Offenses Should Not Be Deterred Because Department of Motor Vehicles Has No Record of Notification Pursuant to § 46.1-441.2

You first ask whether a state trooper or police officer who has stopped a driver and who has received a response from the Department of Motor Vehicles ("DMV") that the driver's license has been suspended may take enforcement action against the driver if the state trooper or police officer does not know whether the driver has received a copy of the suspension notice by certified mail or has been served personally pursuant to § 8.01-296. Service by certified mail or service by a sheriff or deputy sheriff pursuant to § 8.01-296 are the two methods of notification in § 46.1-441.2 as it is presently written, while service by certified mail or service by a sheriff or deputy sheriff in accordance with § 8.01-296(1) are the two methods detailed in § 46.1-441.2, as it has been amended effective July 1, 1989.

In Pitchford v. Commonwealth, 2 Va. App. 377, 381, 344 S.E.2d 924, 926 (1986), the Court of Appeals of Virginia held that § 46.1-441.2 sets forth "two permissible methods by which DMV may provide notice of suspension." (Emphasis in original.) The Court concluded, however, that § 46.1-441.2(A) "does not establish the only permissible methods to provide one with notice of suspension." Id. Actual notice of the suspension also is sufficient notice upon which to base a conviction of driving on a suspended license. See id. at 382, 344 S.E.2d at 926. See also 1986-1987 Att'y. Gen. Ann. Rep. 235, 236. A prior Opinion of this Office concludes that oral notice of suspension or revocation by a police officer is an effective means of giving actual notice, even though written notice as provided in § 46.1-441.2 has not been given. See 1984-1985 Att'y. Gen. Ann. Rep. 206, 207.

The 1989 amendments to § 46.1-441.2 do not, in my opinion, alter the conclusions reached in Pitchford v. Commonwealth and in the prior Opinions of this Office cited above. In Pitchford, the Court placed emphasis on the language in § 46.1-441.2 that a driver "may" receive notification by one of the two methods provided by that statute. See 2 Va. App. at 381, 344 S.E.2d 926. The 1989 amendments retain that language. The 1989 amendments to § 46.1-441.2, among other things, simply add the requirement that the driver be notified personally of the suspension, whether this notification is by certified mail or by personal service pursuant to § 8.01-296(1). It is my opinion that this 1989 amendment does not preclude the use of any other form of notification which results in actual notice being given to the driver of the suspension or revocation.
Based on the above, if a state trooper or police officer stops a driver and learns from DMV that the driver's license has been suspended or revoked, it is my opinion that the state trooper or police officer should not be deterred from taking enforcement action simply because DMV records do not indicate that the driver has received written notice by one of the two methods set forth in § 46.1-441.2, as long as probable cause exists to charge the driver. The driver already may have received actual notice through some other means. As the Pitchford decision demonstrates, the burden of proof will be on the Commonwealth in these cases to show that the accused had actual notice of the suspension or revocation. At trial, if no such proof is available, the Commonwealth obviously may elect not to proceed with the prosecution.

You next ask whether a state trooper or police officer may execute personal service of a license suspension or revocation on a driver with a form which gives notice of the suspension or revocation. I assume that your question involves the police officer who, in making a routine stop of a driver, is aware that the driver's license has been suspended or revoked, but DMV records do not show service of the notification.

As discussed above, actual notice of license suspension or revocation is sufficient notice to support a conviction for driving on a suspended or revoked license, even if the execution of such notice was not accomplished by one of the two methods set forth in § 46.1-441.2. If a state trooper making a routine stop learns that a driver's license has been suspended or revoked, but DMV records do not indicate actual service of that notification, it is my opinion that the state trooper or police officer may give written notice of the suspension to the driver at the time of the stop. This would be one "permissible" method of giving actual notice of the license suspension or revocation in addition to the two methods described in § 46.1-441.2.

Motor Vehicles: Regulation of Traffic.

"Virginia seaport" means port located in Virginia. Statutory weight limit exemption dependent upon marine shipments to or from ports in Virginia.

February 27, 1989

The Honorable L.A. Harris Jr.
Judge, General District Court of Henrico County

You ask for a definition of the phrase "Virginia seaport," as it is used in § 46.1-343 of the Code of Virginia, and whether the weight limit exemption granted by § 46.1-343(a)(2) is dependent upon the maritime shipment of a seagoing container to or from a seaport located in Virginia.
I. Applicable Statutes

Section 46.1-343(a)(2) authorizes a special permit to be granted by the Department of Transportation to allow a vehicle exceeding the maximum weight limits specified in the Code of Virginia upon the highways of the Commonwealth if "the vehicle is hauling or carrying containerized cargo in a sealed, seagoing container bound to or from a Virginia seaport and has been or will be transported by marine shipment." The last sentence of § 46.1-343(a)(2) provides that the requirement

that the container be bound to or from a Virginia seaport need not be met if the cargo in the container (i) is destined for a seaport outside Virginia and (ii) consists wholly of farm products grown in that part of Virginia separated from the larger part of the Commonwealth by the Chesapeake Bay.

II. "Virginia Seaport" Means Port Located in Virginia

It is a general rule of statutory construction that words in a statute should be given their usual, commonly understood meaning. See 1986-1987 Att'y Gen. Ann. Rep. 241. The commonly understood meaning of "seaport" is "[a] harbor or town having facilities for seagoing ships." The American Heritage Dictionary 1106 (2d ed. 1985). Accordingly, it is my opinion that the phrase "Virginia seaport," as it is used in § 46.1-343(a)(2), means a harbor or town having facilities for seagoing ships which is located in Virginia. The conclusion that the General Assembly intended to limit the exemption in § 46.1-343(a)(2) to seaports located in Virginia is demonstrated by the fact that the legislature also exempted trucks carrying seagoing containers filled with Eastern Shore farm products "destined for a seaport outside Virginia."

III. Statutory Exemption Dependent upon Marine Shipments to or from Ports in Virginia

Section 46.1-343(a)(2) exempts from normal weight limits a vehicle which is "carrying containerized cargo in a sealed, seagoing container bound to or from a Virginia seaport and [which] has been or will be transported by marine shipment." (Emphasis added.) The use of the term "and" implies the conjunctive unless the words in a statute clearly express the legislative intent that "and" be considered in the disjunctive. See 1978-1979 Att'y Gen. Ann. Rep. 323, 324. There is nothing in § 46.1-343(a)(2) that expresses a legislative intent that the term "and" should be read to mean "or." It is my opinion, therefore, that a vehicle must be transporting containerized cargo which has been or will be transported by marine shipment to or from a Virginia seaport to be entitled to the exemption in § 46.1-343(a)(2).

In summary, it is my opinion that, unless a vehicle is transporting only farm products grown on the Eastern Shore, a vehicle must be carrying to or from a seaport located in Virginia containerized cargo which has been or will be transported by marine shipment to or from a Virginia seaport to be entitled to a special permit granted pursuant to § 46.1-343(a)(2).

PENSIONS AND RETIREMENT: VIRGINIA SUPPLEMENTAL RETIREMENT ACT.

Statutory amendments do not authorize provision of retirement benefits described in statute to Alcoholic Beverage Control special agents.

August 16, 1989
You ask whether the 1989 amendments to § 51-111.37 of the Code of Virginia authorize the provision of retirement benefits described in that statute to special agents of the Alcoholic Beverage Control ("ABC") Board.

I. Applicable Statutes

Section 51-111.37 authorizes certain employers to provide a retirement benefit described in the statute to certain employees in law-enforcement and fire-fighting positions. Section 51-111.31, which was not amended by the 1989 Session of the General Assembly, describes the employer as

[1]he governing body of any county, city or town, and the directing or governing body of any political entity, subdivision, branch or unit of the Commonwealth or of any commission or public authority or body corporate created by or under an act of the General Assembly specifying the power or powers, privileges or authority capable of exercise by the Commission or public authority or body corporate, as distinguished from §§ 15.1-20, 15.1-21, or similar statutes . . . .

The 1989 amendments to § 51-111.37, which become effective on July 1, 1990, reduce the service and age requirements applicable to state police officers and sheriffs to twenty-five years of service and age fifty, require sheriffs participating in the Virginia Supplemental Retirement System ("VSRS") to receive retirement benefits equivalent to those received by state police officers, and authorize localities that are VSRS participants either to adopt the twenty-five years of service and fifty years of age requirement for local law-enforcement personnel and fire fighters or to continue under the current requirements of thirty years of service and fifty years of age.

II. Prior Opinion and Circuit Court Decision Conclude That § 51-111.37 Is Inapplicable to ABC Enforcement Personnel

A prior Opinion of this Office concludes that § 51-111.37, prior to its amendment by the 1989 Session of the General Assembly, does not apply to ABC enforcement personnel and that retirement benefits comparable to those provided to state police officers are not authorized for ABC enforcement personnel under any existing statute. See 1981-1982 Att'y Gen. Ann. Rep. 448.

Had the legislature intended ABC law-enforcement personnel to be included in the benefits extended to State police officers, it could have so specified. In fact, in the past few years, two bills have been introduced that would have specifically extended coverage to ABC law-enforcement personnel. In 1976, S.B. 365 was introduced to amend §§ 51-143 and 51-144(3). This would have included 'a member of the Enforcement Division of the Virginia Alcoholic Beverage Control Board vested with police authority . . . ' within the definition of 'employee' for purposes of participation in the retirement system for State police. In 1979, H.B. 1390 proposed to amend § 51-111.37 to extend benefits to law-enforcement officers of the ABC and the State Corporation Commission. Both Bills were defeated.

Id. at 449.

In a decision rendered subsequent to this prior Opinion, the Circuit Court of the City of Richmond agreed that § 51-111.37 authorizes a locality, and not the ABC Commission.

**III. Statutory Amendments Do Not Alter Rule of Case or Prior Opinion; Statute Does Not Authorize Provision of Benefits to ABC Agents**

None of the amendments to § 51-111.37 enacted by the 1989 Session of the General Assembly pertains to the provision of retirement benefits to ABC agents. Even after the 1989 amendments to § 51-111.37, this statute remains applicable to localities as employers, and not to the ABC Board or its enforcement personnel. The General Assembly could, of course, amend this statute to include ABC special agents. In the absence of such an amendment, however, it is my opinion that the 1989 amendments do not authorize the provision of retirement benefits described in § 51-111.37 to ABC special agents.

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**PRISONS AND OTHER METHODS OF CORRECTION: COMMENCEMENT OF TERMS; CREDITS AND ALLOWANCES — LOCAL CORRECTIONAL FACILITIES.**

Credit given for time spent in jail awaiting preliminary hearing for defendant convicted pursuant to subsequent direct indictment for identical offense. Cooperation and communication among law-enforcement agencies necessary for accurate recordkeeping.

March 24, 1989

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

You ask whether a criminal defendant should receive credit for time spent in jail awaiting a preliminary hearing on a warrant for third offense petit larceny, when the warrant is dismissed, but the defendant subsequently is convicted on a direct indictment for the identical petit larceny offense. You also ask what records should be kept to document the jail time served by this defendant on the original warrant, since the defendant's jail file typically would be closed following the court's dismissal of that warrant.

**I. Facts**

You describe a defendant who is arrested on a warrant charging a third offense of petit larceny and is detained in jail pending a preliminary hearing on the warrant. After the defendant spends 30 days in jail, the general district court dismisses the warrant and the defendant is released from custody. The defendant subsequently is charged with the same offense in the circuit court on a direct indictment by a grand jury. The defendant is convicted on the indictment and sentenced to 12 months in jail.

You state that the two petit larceny charges against the defendant were based upon the same incident. You further state that jail records available on this defendant do not link the two charges and, unless whoever reads these records is familiar with the cases against this defendant, the charges mistakenly could be considered as based upon two independent incidents.
II. Applicable Statutes

Section 53.1-187 of the Code of Virginia provides, in part:

Any person who is sentenced to a term of confinement in a correctional facility shall have deducted from any such term all time actually spent by the person ... in a state or local correctional facility awaiting trial.... When entering the final order in any such case, the court shall provide that the person so convicted be given credit for the time so spent.

A "local correctional facility" is defined in § 53.1-1 to include a jail.

Section 53.1-116 requires a jailer to "keep a record describing each person committed to jail ... for what offense or cause he was committed, and when received into jail." This record is required to be kept for each prisoner.

III. Credit Must Be Given for Time Spent in Jail Awaiting Preliminary Hearing for Defendant Convicted Pursuant to Subsequent Direct Indictment for Identical Offense

As quoted above, § 53.1-187 provides that a defendant who is sentenced to a term of confinement in a jail must be credited with all time that he spent in pre-trial confinement for the particular offense. Prior Opinions of this Office conclude that § 53.1-187 and its statutory predecessor (former § 53-208) require that all time spent in a correctional facility awaiting trial or pending appeal for the same offense be credited toward the completion of a sentence. See Att'y Gen. Ann. Rep.: 1982-1983 at 197 (although statute requires credit for time spent in pre-trial confinement "for the same offense," credit not proper when charges differ); 1974-1975 at 129 (credit for pre-trial confinement may be awarded by jurisdiction other than where pre-trial confinement is served).

It is my opinion, therefore, that the defendant in the facts you present must be credited with the 30 days spent in jail prior to the preliminary hearing on the initial warrant.

IV. Cooperation And Communication Among Law-Enforcement Agencies Necessary for Accurate Recordkeeping

Although § 53.1-116 provides that it is the responsibility of the jailer to keep the prisoner records described in that statute, constant cooperation and communication among the sheriff's department, the police department (if one exists), and the Commonwealth's attorney is vital to ensure that the information contained in these jail records is complete. The facts upon which your inquiry is based demonstrate this fact. If a long period of time had intervened between this defendant's release from pre-trial confinement on the initial warrant and his conviction by the circuit court on the subsequent indictment, the correlation of the earlier jail record with the subsequent sentencing order would be difficult. The jail record required by § 53.1-116 should be kept in sufficient detail to permit the identification of both the defendant and the offense with which the defendant is charged. The more detailed the jailer's record is, the more likely it will be that complete, accurate jail credit time will be calculated.

The Commonwealth's attorney, who will have a record of the original warrant, should be able to identify pre-trial confinement on a particular charge, even if a defendant also has been confined on other unrelated matters. The defendant certainly will recall prior confinement in jail and, assuming the defendant has not waived his right to counsel, defendant's counsel also should be alert to ensure that complete, appropriate pre-trial confinement is credited to a client's sentence.
Circuit court judge may permit prisoners in local correctional facility to work outside facility on public property; may designate persons other than sheriff to be in charge of working prisoners while ultimate custody remains with sheriff. Prisoners in local work force programs may be found guilty of escape.

January 27, 1989

The Honorable Michael F. Kavanaugh
Sheriff for Roanoke County

You ask whether § 53.1-203 of the Code of Virginia would apply to the escape of a prisoner from a proposed work force program in your jurisdiction. You also ask the degree of supervision required for a person to be "in charge of" a prisoner and for the prisoner to be "in the custody of" an employee of the local correctional facility for purposes of § 53.1-203.

I. Facts

The Roanoke County Sheriff's Department (the "Sheriff's Department") has begun implementing a work force program using local prisoner labor on state and local properties and projects that are not physically located at the correctional facility. You state that the persons who actually will be in charge of the prisoners during their work hours will be county employees from departments other than the Sheriff's Department.

II. Applicable Statutes

Section 53.1-129 authorizes a circuit court judge to allow a prisoner confined in a local jail to work voluntarily on state, county or city property, with the consent of the state, county or city agency involved. This statute further provides, in part:

In the event that a person other than the sheriff is designated by the court to have charge of such prisoners while so working, the court shall require a bond of the person, in an amount to be fixed by the court, conditioned upon the faithful discharge of his duties. [Emphasis added.]

Section 53.1-203 provides, in part:

It shall be unlawful for a prisoner in a state, local or community correctional facility or in the custody of an employee thereof to:

1. Escape from a correctional facility or from any person in charge of such prisoner ....

III. Section 53.1-203 Applies to Prisoners Who Are Not Physically Present in Correctional Facility; County Employees Are Authorized to Be in Charge of Prisoners

Section 53.1-203 applies not only to prisoners confined in a correctional facility, but also to prisoners who are physically away from the facility. Ruffin's Case, 62 Va. (21 Gratt.) 790 (1871); Wood v. Cox, 333 F. Supp. 1064 (W.D. Va. 1971). Section 53.1-129 authorizes a judge to allow prisoners confined in a local correctional facility to work on state, county or city property. This statute necessarily implies that this work will be done outside the local correctional facility.
Section 53.1-129 also authorizes the circuit court to designate a person other than the sheriff "to have charge of such prisoners" while they are working away from the local correctional facility. This statute contemplates that, while the ultimate custody over a prisoner remains with the sheriff, a person other than the sheriff or a deputy sheriff may have actual charge of the prisoner who is away from the local correctional facility. Based on the above, it is my opinion that the provisions of § 53.1-203, quoted above, would apply when a prisoner who is working away from the local correctional facility escapes from a person other than a sheriff or a deputy sheriff who has been designated by the circuit court judge to be in charge of the prisoner.

IV. Statute Applies Regardless of Degree of Supervision over Prisoner

A prior Opinion of this Office concludes that former § 53-165, the predecessor statute to § 53.1-129, is silent as to the degree of supervision required of the person designated by the court to have charge of prisoners working outside the jail on public property. See 1969-1970 Att'y Gen. Ann. Rep. 145, 146. The language of § 53.1-129 makes it clear, however, that persons designated by the circuit court judge may be in charge of the prisoners who are away from the jail and that the ultimate custody of the prisoner remains with the sheriff. Since § 53.1-203(1), by its terms, applies to an escape "from any person in charge of such prisoner," and, likewise, does not require any specific degree of control or supervision over the prisoner by the person in charge, it is my opinion that the provisions of this statute apply to the facts you present, regardless of the degree of actual supervision over the prisoner.

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES.

COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENSES OF OFFICE — COMPENSATION BOARD GENERALLY — SHERIFFS AND SERGEANTS.

COUNTIES, CITIES AND TOWNS: GENERAL.

Locality may not use funds provided by Commonwealth to pay for health insurance program for correctional officers of local jail; local governing body controls funds appropriated by Compensation Board for operating costs of local jails; surplus funds may be used only for goods and services of benefit to inmate population of local jail.

August 29, 1989

The Honorable Norman H. Sprinkle
Sheriff for Botetourt County

You ask whether a locality may use funds appropriated by the General Assembly for jail operating costs to pay for benefits for the jail's correctional officers. You also ask who controls the funds for jail operating costs paid to a locality, and how any surplus funds remaining at the end of the fiscal year may be used.

I. Applicable Statutes

Article 3, Chapter 3 of Title 53.1, §§ 53.1-80 through 53.1-95.1 of the Code of Virginia, governs the funding of local correctional facilities and programs. On a quarterly basis, the Compensation Board allocates to the locality funds which the General Assembly has appropriated in the general appropriations act. The allocation for each locality is based upon the number of prisoner days at the jail during the quarter which precedes
payment. See §§ 53.1-83.1, 53.1-85. These statutes also prescribe the manner of funding salaries and benefits for medical and treatment personnel in local jails. I am advised that you do not have these positions funded at your facility.

Articles 7 and 9, Chapter 1 of Title 14.1 control the funding of salaries for all other employees of local jails, including sheriffs and deputy sheriffs. Article 7 of this Chapter also regulates the funding of the expenses of each sheriff's office, but does not include jail operating costs, since these costs are detailed in §§ 53.1-83.1 and 53.1-85.

Section 15.1-7.3 authorizes a locality to provide group life, accident, and health insurance programs for its officers and employees. If the locality chooses to provide one or more of these programs for its officers and employees, it also must provide the programs for its constitutional officers and their employees, unless the constitutional officers and their employees are covered under a state program. Section 15.1-7.3 also requires that "the cost of such local program [for constitutional officers and their employees] shall be borne entirely by the locality or shared with the employee."

II. Appropriations for Jail Operating Costs Are Distinct from Salaries and Office Expenses

The General Assembly clearly has distinguished funds appropriated for the operating costs of a jail from funds appropriated for salaries for personnel, other than for medical and treatment personnel, and office expenses. The statutes discussed above in Title 53.1 govern operating costs, while the statutes in Title 14.1 control salaries and office expenses. This statutory distinction is continued in the general appropriations act, where the General Assembly makes an appropriation for jail operating costs, and a separate appropriation for salaries and office expenses. Compare Ch. 800, 1988 Va. Acts 1280, 1320 (appropriations for local jail operating costs) with 1313 (appropriations for salaries).

The legislative distinction described above is further evidenced by the different methods used by the General Assembly to determine how allocated funds are to be disbursed. The amount apportioned for jail operating costs is determined by the number of prisoner days. See § 53.1-84. The more inmates a facility confines, the greater the amount the Compensation Board pays for the costs of maintaining these prisoners. In contrast, a sheriff must request specific funding for the salaries and expenses of his office. The Compensation Board exercises great discretion in determining the amount of money allocated for these latter purposes. See §§ 14.1-50, 14.1-51, 14.1-66, 14.1-79. These distinctions drawn by the General Assembly demonstrate that no funds allocated for jail operating costs may be used to pay any salaries or benefits, other than the State's proportional share of salaries and benefits for medical and treatment personnel. See § 53.1-86.

III. Locality Must Pay for Health Insurance Benefits in Facts Presented

The Commonwealth pays for many jail employee benefits, including the employer's share of social security taxes, group life insurance, and participation in the Commonwealth's retirement plan. The only employee benefit your inquiry concerns is health insurance.

You state that your jurisdiction provides a health insurance program for its officers and employees. Since the Commonwealth does not provide this benefit for jail employees, the locality must. See § 15.1-7.3; 1984-1985 Att'y. Gen. Ann. Rep. 74.

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

Section 15.1-7.3. The language of this statute is mandatory. It is my opinion, therefore, that no expense for a health insurance program may be paid with funds provided by the Commonwealth.

IV. Governing Body Controls Actual Disbursement of Funds for Jail Operating Costs

Section 53.1-88 requires the governing body of each locality, or its authorized representative, to examine all statements of account and invoices presented by the sheriff. The locality's treasurer or other disbursing officer pays each outstanding account and invoice after that official is satisfied that the statements and invoices are correct and proper. See § 53.1-88. The locality also may require its own purchasing agent to make or oversee the purchase of foodstuffs, provisions, clothing and medicines. See § 53.1-126.

Section 53.1-92 also requires the sheriff to turn over to his local treasury the funds collected from other jurisdictions, including the federal government, for the reasonable costs of housing the prisoners from these other jurisdictions. It is my opinion, therefore, that the local governing body controls the funds which the Compensation Board appropriates for the operating costs of local jails.

V. Surplus Funds May Be Used Only for Jail Operating Costs

Section 53.1-86 forbids the use of funds allocated pursuant to § 53.1-85 for any purpose other than jail operating costs. If a surplus of state funds exists at the end of any apportionment year, these funds revert to the local treasury "and subsequently shall be expended for operating expenses of local correctional facilities." Section 53.1-86. As discussed above, the operating costs of a local jail are distinct from salaries or office expenses. Based on the above, it is my opinion that any surplus funds may be used only to pay for goods and services which directly benefit the inmate population of the local jail.

VI. Summary

To summarize, it is my opinion that:

(1) a locality must use its own funds to pay jail employee benefits when it provides those benefits to its own officers and employees, unless the State already provides the benefits;

(2) the local governing body controls funds which the State pays for jail operating costs; and

(3) any surplus funds must either be returned to the State or used for the operating costs of the local jail.

These expenses, as opposed to jail operating costs, include "traveling, telephone, telegraph, clerical assistance, office facilities and supplies, bond premiums, cook hire, maintenance and repair cost of automobile police radio equipment including radio transmitter system and all accessories thereto, and any other expense incident to his office." Section 14.1-75.
The Honorable Charles L. Sturdivant  
Sheriff for Frederick County

You ask whether there is any statutory requirement for security officers\(^1\) working in a local jail to be sworn, if the sheriff does not have these officers sworn as deputy sheriffs. You state that the jail is neither a regional jail nor a jail farm.

I. Sheriff Has Authority Over Local Jail; May Assign Duties to Deputy Sheriff

Except for regional jails and jail farms established pursuant to § 53.1-105 of the Code of Virginia, the sheriff of a jurisdiction has authority over the jail in that jurisdiction. See § 53.1-75 (certain prisoners transported to jail "kept" by sheriff); § 53.1-88 (invoices presented to local governing body by sheriff for expenses of jail); § 53.1-118 (penalty for failure to perform duty of operating jail); § 53.1-121 (monthly reports of sheriff to Director of Department of Corrections concerning jail prisoners); § 53.1-122 (sheriff's duty to keep daily record of prisoners in jail); § 53.1-124 (discretionary sheriff's report to courts concerning juvenile and adult prisoners in local jail); § 53.1-125 (jail under "control" and "management" of sheriff); § 53.1-126 (sheriff's duty to provide food, clothing and medicine for inmates in jail). These duties may be assigned to a deputy sheriff. Watts's Case, 99 Va. 872, 876, 39 S.E. 706, 707 (1901).

II. Jail Security Officer Required to Be Sworn Deputy Sheriff

All deputy sheriffs in the Commonwealth are required to take the oath required by § 15.1-48. I am aware of no authority, statutory or otherwise, which would authorize a sheriff to assign his authority over the local jail to any individual other than a deputy sheriff.

It is my opinion, therefore, that a security officer in a local jail is required to be a sworn deputy sheriff.

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\(^1\)You specifically ask whether the security officers should be sworn as "correctional officers." Virginia Code Ann. § 53.1-1 defines the phrase "correctional officer" as a "duly sworn employee of the Department of Corrections whose normal duties relate to maintaining immediate control, supervision and custody of prisoners confined in any state correctional facility." (Emphasis added.) By definition, therefore, the phrase "correctional officer" would not apply to a security officer in a local jail.
and government authorities in other states for use in fulfillment of specific contracts existing at time of purchase.

November 22, 1989

Mr. Edward W. Murray
Director, Virginia Department of Corrections

You ask whether the Director of the Department of Corrections (the "Department"), with the approval of the Governor, is authorized to sell products manufactured by state inmates to contractors or subcontractors for resale to state agencies and government authorities in other states.

I. Applicable State and Federal Statutes

Section 53.1-45(A) of the Code of Virginia restricts the sale of articles produced by state inmates and provides:

Articles produced or manufactured and services provided by prisoners sentenced to state correctional facilities may be disposed of by the Director [of the Department] by sale only to municipal and county agencies in Virginia and to federal, state and local public agencies within or without the Commonwealth or as the Director, with the approval of the Governor, may deem to be in the best interests of the Commonwealth. Except as otherwise provided, no articles produced or manufactured nor services provided by prisoners may be bought, sold or acquired by exchange on the open market.

Because the products would be used in public construction projects in other states and, therefore, involve transportation in interstate commerce, federal statutes also must be reviewed. The knowing transportation in interstate commerce of certain "goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners," generally is prohibited by federal law. 18 U.S.C.A. § 1761(a) (West Supp. 1989). Excepted from this general prohibition, however, are products manufactured "for use... by any State or Political subdivision of a State." Section § 1761(b) (West 1984).

This "state use" exemption does not apply, however, and the general statutory prohibition of federal law controls, unless


II. Prison-Manufactured Products May Be Sold to Governmental Agencies in Other States When Factual Determinations in Federal Statute Satisfied

Both the state and federal statutes quoted above authorize the sale of prison-manufactured products to governmental agencies in other states. The federal statutes require, however, that certain factual determinations be made before the sale is con-
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summatied. The fact that the actual sale or delivery of the products will be to the con-
tractor or subcontractor for the state agency in the other state, rather than to the state
or agency itself, does not alter this statutory authority, as long as the purchase is "made
only for use in the fulfillment of specific Government contracts existing at the time of
the purchase in question, and the amount so purchased must be strictly limited to the
amount necessary to fulfill such specific existing Government contracts." 40 Op. Att'y
Gen. 207, 209 (1942).

Based on the above, it is my opinion that the Director of the Department, with the
approval of the Governor, is authorized to sell prison-manufactured products to contrac-
tors or subcontractors for other states, or for government agencies in those states, for
the fulfillment of specific contracts existing at the time of the purchase. It is further my
opinion that such sale may take place only after the two factual requirements for the
"state use" exception, detailed in Part I of this Opinion, have been satisfied.

PROFESSIONS AND OCCUPATIONS: ATTORNEYS.

RULES OF VIRGINIA SUPREME COURT: FOREIGN ATTORNEYS.

Supreme Court not authorized to allow practice of law by persons employed by legal
services provider but who do not meet current statutory requirements for practicing law.

August 15, 1989

Mr. Thomas A. Edmonds
Executive Director, Virginia State Bar

You ask whether the Supreme Court of Virginia is authorized to adopt a rule provid-
ing special admission to practice in the courts of the Commonwealth for persons who are
employed by a program providing legal services to indigents, but who otherwise do not
meet the requirements for practicing law in Virginia. Specifically, you ask whether pro-
posed Supreme Court of Virginia Rule 1A:1.1, adopted by the Virginia State Bar Council
at its June 1989 meeting, would conflict with § 54.1-3931 of the Code of Virginia. Pro-
posed Rule 1A:1.1 would allow the practice of law by a person who is licensed to practice
law in another jurisdiction, but who has not fulfilled the requirements for practicing law
in Virginia, as long as that person is employed by a legal services program which is spon-
sored, approved, or recognized by the Virginia State Bar.

I. Applicable Statutes

Section 54.1-3900 provides that only those persons who hold a license to practice
law in the Commonwealth and who have paid the prescribed license tax may practice law
in the Commonwealth.1 Section 54.1-3928 provides that licenses to practice law shall be
issued to applicants who successfully pass the Bar examination and who comply with
statutory requirements" and the rules of the Board of Bar Examiners." Any person who
practices law without being authorized or licensed shall be guilty of a Class 1 misde-
meanor. See § 54.1-3904.

Section 54.1-3931 provides that the Supreme Court of Virginia shall have discretion
to grant a certificate without examination, allowing the certificate holder to practice in
the courts of the Commonwealth, to any attorney who has been admitted to practice law
before the court of last resort of any state or territory of the United States or the Dis-
trict of Columbia for at least five years. The statute also provides the Supreme Court of
Virginia with discretion to grant a certificate without examination to any person con-
nected with any foreign embassy or legation to appear in the courts of the Commonwealth in all matters connected with his official duties, provided that such person has been admitted to practice in the court of last resort of his own jurisdiction or has received a degree from a law school approved by the American Bar Association. Section 54.1-3931 provides that all other persons shall take the Bar examination and comply with the applicable statutory provisions for practicing law.

II. Practice of Law by Persons Who Do Not Meet Statutory Requirements Not Authorized

The practice of law in Virginia is regulated by the General Assembly, which has enacted statutes defining who may practice law in the courts of the Commonwealth. See §§ 54.1-3900 to 54.1-3944. The enactment of these statutes is intended to authorize only those persons who meet the statutory requirements to practice law, and to protect the public from those who are not statutorily qualified. Such an enactment is a valid exercise of the state's police power. See Horne v. Bridwell, 193 Va. 381, 68 S.E.2d 535 (1952); Richmond Ass'n of Cr. Men v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937). The General Assembly has detailed who may practice law in the Commonwealth. A prior Opinion of this Office concludes that the Supreme Court of Virginia does not have the authority to permit the practice of law by persons who do not meet the requirements established by the General Assembly. See 1972-1973 Att'y Gen. Ann. Rep. 20. The General Assembly may, of course, change those statutory requirements. In the absence of an amendment to the current statutory requirements, however, it is my opinion that the Supreme Court of Virginia is not authorized to adopt proposed Rule 1A:1.1, which would allow the practice of law by persons who are employed by a legal services provider but who do not meet the current statutory requirements for practicing law.

1Section 54.1-3900 includes exceptions for (1) the occasional practice of law by foreign attorneys in association with practicing Virginia attorneys, (2) the limited practice of law by third-year law students, pursuant to rules and regulations promulgated by the Supreme Court of Virginia, and (3) the appearance of state employees in state agency administrative hearings to represent the interests of their agencies.

2These statutory requirements include (1) completion of degree requirements from an approved law school or receipt of a bachelor's degree from a four-year accredited college or university and completion of at least three years of study with a practicing attorney, and (2) evidence that the applicant is a person of honest demeanor and good moral character, over the age of eighteen and possessing the requisite fitness to practice law. See §§ 54.1-3926, 54.1-3925.

3The Board of Bar Examiners is established pursuant to § 54.1-3919 and authorized to promulgate rules and regulations pursuant to § 54.1-3922.

PROFESSIONS AND OCCUPATIONS: CONTRACTORS.

HOUSING: UNIFORM STATEWIDE BUILDING CODE.

Local building official solely responsible for assuring compliance with Building Code; information indicating Building Code violations in possession of Board for Contractors to be referred to local official.

May 3, 1989

Mr. David R. Hathcock
Director, Department of Commerce
You ask whether the Virginia Board for Contractors (the "Board") may consider the report of a private individual alleging certain violations of the Virginia Uniform State-wide Building Code (the "USBC") in the absence of a citation by a local building official for a violation of the USBC and, based upon that report, find violations of the USBC to support the revocation of a contractor's license or registration pursuant to § 54.1-1110 of the Code of Virginia.

I. Facts

You state that a licensed contractor has completed a construction project, no violations of the USBC have been cited by the local building official, and a certificate of occupancy has been issued for the project. A private individual knowledgeable of building practices and the USBC subsequently has inspected the construction project and has issued a report listing various violations of the USBC by the contractor.

II. Applicable Statutes and USBC Provisions

Section 54.1-1110, a portion of Article 1, Chapter 11 of Title 54.1, §§ 54.1-1100 through 54.1-1117, concerning the licensure and regulation of contractors, provides:

The Board shall have the power to revoke the license or registration of any contractor who is found guilty of:

* * *

4. Failure to comply with the [USBC].

Section 54.1-1114 provides:

Any person may file complaints against any contractor licensed or registered pursuant to this chapter. The Director [of the Department of Commerce] shall investigate complaints and the Board may take appropriate disciplinary action if warranted. Disciplinary proceedings shall be conducted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.). The Board shall immediately notify the Director and the clerk and building official of each city, county or town in the Commonwealth of its findings in the case of the revocation of a license or registration or of the reissuance of a revoked license or registration.

Section 54.1-1116 further provides:

All alleged violations of this chapter reported to the Director and substantiated by affidavits or other satisfactory evidence shall be investigated by the Director. The Director may employ special investigators as provided in § 54.1-306. If the evidence of violations is substantiated, the Board shall report the same to the attorneys for the Commonwealth of the cities or counties in which the violations are alleged to have occurred.

Sections 36-97 through 36-119.1 are the general statutes concerning the USBC. Section 36-105 provides:

Enforcement of the [USBC] shall be the responsibility of the local building department... Whenever a county or a municipality does not have such a building department or board of [USBC] appeals, the local governing body shall enter into an agreement with the local governing body of another county or municipality or with some other agency, or a state agency ap-
proved by the Department [of Housing and Community Development] for such enforcement and appeals resulting therefrom.

Section 115.3 of the New Construction Code portion of the USBC provides, in part:

When a building is entitled thereto, the building official shall issue a certificate of use and occupancy after written application. The certificate shall state the purpose for which the building may be used in its several parts. When the certificate is issued, the building shall be deemed to be in compliance with the USBC.


III. Local Building Official Solely Responsible for Assuring Compliance with USBC

Prior Opinions of this Office consistently conclude that the local building official has the responsibility for the enforcement of the USBC. See Att'y Gen. Ann. Rep.: 1986-1987 at 221; 1985-1986 at 185; 1981-1982 at 402, 403; 1977-1978 at 470; 1976-1977 at 106. "[E]nforcement of the [USBC] is the exclusive responsibility of the local building official, as are the inspections conducted incident to such enforcement." 1985-1986 Att'y Gen. Ann. Rep., supra, at 186. The facts you present include the issuance of a certificate of occupancy for the project at issue. As quoted above, Section 115.3 of the New Construction Code clearly provides that, "[w]hen the certificate [of occupancy] is issued, the building shall be deemed to be in compliance with the USBC." The prior Opinions of this Office cited above, which address the local building official's authority to enforce the USBC, demonstrate the local official's singular responsibility for determining compliance with USBC requirements. Both §§ 54.1-1114 and 54.1-1116 require the Board to report evidence of USBC violations it has to the local building official (§ 54.1-1114) and to the Commonwealth's attorney (§ 54.1-1116) when disciplinary action against a contractor is taken by the Board.

Based on the above, it is my opinion that, when a certificate of occupancy is issued by the local building official, compliance with the USBC has been determined by the official with the sole responsibility for the USBC enforcement, and no enforcement of § 54.1-1110(4) by the Board may be undertaken concerning the particular construction project for which the certificate of occupancy was issued. No person other than the local building official is authorized to cite a violation of the USBC. Information indicating USBC violations in the possession of the Board should be referred to the local building official in the facts you present. This Opinion should not be construed, however, to limit the authority of the Board to revoke the license or registration of any contractor for that contractor's "[g]ross negligence or continued incompetence or misconduct in the practice of his profession." Section § 54.1-1110(3).

PROFESSIONS AND OCCUPATIONS: CONTRACTORS — GENERAL PROVISIONS.

COMMISSIONS, BOARDS AND INSTITUTIONS: ADMINISTRATIVE PROCESS ACT.

In order for Board for Contractors to award claim pursuant to Virginia Contractor Transaction Recovery Act, Board must base decision concerning "improper or dishonest conduct" on terms of court judgment entered against regulant.

July 19, 1989
The Honorable C. Jefferson Stafford  
Member, House of Delegates

You ask whether the Board for Contractors (the "Board") exceeds its authority by requiring, before a claimant can receive payment from the Contractors Transaction Recovery Fund (the "Fund"), that there be a judgment against the regulant specifically finding "improper or dishonest conduct."

I. Applicable Statutes


The Virginia Contractor Transaction Recovery Act, §§ 54.1-1118 through 54.1-1127 (the "Act") is a statutory plan designed to assist persons with certain unsatisfied judgments against regulants of the Board. Section 54.1-1120 details the procedures and conditions for making a successful claim for relief from the Fund. Section 54.1-1120 provides, in part:

Whenever any person is awarded a judgment in a court of competent jurisdiction in the Commonwealth of Virginia against any individual or entity for improper or dishonest conduct and such conduct occurred (i) during a period when such individual or entity was a regulant contracting within its license or registration category (Class A or Class B), and (ii) in connection with a transaction involving contracting, the claimant may file a verified claim . . . to obtain a directive ordering payment from the Fund of the amount unpaid upon the judgment, subject to [certain] conditions . . . . [Emphasis added.]

Section 54.1-1122 instructs the Board to consider the verified claim of the claimant administratively.

If the Board finds there has been compliance with the required conditions, the Board shall issue a directive ordering payment from the Fund to the claimant the amount remaining unpaid on the judgment, subject to the limitations set forth in § 54.1-1123. . . . The Board's findings shall be considered a "case decision" . . . .

The phrase "improper or dishonest conduct" is defined in the Act to include only the wrongful taking or conversion of money, property or other things of value which involves fraud, material misrepresentation or conduct constituting gross negligence, continued incompetence, or intentional violation of the Uniform Statewide Building Code (§ 36-97 et seq.). The term "improper or dishonest conduct" does not include mere breach of contract.

Section 54.1-1118.

II. Finding of Improper or Dishonest Conduct Must Be Contained Within Judgment

The issue presented by your inquiry is whether the judgment against the regulant must contain a specific finding of improper or dishonest conduct.
A "judgment" is defined as the "official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action .... The final decision of the court ...." Black's Law Dictionary 755 (5th ed. 1979). Parties to litigation are bound by a judgment insofar as it adjudicates their rights. Johnson v. Powhatan Min. Co., 127 Va. 352, 103 S.E. 703 (1920).

Section 54.1-1120 provides that, when a judgment is "for improper or dishonest conduct," the claimant may file a claim with the Fund. This language demonstrates that it is not the record from the court, the evidence found by the court, or the evidence presented to the Board that is required to substantiate a claim. It is the actual language of the court's final decision--its judgment--that is required by § 54.1-1120.

The Board is authorized to adopt regulations necessary to carry out the purposes of Chapter 11 of Title 54.1, which includes the Act. See § 54.1-201. These rules and regulations, however, must be consistent with the law, and subject to the implied constitutional limitation that administrative bodies must not legislate. See Chapel v. Commonwealth, 197 Va. 406, 89 S.E.2d 337 (1955); Lucerne Cream & Butter Co. v. Milk Commission, etc., 182 Va. 490, 29 S.E.2d 397 (1944); 1987-1988 Att'y Gen. Ann. Rep. 607, 608. If the Board promulgated regulations that permit the Board to weigh evidence, rather than to rely on the judgment rendered by the court, it is my opinion that the Board would exceed its statutory authority because no statutory authority exists for the Board to modify a court judgment.

Section 54.1-1120 extends to certain judgment creditors the right to submit claims against the Fund and then establishes "required conditions" for these claims which the Board must examine for compliance. If the claimant's judgment does not recite that it is being entered for the "improper or dishonest" conduct, or words of similar import, of the regulant, as required by § 54.1-1120, the claim never reaches the Board for a determination of compliance with the conditions established in § 54.1-1120(1)-(7).

III. Plain Language of Statute Compels Board to Rely upon Judgment Issued by Court

In your letter, you also ask if the Board is authorized to issue an order directing payment, if the claimant seeks an award based on a court judgment that does not contain a specific finding of "improper or dishonest conduct," and presents evidence tending to establish this conduct to the Board. "[W]here a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

As discussed above, § 54.1-1120 requires that there must be a "judgment ... for improper or dishonest conduct." (Emphasis added.) The plain language of this statute leaves the Board no option but to rely on the specific provisions of the court's judgment. The Board's decisions are "case decisions," rather than a "judgment," as that term is used in the Administrative Process Act.

If the Board were to decide the issue of "improper or dishonest conduct!" itself, the Board would not merely be interpreting § 54.1-1120; it would be extending its authority beyond the clear statutory direction provided by the General Assembly. It is my opinion, therefore, that, for the Board to award a claim pursuant to the Act, it must base its decision concerning "improper or dishonest conduct" exclusively on the terms of the court judgment entered against the regulant.

PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS.
Needle electrode portion of electroneuromyography examination requires diagnosis; must be performed only by physician. Nerve conduction portion of examination may be performed by physical therapist.

June 15, 1989
The Honorable Daniel W. Bird Jr.
Member, Senate of Virginia

You describe an electroneuromyography ("ENMG") examination as
the testing by electronic measures of individuals who present physical disorders. ENMG examinations are used to reflect the electrical activity produced by muscle and nerve. They consist of two parts: 1) nerve conduction study and 2) electromyography ("EMG") or needle electrode examination. The nerve conduction study is usually done by the examiner placing surface electrodes on the patient's skin over a muscle. The nerve to the muscle is then stimulated with an external current and the action potential of the muscle is displayed on a screen. The EMG or needle electrode examination is done by the examiner inserting a needle electrode into the patient's muscle. The electric activity of the muscle is then displayed on a screen and heard on a speaker.

You ask "whether the nondiagnostic performance of ENMG examinations, as performed by licensed physical therapists upon referral and direction of a physician, falls within the statutory definition of physical therapy" in § 54.1-2900 of the Code of Virginia.

I. Applicable Statutes

The "practice of physical therapy" is defined in § 54.1-2900 as, "upon medical referral and direction, the evaluation, testing, treatment, reeducation and rehabilitation by physical, mechanical or electronic measures and procedures of individuals who, because of trauma, disease or birth defect, present physical and emotional disorders . . . ."

The "practice of medicine" also is defined in § 54.1-2900 as "the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method."

Your description of an ENMG examination clearly demonstrates that this examination does not involve treatment, reeducation or rehabilitation. The question presented by your inquiry, therefore, is whether an ENMG examination consists of "evaluation" and "testing," which would be the practice of physical therapy, or whether the examination involves "diagnosis," which would be the practice of medicine. Section 54.1-2900. See also 1984-1985 Att'y Gen. Ann. Rep. 172.

II. Prior Opinions Conclude that Nerve Conduction Portion of Examination May Be Conducted by Physical Therapist; Needle Electrode Portion Requires Diagnosis, Physician

As discussed above, you describe an ENMG examination as consisting of two parts—a nerve conduction study and a needle electrode examination. Two prior Opinions of this Office have considered the same issue you raise, and both conclude that the needle electrode portion of the ENMG examination involves diagnosis, requiring the exercise of independent medical judgment, rather than mere evaluation and testing. 1984-1985 Att'y Gen. Ann. Rep., supra, at 173; id., 231, 233 n.4.
Electromyography is a two-part test, the first being nerve conduction studies, and the second being the actual insertion of a needle electrode into the patient. The first portion consists of the placement of external electrodes followed by electrical stimulation of the tested area, from which inferences regarding the potential diagnosis are made by the electromyographer. The second portion of the test is invasive and, because of that, the electromyographer must possess a knowledge of coagulation and anatomy. Additionally, although the 'report' of the first part of the test is reduced to writing, the second part of the test is reported as results, rather than a tape or tracing such as that produced by an electrocardiogram. Also, the electromyographer is diagnosing as he stimulates the muscle with the needle electrode in order to determine what portion of the muscle to stimulate next. The 'report' is not a simple, numerical value which can be compared to normal ranges by the physician, nor is it similar to an x-ray or tracing, which is then 'read' by a physician and a diagnosis obtained. Rather, the test consists of reading an oscilloscope during the needle insertion and determining what muscles and nerves are abnormal and why.


I am in agreement with these prior Opinions. Based on the above, it is my opinion that the nerve conduction study portion of an ENMG examination does not involve diagnosis and, therefore, may be performed by a physical therapist. Because the needle electrode portion of the ENMG examination requires interpretation by the examiner, however, this second portion of the examination requires diagnosis by a physician and may not be performed by a physical therapist.

PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS.
CORPORATIONS: PROFESSIONAL CORPORATIONS.

Proposed arrangement among Eastern Virginia Medical School Academic Physicians and Surgeons Health Services Foundation, Medical College of Hampton Roads and physicians serving on faculty of Medical College not violative of certain Virginia statutes.

June 28, 1989

The Honorable Hunter B. Andrews
Member, Senate of Virginia

You ask whether a proposed arrangement among the Eastern Virginia Medical School Academic Physicians and Surgeons Health Services Foundation (the "Foundation"), the Medical College of Hampton Roads (the "Medical College"), and physicians serving on the faculty of the Medical College would violate certain Virginia statutes. Specifically, you ask whether this arrangement would violate §§ 54.1-2900, 54.1-2902, 54.1-2903, or § 54.1-2929 of the Code of Virginia, defining the practice of medicine and detailing medical licensure requirements; § 54.1-2914, concerning unprofessional conduct by physicians and others; and §§ 13.1-542 through 13.1-556, including the amendments to §§ 13.1-543 and 13.1-544 enacted by the 1989 Session of the General Assembly, concerning professional corporations.
I. Facts

The facts and supporting documents you provide state that the Foundation was formed by the Medical College as a nonstock, nonprofit corporation to assist the Medical College and its faculty in performing educationally related health services and to improve the Medical College's system for the collection of fees from paying patients who are treated by the medical faculty. See Draft Articles Pt. II(a), Purposes and Restrictions at 1; Draft Bylaws, Mission Statement at 1, and § 7.08, Practice of Medicine at 32, 33; Draft Agreement No. 1, Definitions at 3-5, and No. 3(b), Accounts Receivable at 13; and Draft Employment Agreement at 1-3. The Draft Articles provide for no members. See id. Pt. IV, Members at 5.

Under the proposed arrangement, the faculty would be salaried employees of the Foundation and of the Medical College and would be solely responsible for providing medical care to patients. Each physician employed by the Foundation will be licensed by the Commonwealth to practice medicine. No physician's exercise of professional judgment would be controlled or influenced in any way by either the Foundation or the Medical College. The Foundation itself will not practice medicine but, rather, will provide support services for its faculty employees engaged in the practice of medicine.

The Foundation's assets will be contributed entirely by the Medical College, and it will operate in facilities owned by the Medical College. The Foundation is obligated to reimburse the Medical College for a portion of its costs and to distribute a portion of its net operating revenues to the Medical College. These revenues will be derived primarily from the professional services rendered by the physicians. Seventy percent of these revenues will be distributed to the clinicians as incentive payments added to each clinician's base salary from the Medical College, in accordance with procedures expected to be based on such factors as the contribution by a particular department or its clinicians to the earnings of the Foundation, as well as the medical services rendered for the benefit of the Foundation and the Medical College.

II. Applicable Statutes

A. Practice of Medicine

The statutes to which you refer in Title 54.1 define the practice of medicine and describe the licensure requirements to practice medicine in the Commonwealth, in addition to the unprofessional conduct which may subject a physician or other health care practitioner to professional discipline. Section 54.1-2900 contains a definition of the practice of medicine or osteopathic medicine. Section 54.1-2902 provides that it is unlawful to practice medicine without a license. Section 54.1-2903 further details certain conduct that constitutes the practice of medicine and the other healing arts. Section 54.1-2929 reiterates that no person shall practice medicine in the Commonwealth without first obtaining a license from the Board of Medicine. Section 54.1-2914 specifically lists the grounds upon which a physician may be considered guilty of unprofessional conduct.

B. Professional Corporations

The statutes you describe in Title 13.1 govern the creation, modification, authority and liability of professional corporations, including those formed for physicians. Section 13.1-544, which describes who may organize and become a shareholder in such professional corporations, was amended by the 1989 Session of the General Assembly to provide:
An individual or group of individuals duly licensed or otherwise legally authorized to render the same professional services within this Commonwealth may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under the provisions of Chapter 9 (§ 13.1-601 et seq.) of this title or become a member or members of a nonstock corporation under the provisions of Chapter 10 (§ 13.1-801 et seq.) of this title.


III. Foundation Not Practicing Medicine

In the draft documents you provide, the Foundation neither practices medicine nor exercises any control over the professional judgment of the licensed physicians it employs, although it will provide support services for its physicians. See Draft Articles Pt. II(b), supra, at 2-3; Draft Bylaws, supra § 7.08; and Draft Agreement No. 11, Practice of Medicine at 24. Based on the above, it is my opinion that the proposed arrangement does not violate the statutes in Title 54.1 referred to in Part II(A) of this Opinion.

IV. Physicians May Become Members of Nonstock Corporations

In the arrangement you describe, only licensed physicians will be practicing medicine. The Foundation is a nonstock corporation that will employ these physicians to practice medicine and will have no members. It is further my opinion, therefore, that no provision in §§ 13.1-542 through 13.1-556 prohibits the arrangement you describe.

The documents you provide include: (1) an undated, 16-page "Amended and Restated Articles of Incorporation of EVMS Academic Physicians and Surgeons Health Services Foundation" (the "Draft Articles"); (2) an undated, 41-page "Amended and Restated Bylaws of EVMS Academic Physicians and Surgeons Health Services Foundation" (the "Draft Bylaws"); (3) an unsigned, 47-page "Initial Affiliation Agreement," dated November 1, 1988, between the Foundation and the Medical College (the "Draft Agreement"); and (4) an unsigned, 11-page "Standard Employment Agreement," labeled 5/3/89 BMG Draft (G-20/MCHR-1) (the "Draft Employment Agreement").

PROFESSIONS AND OCCUPATIONS: PUBLIC ACCOUNTANCY.

Prohibitions against use of technical accounting terms by non-CPAs constitute permissible regulation of accountancy profession.

August 24, 1989

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

You ask whether a practicing accountant who is not a certified public accountant ("CPA") violates any state law by executing a proposed representation letter which includes references to the "fair presentation of . . . financial statements, in conformity with generally accepted accounting principles," and "departures from generally accepted accounting principles."
I. Applicable Statutes

Restrictions on the use of technical accounting terms are contained in § 54.1-2007(C) of the Code of Virginia:

A person who does not hold a valid license issued by the Board [for Accountancy] shall not claim to have used 'generally accepted accounting principles,' 'generally accepted accounting standards,' 'public accountancy standards,' 'generally accepted auditing principles,' or 'generally accepted auditing standards,' in connection with his preparation of any financial statement; nor shall he use any of these terms in describing any complete or partial variation from such standards or principles or to imply complete or partial conformity with such standards or principles.

Section 54.1-2000 provides that the term "report," when used with reference to a financial statement, "means an opinion or disclaimer of opinion or other form of language or representation which states or implies any form of assurance or denial of assurance." The same statute defines the term "assurance" as "any act or action, whether written or oral, expressing an opinion or conclusion about the reliability of a financial statement or about its conformity with any financial accounting principles or standards."

II. Statute Restricts Accountants' Communications with, and on Behalf of, Their Clients; Non-CPA May Not Execute Representation Letter in Facts Presented

The Fourth Circuit Court of Appeals has held that statutory restrictions on the professional activities of accountants who are not certified to practice public accountancy by the Board for Accountancy, including prohibitions on the use of particular terminology, constitute a permissible regulation of the accountancy profession. Accountant's Soc. of Virginia v. Bowman, 860 F.2d 602, 605 (4th Cir. 1988).

A person who is not a CPA may not state that any financial statement that he has prepared varies from, or conforms to, certain financial accounting principles or standards detailed in § 54.1-2007. See § 54.1-2007(C). Even within the context of a representation letter from a non-CPA to a CPA, which authorizes the CPA to whom it is addressed to rely upon information contained or referred to therein, such a claim is tantamount to a "report" because it communicates a professional judgment by the non-CPA concerning the reliability of the financial data provided to the CPA. To the extent that a practicing accountant, who is not a CPA, assumes responsibility on behalf of a client for the "fair presentation of financial statements" in conformity with "generally accepted accounting principles," this representation constitutes an expression of an assurance that the statements as presented do conform with those principles.

A statement which describes departures from "generally accepted accounting principles" is the expression of an opinion concerning variations from financial accounting principles. It is my opinion that such professional activities by an accountant who is not a CPA are prohibited by § 54.1-2007(C).

It is further my opinion, therefore, that an accountant who is not a CPA may not sign a representation letter which states or implies that he is responsible for the presentation of financial statements which conform to, or depart from, generally accepted accounting principles.
1989 REPORT OF THE ATTORNEY GENERAL

The Board for Accountancy issues licenses to persons who hold a valid certificate and who have met work experience requirements established by Board regulations. See § 54.1-2004.

PROFESSIONS AND OCCUPATIONS: REAL ESTATE BROKERS, SALESPERSONS AND RENTAL LOCATION AGENTS.

Parties referring potential customers to homebuilder for compensation required to be licensed as brokers or salespersons.

April 26, 1989

The Honorable Bernard S. Cohen
Member, House of Delegates

You ask whether § 54.1-2107 of the Code of Virginia prohibits a homebuilder from implementing a program to reward a contract purchaser or owner of the builder's product who refers potential customers to the homebuilder. For each referral resulting in the sale of a home by the homebuilder, the prior customer and the new purchaser each will receive either a monetary credit toward settlement or a prize—for example, a dinner or a ski weekend. You state that this transaction will include the sale of the real property on which the home will be built.

I. Applicable Statutes

Section 54.1-2100 defines a "real estate broker" as

any person . . . who, for compensation or valuable consideration (i) sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate . . . or (ii) leases or offers to lease, or rents or offers for rent, any real estate or the improvements thereon for others.

Section 54.1-2101 defines a "real estate salesperson" as

any person who for compensation or valuable consideration (i) is employed either directly or indirectly by, or affiliated as an independent contractor with, a real estate broker, to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease, rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon . . . .

An individual is a real estate broker or salesperson and must be licensed1 if he does any of the acts detailed in § 54.1-2100 or § 54.1-2101: 2

One act for compensation or valuable consideration of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, or leasing, or renting, or offering to rent real estate, except as specifically excepted in § 54.1-2103 of this chapter [Chapter 21 of Title 54.1], shall constitute the person, firm, partnership, copartnership, association or corporation, performing, offering or attempting to perform any of the acts enumerated above, a real estate broker or real estate salesperson.

Section 54.1-2107.
II. Referring Parties Required to Be Licensed as Real Estate Brokers or Real Estate Salespersons

The purpose of the Commonwealth's statutes regulating the real estate business and requiring brokers and salesmen to procure a license is "to protect the public from the fraud, misrepresentation and imposition of dishonest and incompetent persons." Massie v. Dudley, 173 Va. 42, 55, 3 S.E.2d 176, 181 (1939). In Massie, the plaintiff claimed that the owner of a farm promised to give the plaintiff a percentage of the sale price "if [the plaintiff] would bring [the owner] a 'customer' to whom a sale of [the owner's] farm could be effected." 173 Va. at 47, 3 S.E.2d at 178. The Supreme Court of Virginia held that the plaintiff should be included within the provisions of the statutory predecessor to current § 54.1-2107 because "'[a] broker negotiates just as much when he brings parties together in such frame of mind that they can by themselves evolve a plan of procedure, as when he himself carries on the discussion and personally induces an agreement to accept a specific provision.' " 173 Va. at 51, 3 S.E.2d at 180 (citation omitted). A prior Opinion of this Office discusses the status of liaisons between buyers and sellers of real property and concludes:

The fact that [liaisons] do not engage in bargaining with or for the buyer and/or the seller does not mean that they are not engaged in the negotiation of the sale or other exchange of the property. Their activity would also constitute an offer of sale or other exchange of real property for others. The fact that they operate through other salesmen or brokers is irrelevant. For these reasons, I conclude that these persons must be licensed by the Virginia Real Estate Commission [now the Real Estate Board].


It is my opinion that the activities of the referring party in the facts you present fall squarely within the holding of the Supreme Court of Virginia in Massie and the conclusion of the prior Opinion of this Office. It is further my opinion, therefore, that the referring party in the facts you present must be a licensed real estate broker or real estate salesperson before accepting the consideration offered by the homebuilder for the referral.

1 See § 54.1-2106.
2 If the homebuilder were building a home on a lot owned by the purchaser of the home, rather than building the home on his own lot and selling both the real estate and the improvement (the home), neither § 54.1-2100 nor § 54.1-2101 would apply, since the purchase or sale would be for the improvement and not for the real estate itself.
3 Section 54.1-111 provides that it is unlawful for a person to practice a profession or occupation without holding the required license.

PROPERTY AND CONVEYANCES: CONDOMINIUM ACT.

Action of unit owners in approving capital expenditure which board of directors did not include in budget of association for purposes of determining special assessments and discount for advance payment of assessments not violative of Act.

April 12, 1989

The Honorable Frank Medico
Member, House of Delegates
You ask two questions concerning the management of River Towers Condominium by the board of directors of the unit owners association (the "board of directors"). Your first inquiry concerns your statement that the unit owners have approved a capital expenditure which the board of directors did not include in the subsequent budget of the unit owners association for purposes of determining special assessments. Your second inquiry is based upon the premise that, in making a special assessment, the board of directors allows a discount to those unit owners who pay the assessment in advance. In both fact situations, you ask whether the actions of the board of directors violate the Condominium Act, §§ 55-79.39 through 55-79.103 of the Code of Virginia (the "Condominium Act" or the "Act"). In the event that I conclude that either of these actions by the board of directors violates the Act, you ask that I transmit my conclusion to the Virginia Real Estate Board (the "Real Estate Board") for appropriate enforcement.

1. Applicable Statutes and Bylaw Provisions

Section 55-79.45 provides, in part, that "no condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of [the Condominium Act, Chapter 4.2 of Title 55]." The phrase "condominium instruments" is defined in § 55-79.41(e) as

a collective term referring to the declaration, bylaws, and plats and plans, recorded pursuant to the provisions of this chapter. . . . Any amendment or certification of any condominium instrument shall, from the time of the recordation of such amendment or certification, be deemed an integral part of the affected condominium instrument, so long as such amendment or certification was made in accordance with the provisions of this chapter.

The Act provides for the self-government of a condominium in § 55-79.73, which provides, in part:

(a) There shall be recorded simultaneously with the declaration a set of bylaws providing for the self-government of the condominium by an association of all the unit owners. . . .

(b) The bylaws shall provide whether or not the unit owners' association shall elect an executive organ. If there is to be such an organ, the bylaws shall specify the powers and responsibilities of the same and the number and terms of its members. The bylaws may delegate to such organ, inter alia, any of the powers and responsibilities assigned by this chapter to the unit owners' association. The bylaws shall also specify which, if any, of its powers and responsibilities the unit owners' association or its executive organ may delegate to a managing agent.

Section 55-79.79(a) provides, in part:

Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (1) to the unit owners' association in the case of the common elements, and (2) to the individual unit owner in the case of any unit or any part thereof, except to the extent that the need for repairs, renovation, restoration or replacement arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities.
Section 55-79.80 further provides:

(a) Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the unit owners' association shall have the power to:

* * *

(2) Make or cause to be made additional improvements on and as a part of the common elements.

* * *

(3)(b1) Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the executive organ of the unit owners' association, if any, and if not, then the unit owners' association itself, shall have the irrevocable power as attorney-in-fact on behalf of all the unit owners and their successors in title after the expiration of any period of declarant control reserved pursuant to § 55-79.74 (a), to assert, through litigation or otherwise, defend against, compromise, adjust, and settle any claims or actions related to common elements.

Section 55-79.83(e) provides:

The amount of all common expenses not specially assessed pursuant to subsections (a), (b) or (bl) hereof, less the amount of all common profits, shall be assessed against the condominium units in proportion to the number of votes in the unit owners' association appertaining to each such unit, or, if such votes were allocated as provided in subsection (b) of § 55-79.77, those common expense assessments shall be either in proportion to those votes, or in proportion to the units' respective undivided interest in the common elements, whichever basis the condominium instruments specify. Such assessments shall be made by the unit owners' association annually, or more often if the condominium instruments so provide. No change in the number of votes in the unit owners' association appertaining to any condominium unit shall enlarge, diminish, or otherwise affect any liabilities arising from assessments made prior to such change.

Section 55-79.88 details the requirements for the registration of condominiums and provides, in part:

1. No declarant may offer or dispose of any interest in a condominium unit located in this Commonwealth, nor offer or dispose in this Commonwealth of any interest in a condominium unit located without this Commonwealth prior to the time the condominium including such unit is registered in accordance with this chapter.

Section 55-79.93 requires the filing of an annual report and provides, in part, that "[i]n the event that the annual report reveals that all of the units in the condominium have been disposed of, and that all periods for conversion or expansion have expired, the agency shall issue an order terminating the registration of the condominium."

You provide copies of portions of the Bylaws. Copies of the September 7, 1979, Declaration (the "Declaration") and Exhibit C to that Declaration, the Bylaws, also dated September 7, 1979, have been provided by the Property Registration Office of the Real Estate Board. Article II, section 4 of the Declaration provides that "[n]otwithstanding
the ownership of the various portions of the Common Elements and the Units by virtue of the foregoing boundary description, the provisions of the Bylaws shall govern the division of maintenance and repair responsibilities between the Unit Owner and the Unit Owners Association of River Towers Condominium.

Article III, section 2 of the Bylaws provides, in part:

The Board of Directors shall have all of the powers and duties necessary for the administration of the affairs of the Unit Owners Association and may do all such acts and things as are not by the Condominium Act, the Declaration or by these Bylaws required to be exercised and done by the Unit Owners Association. The Board of Directors shall have the power from time to time to adopt any Rules and Regulations deemed necessary for the benefit and enjoyment of the Condominium; provided, however, that such Rules and Regulations shall not be in conflict with the Condominium Act, the Declaration or these Bylaws. The Board of Directors shall delegate to one of its members or to a person employed for such purpose the authority to act on behalf of the Board of Directors on such matters relating to the duties of the Managing Agent (as defined in Section 3 of this Article), if any, which may arise between meetings of the Board of Directors as the Board of Directors deems appropriate. In addition to the duties imposed by these Bylaws or by any resolution of the Unit Owners Association that may hereafter be adopted, the Board of Directors shall on behalf of the Unit Owners Association:

(a) Prepare and adopt an annual budget, in which there shall be exercised the assessments of each Unit Owner for the Common Expenses.

(b) Make assessments against Unit Owners to defray the costs and expenses of the Condominium, establish the means and methods of collecting such assessments from the Unit Owners and establish the period of the installment payment of the annual assessment for Common Expenses. Unless otherwise determined by the Board of Directors, the annual assessment against each Unit Owner for his proportionate share of the Common Expenses shall be payable in equal monthly installments, each such installment to be due and payable in advance on the first day of each month for such month.

Article III, section 3 of the Bylaws states, in part, that "[t]he Board of Directors shall employ for the Condominium a 'Managing Agent' at a compensation to be established by the Board of Directors." The duties of the managing agent are listed in section 3(b) and include, among other things, that, "[t]he Managing Agent shall perform the obligations, duties and services relating to the management of the property, the rights of Mortgagees and the maintenance of reserve funds in compliance with the provisions of these Bylaws." Section 3(c) establishes the standards for the performance of the managing agent's duties and includes in subparagraph (6) the requirement that the managing agent provide

a monthly financial report . . . for the Unit Owners Association containing:

* * *

(F) a Delinquency Report listing all Unit Owners who are delinquent in paying condominium assessments and describing the status of any actions to collect such assessments.

Article V of the Bylaws, entitled "Operation of the Property," provides detail for the determination of common expenses and assessments against unit owners (sec. 1); the
maintenance, repair, replacement and other common expenses of the River Towers Condominium both as to the board of directors and the unit owners (see. $5); and the additions, alterations or improvements by the board of directors as well as by unit owners (see. 6-7).

II. Condominium Act Does Not Specify What Must Be Included in Annual Budget Concerning Special Assessments or Contemplated Capital Expenditures; Act Not Violated in Facts Presented

It is clear, both from the provisions of § 55-79.45, quoted above, and from the opinion of the Supreme Court of Virginia in Unit Owners Assoc. v. Gillman, 223 Va. 378, 292 S.E.2d 378 (1982), that "[n]o condominium shall come into existence in Virginia except on the recordation of condominium instruments pursuant to the ... Condominium Act.... The entire condominium concept, and all pertaining to it, is therefore a statutory creation." Id. at 762, 292 S.E.2d at 383.

Both the Declaration and the Bylaws state that River Towers Condominium is subject to the provisions of the Act. See Declaration art. I, sec. 1; Bylaws art. I. As contemplated by § 55-79.73(a), the Bylaws provide in detail for the self-government of the condominium, including special assessments, reserves for contingencies, and reserves for contemplated capital expenditures. Section 55-79.83, a portion of which is quoted above, addresses the liability of the unit owners for items such as common expenses and special assessments. Neither § 55-79.83 nor any other portion of the Act requires a process for anything other than determining liability for the assessment. There is nothing in the Act which addresses whether special assessments must be included as a part of a budget, whether a budget even is necessary, or whether such assessments may be announced in some other manner. It is my opinion, therefore, that the action of the unit owners in approving a capital expenditure which the board of directors did not include in the budget of the association for the purposes of determining special assessments does not violate the Act.

"The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners." Gillman, 223 Va. at 766, 292 S.E.2d at 385. Unit owners' concerns about the application of the Bylaws to a specific situation, such as the nondisclosure in the budget of prospective capital expenditures, is one which may be settled pursuant to the provisions of §§ 55-79.79(a) and 55-79.80(b). Since the board of directors is elected by a vote of unit owners, those same unit owners, as provided by their Bylaws, may remove any or all of the directors, with or without cause. See Bylaws art. III, sec. 5.

III. Board of Directors' Decision to Allow Discount for Prompt Payment of Special Assessments Does Not Violate Condominium Act

Section 55-79.83 generally addresses liability for common expenses, including special assessments, but neither this statute nor any other portion of the Act provides further detail. For example, there is no provision in the Act concerning how the costs of collecting an unpaid special assessment against a particular unit owner should be treated. In attempting to collect the pro-rata share of a special assessment against a particular unit owner, considerable legal expense conceivably could be incurred, which would cause the net collection, if any money ever was collected at all, to be less than what that unit owner should have paid for the assessment itself. While § 55-79.83(c) requires that assessments for common expenses be made annually, neither this statute nor any other portion of the Act addresses plans for payment. Without such a statutory program requiring monthly, quarterly or other periodic payments of assessments, the discretion to tailor such a plan is left to the unit owners. The Bylaws require a monthly installment. See id. art. III, § 2(b).
Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.

... 'Absence a demonstration of the board's lack of good faith, self-dealing, dishonesty or incompetency, its determination that an emergency existed should not be judicially reviewed.'


Based on the above, it is my opinion that the advance payment discount you describe is not a violation of the Act. Furthermore, you present no facts that indicate that the board of directors' offer of this discount demonstrates dishonesty, incompetency or an absence of good faith. Under the rule established in Dockside, therefore, any further review of this matter would be inappropriate.

As discussed earlier, if the unit owners believe that the board of directors acted beyond its authority, the powers extended to them by §§ 55-79.79(a) and 55-79.80(b1) authorize the unit owners to seek the aid of the courts to require the board of directors to act as they wish. Since I conclude that no violations of the Act have occurred in the facts you present, it is unnecessary that I forward this matter to the Real Estate Board.

You also ask whether the facts you present violate the Bylaws of River Towers Condominium (the "Bylaws"). A response to this inquiry requires an examination of the private agreements among the several co-owners. This Office historically has declined to render Opinions in matters of such a purely private nature and has limited responses to requests for Opinions to matters which "concern an interpretation of federal or State law, rule or regulation." See Op. to Hon. Moody E. Stallings, Va. Sen. (Feb. 22, 1989); 1986-1987 Att'y Gen. Ann. Rep. 347, 348.

The Real Estate Board is the agency responsible for administration of the Condominium Act. See § 55-79.86. The Real Estate Board advises that, in accordance with § 55-79.93, the registration of River Towers Condominium was terminated on October 17, 1988. See mem. from Maria J.K. Everett to Richard B. Zorn (Mar. 17, 1989). This Opinion is based on an application of the Act to the Bylaws which were in the possession of the Real Estate Board files on that date.

While § 55-79.741 requires that books and records be maintained and that they be kept "in accordance with generally accepted accounting practices," there is no requirement in this statute that the process be initiated with a budget. In accordance with the "self-government" provision established by § 55-79.73(a), a great deal of flexibility is left to unit owners to determine how much detail and what particular methods are most suitable for their condominium.


PROPERTY AND CONVEYANCES: CONDOMINIUM ACT — VIRGINIA REAL ESTATE TIME-SHARE ACT.

Amendments to condominium bylaws do not violate Condominium Act regulating unit ownership; Act's provisions preserve status of ownership created prior to effective date.
of Act. Time Share Act mandates elements necessary for creation of time-share ownership or use in condominium unit.

February 22, 1989

The Honorable Moody E. Stallings Jr.
Member, Senate of Virginia

You ask two questions concerning the use of a residential condominium. Your first question is based on the fact that one of the owners of the condominium has leased the unit on an annual basis to a corporation which, in turn, authorizes out-of-town guests to occupy the property on a transient basis, apparently without premium or fee. Specifically, you ask whether this arrangement violates the Condominium Act, §§55-79.39 through 55-79.103 of the Code of Virginia.

You next ask whether the acquisition of a unit in a condominium project by several families, who then divide the year into portions within which each family has the exclusive right to occupy the unit, violates a clause in the bylaws of the condominium which prohibits time-sharing.

I. Applicable Statutes and Bylaw Provisions

Section 55-79.40(A) provides:

[C]hapter [4.2 of Title 55] shall apply to all condominiums and to all horizontal property regimes or condominium projects. For the purposes of this chapter, the terms 'horizontal property regime' and 'condominium project' shall be deemed to correspond to the term 'condominium'; the term 'apartment' shall be deemed to correspond to the term 'unit'; the term 'co-owner' shall be deemed to correspond to the term 'unit owner'; the term 'council of co-owners' shall be deemed to correspond to the term 'unit owners' association'; the term 'developer' shall be deemed to correspond to the term 'declarant'; the term 'general common elements' shall be deemed to correspond to the term 'common elements'; and the terms 'master deed' and 'master lease' shall be deemed to correspond to the term 'declaration' and shall be deemed included in the term 'condominium instruments.' This chapter shall be deemed to supersede the Horizontal Property Act, §§55-79.1 through 55-79.38, and no condominium shall be established under the latter on or after July 1, 1974. But this chapter shall not be construed to affect the validity of any provision of any condominium instrument recorded prior to July 1, 1974. Nor shall Article 4 (§55-79.86 et seq.) of this chapter be deemed to supersede §§55-79.16 through 55-79.31 of the Horizontal Property Act as to any condominiums established prior to the effective date hereof.

Section 55-79.45 provides, in part, that "[n]o condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of this chapter."

The Condominium Act provides for the self-government of a condominium in §55-79.73(a) which, in part, provides that "[t]here shall be recorded simultaneously with the declaration a set of bylaws providing for the self-government of the condominium by an association of all the unit owners." Section 55-79.53 provides:

The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for
an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association, or by its executive organ or any managing agent on behalf of such association, or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action.

Section 55-366, a portion of the Virginia Real Estate Time-Share Act (the "Time-Share Act"), provides:

Time-shares may be created in any unit, unless expressly prohibited by the project instruments or local governing laws; but [Chapter 21] shall not be construed to affect the validity of any provisions of any time-share program or any expansion thereof or time-share instrument recorded or in existence prior to July 1, 1981. A project created after July 1, 1981, shall not have a time-share program therein unless the project instrument applicable to such project affirmatively states that time-share programs are permitted.

Terms are used in this Opinion that do not have commonly understood meanings. The following terms are defined in § 55-79.41 of the Condominium Act:

(e) 'Condominium instruments' shall be a collective term referring to the declaration [and] bylaws ... recorded pursuant to the provisions of [Chapter 4.2].

***

(y) 'Unit' shall mean a portion of the condominium designed and intended for individual ownership and use....

(z) 'Unit owner' shall mean one or more persons who own a condominium unit....

The following terms are defined in § 55-362 of the Time-Share Act:

'Time-share estate' means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, coupled with a freehold estate or an estate for years in a time-share project or a specified portion thereof;

***

'Time-share' means a time-share estate or a time-share use;

***

'Time-share use' means a right to occupy a time-share unit or any of several time-share units during five or more separated time periods over a period of at least five years, including renewal options, not coupled with a freehold estate or an estate for years in a time-share project or a specified portion thereof. 'Time-share use' shall not mean a right to use which is subject to a first-come, first-served, space-available basis as might exist in a country club, motel, hotel, health spa, campground, or membership or resort facility.

You provide the original recorded bylaws of the condominium dated October 31, 1973. Article IX of the original bylaws establishes a procedure for their amendment. Once recorded, such amendments are considered effective according to this provision.
You also provide a number of amendments to these bylaws, but only one bylaw amendment appears to be relevant to your inquiries. That amendment, dated April 29, 1987, and recorded May 8, 1987, amends article V, section 8 of the bylaws and provides:

No condominium unit may be leased for any period less than thirty days (30) days.

No condominium unit may be transferred or converted to 'time share' or interval ownership.

II. Amendments to Bylaws Do Not Violate Condominium Act
Regulating Condominium Ownership in View of Special Provisions
That Preserve Status of Ownership Created Prior to 1974

In its passage of the Condominium Act in 1974, the General Assembly carefully preserved the validity of condominiums created prior to 1974 and, at the same time, afforded these condominiums the protections of the Act. See § 55-79.40(A). Although the project described in your request was one of those created prior to 1974, therefore, the provisions of the Act still apply to your inquiries.

It is clear, both from the provisions of § 55-79.45 quoted above and from the opinion of the Supreme Court of Virginia in Unit Owners Assoc. v. Gillman, 223 Va. 752, 292 S.E.2d 378 (1982), that "[n]o condominium shall come into existence in Virginia except on the recordation of condominium instruments pursuant to the ... Condominium Act. ... The entire condominium concept, and all pertaining to it, is therefore a statutory creation." 223 Va. at 762, 292 S.E.2d at 383. The Court earlier had affirmed the validity of condominiums created before the passage of the Act in 1974.

During its 1974 session, the General Assembly enacted the 'Condominium Act'. It superseded the HPA [Horizontal Property Act] but did not affect the validity of any provision of any condominium instrument recorded prior to July 1, 1974.

Provisions in [the Condominium] Act for adjustment of terminology facilitate the transition from the 1962 HPA to the 1974 Act. For example ... 'co-owner' now coincides with 'unit owner' ... and, 'master deed' now corresponds with the term 'declaration' and is included in the term 'condominium instruments.'


The condominium you describe was established on November 13, 1973, upon the recordation of the master deed and bylaws. Included in the fifth clause of the master deed is the statement that

[the administration of the Condominium shall be by the Council in accordance with the provisions of this Master Deed and with the provisions of the Bylaws. All of the Co-owners or group of Co-owners of a unit shall automatically be a member of the Council and shall remain a member of the Council until such time as his ownership ceases for any reason, at which time his membership in the Council shall automatically cease.

The eighth clause of the master deed requires that "[t]he Co-owner shall comply with the provisions of this Master Deed, the Bylaws, decisions and resolutions of the Board of Directors and of the Council or its representatives as lawfully amended from time to time."
The 1987 recorded amendment to the bylaws specifically authorizes the leasing of condominium units as long as the duration of any lease is 30 days or more. The Condominium Act specifically requires that self-government be by the co-owners through bylaws under their control. The original bylaws provide a method for their amendment; any such amendment will become effective upon recordation.

There is no evidence in the material you provide that any provision of the Condominium Act has been violated. The recorded condominium documents included bylaws. Although the General Assembly changed the law applicable to condominium ownership subsequent to the creation of the condominium you describe, special provisions were enacted to preserve its status and to make the provision of the Act applicable to this development. Pursuant to the terms of the original documents, and apparently as a result of the Act, the bylaws were amended to establish that leases for units in the condominium must be for a term of 30 days or more. Except for the provision regarding time-sharing, this amendment does not otherwise restrict the use of a leased unit to bar guests, nor does it address in any other way the length of stay for a gratuitous "guest."

The corporation's arrangements with its guests are not described in your request as being pursuant to a lease. A lease is "a contract for the possession and profits of lands and tenements on the one side, and the recompense of rent or property on the other . . . in consideration of a return of rent or other recompense." Clark v. Harry, 182 Va. 410, 414, 29 S.E.2d 231, 233 (1944). You state that the guests referred to in your first inquiry use the unit "without premium or fee." It is apparent, therefore, that there is no lease between the corporation and its guests. The master deed and bylaws contemplate the use of the condominium by persons other than owners and lessees. See master deed cl. 9 (owners, tenants, future tenants, or any other person who might use the condominium subject to provisions of master deed); bylaws art. I, § 2 (all owners, occupants, users, and agents and servants of any of them are subject to master deed, bylaws and applicable laws of the Commonwealth). Based on the above, it is my opinion that the transaction you describe between the unit owner and the corporation complies with a duly enacted and recorded 1987 bylaw amendment and, therefore, is in compliance with the Condominium Act. It does not appear that the corporation's authorization to its guests may be construed as a lease and, therefore, it is further my opinion that these arrangements are not prohibited by the Act.

III. Time-Share Act Mandates Elements Necessary for Creation of Time-Share Ownership or Use

Section 55-366 recognizes that time-sharing may be prohibited under certain conditions. This statute also confirms that time-shares may be created in a condominium unit when there is written authority to do so in the project instruments. The Time-Share Act details the elements necessary for the creation of a time-share estate or use in its definitions of those terms. In addressing the issue whether the acquisition of a unit in the condominium project by several families who then divide the year into portions of exclusive occupancy is controlled by the Act, the stated facts must be applied to the definitions contained in the Act. This Office has addressed some aspects of time-sharing in prior Opinions. See, e.g., Att'y Gen. Ann. Rep.: 1984-1985 at 247; 1983-1984 at 295.

Whether the 1987 bylaw amendment for the condominium which is the subject of your inquiry was enacted pursuant to the provisions of § 55-366 is unclear. The contents of the private agreements among the co-owners for use of their co-owned unit have not been provided. In defining a "time-share use" or a "time-share estate," it is necessary to determine whether the right to occupy the unit covers a period of five or more separated time periods over a period of at least five years. In the facts you present, I am unable to determine whether the private occupancy agreements by the several families cover the applicable time period. Although it appears that the families are dividing the year into
equal periods of exclusive occupancy, it is not clear how long the shared occupancy is to last or whether the period allocated to each family will remain the same each year. A response to your second question, therefore, is not possible in the abstract.

This Office also must decline to render an Opinion concerning your second inquiry for another reason. As discussed above, a response to this question requires an examination of the private agreements among the several co-owners. This Office historically has declined to render Opinions in matters of such a purely private nature and has limited responses to requests for Opinions to matters which "concern an interpretation of federal or State law, rule or regulation." 1986-1987 Att'y Gen. Ann. Rep. 347, 348. I trust you will understand the rationale for this long-standing practice.

1 Although it was not the bylaw amendment upon which your question is based, a July 12, 1982, recorded amendment to bylaws art. V, sec. 8 addresses the age and number of occupants permitted in each room of a unit, whether leased or otherwise occupied.

PROPERTY AND CONVEYANCES: PROPERTY OWNERS' ASSOCIATION ACT.

Act authorizes purchaser's avoidance of sales contract for real estate if statutory disclosure not made; if purchaser does not make written request for disclosure packet, purchaser waives right to detailed disclosure available through packet.

October 17, 1989

The Honorable Robert T. Andrews
Member, House of Delegates

You ask whether the Property Owners' Association Act, §§ 55-508 through 55-516 of the Code of Virginia (the "Act"), includes a homebuyer's right of rescission. You also ask whether a homebuyer may waive his right to a disclosure packet, which is described in §§ 55-511 and 55-512 of the Act.

I. Applicable Statutes

Section 55-511 creates the following disclosure requirements for the sale of real property affected by the Act:

A. The seller shall insert or cause to be inserted in a contract for sale or resale of his lot, in bold print or underlined, language to the effect that (i) the lot is located within a development which is subject to the Virginia Property Owners' Association Act, and (ii) the Act requires the development's property owners' association to provide the seller, within fourteen days of a written request and payment of the appropriate fee, with a disclosure packet which the seller, upon written request by the purchaser, will request from the association and upon receipt thereof provide to a purchaser.

B. The failure to cause the disclosure required by subsection A to be inserted in the contract for sale or resale shall be grounds for the avoidance of the contract by the purchaser. Except for knowing or willful misrepresentation, the purchaser's sole remedy against a seller or licensed real estate broker or sales person or attorney for failure to cause the disclosure required by subsection A to be inserted in the contract for sale or resale shall be avoidance of the contract. [Emphasis added.]
Section 55-512 establishes the contents of a disclosure packet and, in subsection A, provides, in part:

The association shall provide [a disclosure packet] to the seller of a lot within fourteen days of the actual receipt of a written request therefor and receipt of the appropriate fee.

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The disclosure packet, once received by the seller from the association, shall be delivered by the seller to the purchaser upon the written request of the purchaser.

II. Act Authorizes Purchaser's Avoidance of Contract if Statutory Disclosure Not Made

Section 55-511(B) clearly provides that the purchaser may avoid a sales contract for real estate subject to the Act if the disclosure of the items described in § 55-511(A) is not made in the sales contract. It is my opinion, therefore, that a purchaser, at his option, has grounds to avoid a sales contract for real estate subject to the Act if the seller has not inserted the language required by § 55-511(A) into the contract.

III. Purchaser May Waive Receipt of Disclosure Packet

As quoted above, § 55-511(A) requires the property owners' association to provide the seller, within fourteen days of a written request and payment of the fee, with a disclosure packet which the seller, upon the written request of the purchaser, will provide to the purchaser. This statute, therefore, details the duties of the association and the seller, not the purchaser.

There is no language in § 55-511 that requires either a purchaser to request the disclosure packet or a seller to mail the disclosure packet to the purchaser absent a written request from the purchaser. If the purchaser whose contract is prepared in accordance with § 55-511(A) does not make a written request for this disclosure packet, therefore, it is my opinion that the purchaser has waived his right to the detailed disclosure available through the packet.

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1 Your specific question was whether a "homebuyer's right of rescission" exists in these circumstances. The terms "rescission" and "avoidance" often are used interchangeably. See, e.g., Elam v. Ford, 145 Va. 536, 134 S.E. 670 (1926); J. Calamari & J. Perillo, The Law of Contracts 758 (2d ed. 1977). "Rescission," however, as it is used in the law of contracts, is a term of art referring to a mutual agreement to discharge contractual duties. See § 8.2-209 Official Comment No. 3. Rather than a mutual discharge agreement in the question you raise, § 55-511(B) authorizes unilateral avoidance of the sales contract by the purchaser if certain disclosures are not made by the seller.

2 This disclosure is required to be in bold print or underlined in the sales contract.

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PUBLIC SERVICE COMPANIES: RAILROAD CORPORATIONS - HIGHWAY CROSSINGS.

COUNTIES, CITIES AND TOWNS: POWERS OF CITIES AND TOWNS.

Locality's authority to regulate length of time moving train may obstruct traffic; state or local regulation of moving trains must not impose unreasonable burden on interstate commerce.
July 20, 1989

The Honorable G. Steven Agee
Member, House of Delegates

You ask several questions concerning the authority of a city to regulate the length of time a moving train may delay the passage of traffic over a public street. Specifically, you ask whether any statute other than § 56-412.1 of the Code of Virginia regulates the amount of time a moving train may block a street. You next ask whether removing the term "standing" from § 56-412.1, or granting municipalities specific statutory authority to regulate the time a moving train may block a street would conflict with the statutory authority of the federal Interstate Commerce Commission, the commerce clause of the Constitution of the United States or other federal statutes. You also ask whether a specific charter amendment to authorize a city to regulate the length of time a train may obstruct traffic would be invalid because of the provisions of § 56-412.2.

I. Applicable Statutes

Section 56-412.1 provides:

It shall be unlawful for any railroad company, or any receiver or trustee operating a railroad, to obstruct for a longer period than five minutes the free passage on any street or road by standing cars or trains across the same, except a passenger train while receiving or discharging passengers, but a passway shall be kept open to allow normal flow of traffic . . . .

Section 56-412.2 further provides that "[n]o city, town or county shall adopt any ordinance, order or resolution in conflict with the provisions of § 56-412.1 and all ordinances, orders or resolutions of any city, town or county heretofore adopted in conflict with such section are hereby repealed to the extent of such conflict."


II. No Statute Exists Specifically Regulating Moving Trains;
Local Authority May Exist, Depending on Charter Provisions

I am aware of no statute that regulates the amount of time a moving train may block a municipal street. Your questions assume that, absent such a specific regulatory statute, no authority presently exists for a city to regulate moving trains. Most city charters, however, grant a city the authority to regulate traffic on and across its streets, to regulate obstructions to that traffic, and to enact other regulations within the proper exercise of the city's police power. See, e.g., §§ 15.1-891, 15.1-893. Although you have not made reference to a specific city in your request, a city charter presently may authorize the municipal regulation of moving trains without further enabling legislation. See generally J. E. McQuillin, The Law of Municipal Corporations § 24.693 (3d ed. 1989) (municipal corporations may exercise police power over the operation of railroads on their streets); C. Rhyne, The Law of Local Government Operations § 22.3 (1980) (municipality may regulate the operation of a railroad where regulations are a proper exercise of the city's police power). The provisions of §§ 56-412.1 and 56-412.2, which concern the
regulation of standing trains, do not alter this conclusion with respect to a city's regulation of moving trains. I cannot reach a specific conclusion, however, since you do not refer to any specific city in your request.

III. Determination of Potential Commerce Clause Violation Requires Balancing of Interests

Any state or local regulation of moving trains must not impose an unreasonable burden on interstate commerce. The determination whether general enabling legislation, a proposed charter amendment, or a particular local ordinance unreasonably burdens interstate commerce and, as a result, violates the commerce clause of the Constitution of the United States, necessarily depends upon the specific language of the legislation, amendment or ordinance. You do not refer to specific statutory language in your request, however, and I am unable, therefore, to determine whether the particular legislation in question would unreasonably burden interstate commerce.

Nonetheless, several general principles will be helpful in reviewing any such legislation. The test developed by the Supreme Court of the United States to determine whether state or local regulation of trains violates the commerce clause involves a balancing of interests:

[The matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.]


IV. State or Local Regulation of Moving Trains Not Violative of § 56-412.2

Based on my conclusion in Part II of this Opinion that the provisions of §§ 56-412.1 and 56-412.2 concerning the regulation of standing trains do not affect the state or local regulation of moving trains pursuant to the police power of the state or locality, it is fur-
ther my opinion that a specific charter amendment to authorize a city to regulate the length of time a moving train may obstruct traffic would not be invalid because of the provisions of § 56-412.2. Even if the charter amendment was held to conflict with § 56-412.2, however, the charter amendment would prevail for several reasons. Specific charter provisions usually take precedence over conflicting general statutes. See, e.g., § 15.1-840; 1987-1988 Att'y Gen. Ann. Rep. 363, 364. In addition, even if provisions of two legislative enactments are read to conflict, the earlier enactment must yield to legislation passed subsequently. See Att'y Gen. Ann. Rep.: 1987-1988 at 1, 2; 1985-1986 at 246.

1See U.S. Const. art. I, § 8, cl. 3.

PUBLIC SERVICE COMPANIES: UTILITY FACILITIES ACT — GENERAL PROVISIONS.

Requirement for certificate of public convenience and necessity for proposed 115 kilovolt overhead electrical transmission line running 30 miles and requiring acquisition of real property or easements by eminent domain depends upon whether proposed line constructed outside company's authorized service area and whether it is ordinary extension or improvement in usual course of business; notice and hearing required only in case of facilities for which certificate must be obtained.

November 30, 1989

The Honorable Richard J. Holland
Member, Senate of Virginia

You ask two questions concerning the construction of 115 kilovolt overhead electrical transmission lines by an electric utility company.

I. Facts

You state that an electric utility company (the "company") desires to construct 115 kilovolt overhead electrical transmission lines, requiring the use of eminent domain. To construct these lines, the company will acquire real property easements along the entire route of the lines, the length of which will be approximately 30 miles.

II. Applicable Law


It shall be unlawful for any public utility to construct, enlarge or acquire, by lease or otherwise, any facilities for use in public utility service, except ordinary extensions or improvements in the usual course of business within the territory in which it is lawfully authorized to operate, without first having obtained a certificate [of convenience and necessity] from the Commission that the public convenience and necessity require the exercise of such right or privilege. The certificate shall be issued by the Commission only after formal or informal hearing and after due notice to interested parties. The certificate for overhead electrical transmission lines of 150 kilovolts or
The purpose of the certification requirement for improvements outside the utility's authorized service area is to ensure that territory is allotted in a manner that will best meet the public need for adequate service. See Gas Corp. v. Gas Light Co., 201 Va. 370, 377-78, 111 S.E.2d 439, 444 (1959).

Section 56-46.1 provides that, whenever Commission approval is required for the construction of a facility, the Commission must consider the environmental impact of the proposed facility and must conduct a public hearing upon the request of any interested party. With regard to overhead electrical transmission lines of 150 kilovolts or more, § 56-46.1(B) further provides that at least 30 days' advance notice must be given and requires that the Commission must determine both that the line is needed and that the route chosen will reasonably minimize its adverse scenic and environmental impact on the area affected.

The purpose of the special requirements concerning certain high voltage transmission lines is to ensure consideration of environmental concerns and uniform statewide regulation of lines that must often traverse several counties. See Fairfax County v. VEPCO, 222 Va. 870, 873-74, 284 S.E.2d 615, 617 (1981).

III. Requirement of Certificate of Public Convenience and Necessity Depends upon Variety of Factors

You first ask whether § 56-265.2 requires the company to obtain a certificate of public convenience and necessity before constructing the 115 kilovolt overhead electrical transmission line that will run 30 miles and requires acquisition of real property or easements by eminent domain. Section 56-265.2 expressly excepts from the requirement of Commission approval "ordinary extensions or improvements in the usual course of business within the territory in which [the public utility] is lawfully authorized to operate," unless the extension or improvement involves construction of an overhead transmission line of 150 kilovolts or more. Section 56-265.2 was amended by the 1985 Session of the General Assembly to require compliance with the specific approval requirements of § 56-46.1 in the case of overhead electrical transmission lines of 150 kilovolts or more. See Ch. 282, 1985 Va. Acts 355, 357.

The Supreme Court of Virginia has construed the exception in § 56-265.2 for "ordinary extensions or improvements in the usual course of business" to encompass improvements that do not involve any intrusion by the utility into unauthorized territory but which merely improve the facilities by which the utility serves customers in its assigned area. Kricorian v. C & P Tel. Co., 217 Va. 284, 289, 227 S.E.2d 725, 728-29 (1976).

Whether a certificate of public convenience and necessity is required for the proposed 115 kilovolt overhead transmission line you describe, therefore, depends upon whether the proposed line is to be constructed outside the company's authorized service area and whether it is an ordinary extension or improvement in the usual course of business. If the line is to be constructed outside the company's authorized service area, it is my opinion that it would not be considered ordinary or usual for purposes of the exception to § 56-265.2 and that a certificate of public convenience and necessity would be required. Kricorian, 217 Va. at 289, 227 S.E.2d at 723. If the line you describe is to be constructed within the company's authorized service area, it is further my opinion that a certificate of public convenience and necessity from the Commission would still be required unless the proposed line is an ordinary extension or improvement in the usual course of business. Relying on Kricorian, the Commission recently has interpreted the phrases "ordinary extension or improvement" in the "usual course of business" to require
consideration of the purpose and financial and physical magnitude of the proposed proj-
 No. PUE890072 (Nov. 22, 1989). The fact that real property or easements for the location
 of the line must be acquired by eminent domain is not controlling. Kricorian, 217 Va. at
 288-89, 227 S.E.2d at 728-29.

IV. Requirement of Notice and Hearing Dependent
on Certificate of Public Necessity and Convenience

You also ask whether the Commission must provide notice to interested parties and
conduct a hearing. Sections 56-46.1 and 56-265.2 require notice and hearing only in the
case of facilities for which a certificate of public necessity and convenience must be
obtained. If, under the criteria described in Part III above, the proposed transmission line
you describe is one for which a certificate is required, § 56-265.2 would require due
notice to interested parties and a hearing before a certificate may be issued.

1 Section 56.1-46.1 provides, in part:
"B. No overhead electrical transmission line of 150 kilovolts or more shall be con-
structed unless the State Corporation Commission shall, after at least 30 days' advance
notice by publication in a newspaper or newspapers of general circulation in the counties
and municipalities through which the line is proposed to be built, and written notice to
the governing body of each such county and municipality, approve such line. Such ap-
proval shall not be required for transmission lines constructed prior to January 1, 1983,
for which the Commission has issued a certificate of convenience and necessity. Such
notices shall include a written description of the proposed route the line is to follow, as
well as a map or sketch of the route. As a condition to approval the Commission shall
determine that the line is needed and that the corridor or route the line is to follow will
reasonably minimize adverse impact on the scenic assets and environment of the area
concerned.
"C. If, prior to such approval, any interested party shall request a public hearing, the
Commission shall, as soon as reasonably practicable after such request, hold such hearing
or hearings at such place as may be designated by the Commission. In any hearing the
public service company shall provide adequate evidence that existing rights-of-way can-
not adequately serve the needs of the company.
"If, prior to such approval, written requests therefor are received from twenty or
more interested parties, the Commission shall hold at least one hearing in the area which
would be affected by construction of the line, for the purpose of receiving public com-
ment on the proposal. If any hearing is to be held in the area affected, the Commission
shall direct that a copy of the transcripts of any previous hearings held in the case be
made available for public inspection at a convenient location in the area for a reasonable
time before such local hearing."

2Section 56-46.1 previously required Commission approval for electrical transmission

TAXATION: GENERAL PROVISIONS OF TITLE 58.1 — IN GENERAL — LICENSE TAXES.

ADMINISTRATION OF GOVERNMENT GENERALLY: PRIVACY PROTECTION ACT OF
1976 — VIRGINIA FREEDOM OF INFORMATION ACT.

Information provided to commissioner of revenue on production amounts of, and taxes
collected from, coal company may not be disclosed.

July 20, 1989
The Honorable Ralph D. Vanover
Commissioner of the Revenue for Dickenson County

You ask whether the release of specific information on production amounts of, and taxes collected from, a coal company pursuant to § 58.1-3712 of the Code of Virginia violates § 58.1-3.

I. Applicable Statutes

Section 58.1-3712 authorizes a county or city to "levy a license tax on every person engaging in the business of severing coal or gases from the earth." This license tax is based upon a percentage of the gross receipts from the sale of coal or gases severed within the county. The locality enacting the license tax may require the producers of coal to "file reports showing the quantities of and receipts from coal . . . which they have produced or transported." Id.

Section 58.1-3(A) provides, in part:

Except in accordance with proper judicial order or as otherwise provided by law, the . . . commissioner of the revenue . . . shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation.

Section 58.1-3(A) contains exemptions from the general prohibition, quoted above, including "[m]atters required by law to be entered on any public assessment roll or book" and "[a]cts performed or words spoken or published in the line of duty under the law."

Section 58.1-3(B) further provides that the statute's provisions shall not be construed "to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof or . . . to prohibit a local tax official from disclosing whether a person, firm or corporation is licensed to do business in that locality."

Section 2.1-342(B)(22), a portion of The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1, and § 2.1-382(D) of the Privacy Protection Act of 1976, §§ 2.1-377 through 2.1-386, protect information covered in § 58.1-3 from disclosure or dissemination.

II. Information Provided to Commissioner

Pursuant to § 58.1-3712 is Protected by § 58.1-3

The proscription in § 58.1-3 against a commissioner of the revenue disclosing information obtained in the course of his public duty is broad. See 1984-1985 Att'y Gen. Ann. Rep. 429, 430. Absent an exception, such as those quoted above, a commissioner of the revenue is prohibited from disclosing information about transactions, property, income or the business affairs of a person or entity. I am aware of no exception which would permit a commissioner of the revenue to make public information on production amounts of, and taxes collected from, a coal company pursuant to § 58.1-3712. It is my opinion, therefore, that the release of this information would violate § 58.1-3.
Title insurance companies subject to state insurance license tax provision; locality may not impose business license tax upon title guarantee or title insurance companies.

December 7, 1989

The Honorable Glenn R. Croshaw
Member, House of Delegates

You ask whether § 58.1-2508(B) of the Code of Virginia prohibits a locality from imposing a business license tax upon title guarantee and title insurance companies.

I. Applicable Statutes

Section 58.1-2501(A), a portion of Chapter 25 of Title 58.1 ("Chapter 25"), imposes a license tax on "every insurance company defined in § 38.2-100 which issues policies or contracts for any kind of insurance classified and defined in §§ 38.2-102 through 38.2-134." The phrase "title insurance" is defined in § 38.2-123 and, therefore, is included within the scope of § 58.1-2501(A).

Section 58.1-2508(B) provides that the license tax authorized by Chapter 25, in addition to certain other property taxes and specified fees, "shall be in lieu of all fees, licenses, taxes and levies whatsoever, state, county, city or town." Section 58.1-3703(B)(11) specifically prohibits any county, city or town from levying any license tax 

II. Locality May Not Impose Local Business License Tax on Title Guarantee Company or Title Insurance Company Subject to Taxation Pursuant to Chapter 25

A prior Opinion of this Office concludes that "[t]he clear language of § 58.1-3703(B)(11) prohibits the imposition of the local business license tax [o]n any insurance company subject to taxation under Ch. 25." 1987-1988 Att’y Gen. Ann. Rep. 509, 510 (emphasis omitted). As discussed above, title guarantee companies and title insurance companies are subject to the state insurance license tax provision of Chapter 25 pursuant to §§ 38.2-123 and 58.1-2501. It is my opinion, therefore, that a locality may not impose a business license tax upon title guarantee or title insurance companies.

1 The material included with your request does not distinguish between a title guarantee company and a title insurance company. Section 38.2-100 defines the phrase "insurance policies" to include "contracts of fidelity, indemnity, guaranty and suretyship." The phrase "title guaranty company" describes a business that searches title to real property and provides a guaranty of the title to a buyer or mortgagor of that property from the public records. See Black’s Law Dictionary 1333 (5th ed. 1979). For purposes of this Opinion, I assume that the "guaranty" provided by the title guarantee company you describe is an "insurance policy," as defined in § 38.2-100.

TAXATION: LICENSE TAXES.

Business license tax based on gross receipts received by subsidiary corporation from parent corporation prohibited. Subsidiary which receives all gross receipts from parent corporation subject to minimum business license tax.

June 21, 1989
The Honorable Ray A. Conner
Commissioner of the Revenue for the City of Chesapeake

You ask whether a certain business located in the City of Chesapeake is subject to the local business license tax if the business is a subsidiary corporation receiving its income from the parent corporation.

I. Facts

You state that the parent corporation operates a home shopping television program from facilities located in Pennsylvania. This program is broadcast by satellite to many states, including Virginia. Viewers call a toll-free number to order merchandise from the program, and this merchandise is shipped from warehouse facilities in Pennsylvania to the home shopper. The parent corporation handles the billing and collection for all merchandise sold.

A wholly owned subsidiary of the parent corporation operates a telephone and computer facility in the City of Chesapeake. This Chesapeake facility receives customer orders by telephone that originate from certain states other than Virginia and transmits them to Pennsylvania. The parent corporation has contracted with the subsidiary corporation to pay the subsidiary corporation an annual payment in addition to reimbursing all of its operating expenses.

II. Applicable Statutes

Section 58.1-3703(A) of the Code of Virginia provides:

The governing body of any county, city or town may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town subject to the limitations provided in subsection B of this section.

Section 58.1-3703(B)(1A) prohibits the levy of any license tax by a local government "[o]n or measured by receipts or purchases by a corporation which is a member of an affiliated group of corporations from other members of the same affiliated group." An "affiliated group" includes a parent corporation and its wholly owned subsidiaries. See id. The exclusion does not exempt "affiliated corporations from such license or other tax measured by receipts or purchases from outside the affiliated group." Id.

Subject to certain exceptions detailed in the statute, § 58.1-3706(A) provides that no license tax shall exceed thirty dollars or the rate established for the particular business category on the basis of the gross receipts of the business.

III. License Tax Based on Income Received by Subsidiary

Corporation from Parent Corporation Prohibited

A prior Opinion of this Office concerns facts similar to the facts you present. See 1987-1988 Att'y Gen. Ann. Rep. 512. In the prior Opinion, the home shopping program had its corporate headquarters in Florida and a second facility in Salem, Virginia. The toll-free telephone call placing the order typically was answered in Florida. If the Florida telephone lines were not available, however, calls were switched automatically to the Salem, Virginia, facility. In the prior Opinion, orders may or may not have been filled from the company's Salem, Virginia, warehouse. The prior Opinion concludes that a sufficient nexus in Virginia existed in the facts presented to support the imposition of a gross receipts license tax on the Salem facility. Id. at 513. The Opinion also concludes that the
tax should be computed on the basis of the gross receipts generated from sales in Virginia, as determined by the destination of the merchandise ordered. Id.

The facts you present also establish a sufficient nexus in Virginia pursuant to the Commerce Clause of the Constitution of the United States to support the imposition of a gross receipts business license tax on the Chesapeake subsidiary. As a factual matter, however, the corporate structure you present limits or precludes the imposition of the license tax.

Pursuant to § 58.1-3703(B)(10), the gross receipts of a subsidiary corporation resulting from transactions with the parent corporation are excluded from business license taxation. If the subsidiary corporation has no receipts other than receipts from the parent corporation, it is my opinion that the subsidiary corporation would not be subject to a business license tax based upon its gross receipts. The subsidiary corporation, however, is subject to a gross receipts tax to the extent that it has gross receipts generated by transactions with third-party customers. 1984-1985 Att'y Gen. Ann. Rep. 353.

IV. Subsidiary Corporation Is Subject to Minimum License Tax

The prohibition in § 58.1-3703(B)(10) applies only to a tax "on" the gross receipts or "measured by" the gross receipts received from other members of an affiliated group, and does not prohibit the imposition of the minimum license tax authorized by § 58.1-3706(A). If the subsidiary corporation has no receipts other than from its parent corporation, it is my opinion that the subsidiary corporation remains subject to whatever minimum license tax has been adopted by local ordinance.

TAXATION: LICENSE TAXES.

County may exempt sale of farm products purchased for resale.

September 6, 1989

The Honorable John H. Smedley Sr.
Commissioner of the Revenue for Warren County

You ask several questions concerning § 58.1-3717 of the Code of Virginia and its effect upon Warren County, Va., Code § 9-2 (1988). Specifically, you ask whether (1) a person who resides in another jurisdiction may sell produce in Warren County that he grows himself without paying a Warren County license tax; (2) such person may sell produce in Warren County that is purchased by him for resale without paying a Warren County license tax; and (3) Warren County can exempt its own residents from the license tax but require residents of other localities to purchase a license to sell produce in Warren County that is purchased for resale.

I. Applicable Statutes and Local Ordinance

Sections 58.1-3703 and 58.1-3717 permit the imposition of a local license tax upon peddlers and itinerant merchants. Section 58.1-3717(D), however, provides that the tax "shall not apply to a peddler at wholesale or to those who sell or offer for sale in person or by their employees . . . farm products grown or produced by them and not purchased by them for sale." (Emphasis added.)

Section 58.1-3705 further provides that "[w]henever any county, city or town levies a license tax, the basis for such tax, whether it be gross receipts or otherwise, shall be the same for all persons engaged in the same business . . . ."
Warren County, Va., Code § 9-2 defines an "itinerant merchant" as "[a]ny person who engages in, does, or transacts any temporary or transient business in Warren County except for the sale of farm, domestic, or nursery products and who, for the purpose of carrying on such business, occupies any location for a period of less than one year." This local ordinance also defines a "peddler" as "[a]ny person who shall carry from place to place any goods, wares or merchandise except for farm, domestic, or nursery products and contemporaneously offer to sell or barter the same, or actually contemporaneously sell or barter the same within Warren County."

II. County Must Impose License Tax Equally on All Persons Engaged in Same Business; No Different Treatment Based on Residency Permitted

As quoted above, § 58.1-3717 precludes a locality from levying a local license tax on the seller of produce grown by the seller himself. This statutory prohibition does not provide for the different treatment of residents and nonresidents of the taxing jurisdiction.

Section 58.1-3705 requires that a local license tax, if imposed, must be the same for all persons engaged in the same type of business. See 1973-1974 Att'y Gen. Ann. Rep. 379 (municipal ordinance differentiating between resident and nonresident laundering establishments violates language and intent of predecessor statute to § 58.1-3705). It is my opinion, therefore, that a person who resides in another jurisdiction may sell produce in Warren County that he grows himself without paying a local license tax.

III. Local License Tax Exemption for Sale of Farm Products Purchased for Resale Is Permissible

The license tax exemption in § 58.1-3717(D) is limited to the sale of agricultural products by the person who grows or produces these products. The Warren County ordinance you present, however, exempts from the local license tax the sale of all farm products, which would include the sale by a purchaser of these products solely for resale.

The imposition of the license tax by localities is permissive. No statute requires that a particular business activity be taxed as long as the classifications of businesses subject to the tax and those that are not taxed are reasonable. See Rogers v. Miller, 401 F. Supp. 826, 828 (E.D. Va. 1975) (license tax on massage parlors, and not on beauty shops, upheld because discrimination in favor of certain class does not violate Fourteenth Amendment if discrimination is based upon reasonable distinction).

Based on the above, it is my opinion that the local license tax exemption in the Warren County ordinance which includes the sale of farm products by a person who purchased these products solely for resale is permissible if the classification created by the ordinance is based upon a reasonable distinction. This resale exemption does not conflict with § 58.1-3717(D) because that statute only prohibits the taxation of the sale of farm products grown or produced by the producer. Section 58.1-3717(D) does not pertain to the sale of such products purchased for resale.

It is further my opinion that the granting of the resale exemption only to residents of the taxing jurisdiction is prohibited for the reasons discussed in Part II of this Opinion.

1See § 58.1-3703(A), providing that the governing body of cities, counties and towns may levy a license tax on businesses subject to the limitations in § 58.1-3703(B).
TAXATION: LICENSE TAXES.

Gross receipts of motor vehicle dealer measured by price for which motor vehicle sold with no deduction for trade-in of used motor vehicle.

October 24, 1989

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether, for purposes of the local business license tax, the gross receipts of a motor vehicle dealer should be measured by the price for which the motor vehicle is sold, without any deduction for the trade-in of a used motor vehicle, or after the appropriate trade-in value is deducted.

I. Applicable Statutes

Section 58.1-3701 of the Code of Virginia authorizes the Department of Taxation (the "Department") to promulgate guidelines which define and explain the categories for local business license taxes. The Department's guidelines promulgated pursuant to this statute are silent with regard to the specific question you pose. See Dep't Tax'n, Guidelines for Loc. Bus., Prof. & Occupational License Taxes (Jan. 1, 1984) ("BPOL Guidelines").

Section 58.1-3703(A) provides: "The governing body of any county, city or town may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town . . . ."

Section 58.1-3706 establishes a limitation on the rate of license taxes for various categories of businesses, professions and occupations. Section 58.1-3706(2) establishes the limitation for retail sales at twenty cents per $100 of gross receipts.

II. Gross Receipts, Defined as "Whole, Entire, Total Receipts," Includes Trade-In Allowance of Motor Vehicle Dealer

The governing body of a county, city or town is authorized by § 58.1-3703 to levy a local license tax on all licensable businesses, trades, professions and occupations operating within its jurisdiction. The tax is levied on gross receipts in accordance with the rates and limitations in § 58.1-3706.


A prior Opinion of this Office concerning the business license tax concludes that the term "gross receipts," for tax purposes, typically refers to the total amount of money or the value of other consideration received from selling property or performing services. See Op. to Hon. Claude M. Wells, Comm'r of Rev., City of Falls Church (Sept. 11, 1989).
Based on the above, it is my opinion that the gross receipts of a motor vehicle dealer, for purposes of the local business license tax, should be measured by the price for which a motor vehicle is sold, without any deduction for the trade-in of a used motor vehicle.  

1Sales of motor vehicles by motor vehicle dealers are classified as retail sales. See BPOL Guidelines § 2-2(a), at 11 ("retail sale" defined as "the sale of goods, wares and merchandise for any purpose other than resale, but not including sales at wholesale to institutional, commercial and industrial users").

2I am aware that some jurisdictions still calculate the gross receipts of motor vehicle dealers for business license tax purposes pursuant to a circular issued by former State Tax Commissioner C.H. Morrisett in 1947 and reissued in 1952. This circular provides that "the amount to be used in measuring the license tax is the sales price of the new vehicle in each case less the amount allowed by the retailer on the used or secondhand vehicle taken in on the transaction." The decision of the Supreme Court of Virginia in Alexandria v. Morrison-Williams, however, rendered subsequent to the Morrisett circular and extending the broad definition of the term "gross receipts" to local business license taxes on motor vehicles, now requires a different conclusion than that reached by the former Tax Commissioner.

TAXATION: LICENSE TAXES.

Nonprofit organization which regularly offers seminars subject to tax upon fees received from seminars; donations made to organization not "gross receipts" for purposes of tax.

September 11, 1989

The Honorable Claude M. Wells
Commissioner of the Revenue for the City of Falls Church

You ask whether fees collected by a nonprofit organization from attendees at seminars conducted by the organization outside the Commonwealth are subject to local license taxes. You state that the organization is qualified as tax exempt under I.R.C. § 501(c)(4) (West Supp. 1989). You further state that the organization maintains its principal place of business in Falls Church, Virginia, but occasionally will conduct seminars in other states. You also ask whether donations made to this organization constitute "gross receipts" for purposes of the business license tax.

I. Applicable Statutes

Section 58.1-3703 of the Code of Virginia generally authorizes localities to levy a license tax:

The governing body of any county, city or town may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town subject to the limitations provided in subsection B of this section.

When a business maintains only one office location, the situs for local license taxation is the locality in which the office is located. See § 58.1-3708(A).
II. Nonprofit Organization Distributing Literature and Conducting Seminars for Compensation is Subject to License Tax

As noted above, § 58.1-3703 authorizes the governing body of any county, city or town to collect license taxes on businesses, trades, professions and callings. The initial question presented by your inquiry is when, and to what extent, a nonprofit organization is engaged in business.

In *Portsmouth v. Citizens Trust Co.*, 219 Va. 903, 252 S.E.2d 339 (1979), the Supreme Court of Virginia defined the phrase "engaged in business" as "a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit . . . . It implies a continuous and regular course of dealing, rather than an irregular or isolated transaction . . . ." *Id.* at 905-06, 252 S.E.2d at 341 (citation omitted). Noting that the volume of business activity, not the profit motive of the owners of the business, determines whether an organization is engaged in business, the Supreme Court of Virginia also has held that a nonprofit association was engaged in business, although the profits from food sales to its members were used solely for association purposes. *Commonwealth v. Employees Assoc.*, 195 Va 663, 670, 79 S.E.2d 621, 625 (1954). See also *Dep't Tax'n, Guidelines for Loc. Bus., Prof. & Occupational License Taxes* at 13 (Jan. 1, 1984) (charitable institution or other not-for-profit organization that engages in business may be subject to local license tax, even though proceeds from sales are subsequently used for charitable purposes).

Based on the above, it is my opinion that a nonprofit organization which regularly offers seminars would be subject to the local license tax upon fees received by the organization from the seminars. Whether a particular nonprofit organization is engaged in business activities and, as a result, is required to secure a local business license, is a question of fact to be determined by the commissioner of the revenue. See 1983-1984 *Att'y Gen. Ann. Rep.* 371, 372.

III. Donations Are Not "Gross Receipts" for Purposes of License Tax

Business license taxes are calculated on the gross receipts of the business to be taxed. See § 58.1-3706. The term "gross receipts," for tax purposes, typically refers to the total amount of money or the value of other consideration received from selling property or from performing services. See, e.g., *New Mexico Enterprises, Inc. v. Bureau of Revenue*, 86 N.M. 799, 800, 528 P.2d 212, 213 (1974); *Black's Law Dictionary* 633 (5th ed. 1979). A donation or gift, on the other hand, is "[a] voluntary transfer of property to another made gratuitously and without consideration." *Black's Law Dictionary*, supra 619 (emphasis added).

It is my opinion, therefore, that donations received by a nonprofit organization are not gross receipts subject to the business license tax, since these donations are derived from the charitable, rather than from the business, activities of the organization.

IV. Gross Receipts Contingent on Events Occurring Outside Taxing Jurisdiction Includeable as Measure of License Tax When Only Tax Situs Is Located in Taxing Jurisdiction

You also ask the extent to which the gross receipts of an organization whose only business location is in the Commonwealth, but which conducts seminars for compensation outside Virginia, are subject to the license tax in the Virginia locality where the business is located. As discussed above, § 58.1-3708 provides, in part, that "the situs for the local taxation for any licensable business . . . shall be the county, city or town . . . in which the person so engaged has a definite place of business or maintains his office."
The organization in the facts you present maintains no regular business location other than its principal place of business in Falls Church, Virginia. Fees charged for seminars presented outside of Virginia are billed from and received at the Falls Church business location. The organization, therefore, has not established a tax situs elsewhere, and an apportionment of its gross receipts is not required. See Braniff Airways v. Nebraska Board, 347 U.S. 590 (1954) (state of domicile may tax full value of personal property as long as no tax situs has been established elsewhere). The fact that the measure of the tax—in the facts you present, gross receipts—is contingent upon events occurring outside of the Commonwealth does not invalidate the tax. See Norton Co. v. Dept. of Revenue, 340 U.S. 534 (1951); see also 1981-1982 Att'y Gen. Ann. Rep. 390 (fees for accounting services performed outside of taxing jurisdiction includable in gross receipts for local license tax when only business office located in that jurisdiction).

Both §§ 58.1-3707 (situs for local license taxation of practitioners of professions) and 58.1-3708 (situs for local license taxation of businesses and occupations) provide that the situs for local taxation shall be the county, city or town in which the taxpayer's office is maintained. It is my opinion, therefore, that the tax situs of the organization you describe is the locality in which the organization's sole business office is located. It is further my opinion that the total amount of the organization's gross receipts, excluding donations, is includable in its tax base for purposes of that locality's business license tax.

1 I.R.C. § 501(c)(4) exempts from federal income tax "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."

TAXATION: LICENSE TAXES.

PUBLIC SERVICE COMPANIES: MOTOR VEHICLE CARRIERS GENERALLY.

Local business license tax that discriminates in favor of intrastate commerce at expense of interstate commerce in violation of U.S. Constitution Commerce Clause.

August 9, 1989

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

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether a violation of the Commerce Clause of the Constitution of the United States exists when an "exclusively interstate trucking company" is "subject to local business license taxes, while its competitors, who hold both Virginia certificates of convenience and necessity and Interstate Commerce Commission authority, are not subject to the same such taxes." You state that the company has terminal facilities in 42 states, four of which are located in four separate Virginia localities, and is in "direct competition for [interstate] shipping business" with trucking companies holding both State Corporation Commission ("S.C.C.") intrastate certificates of public convenience and necessity and Interstate Commerce Commission ("I.C.C.") interstate authority.

I. Applicable Statutes

Section 58.1-3703(A) of the Code of Virginia authorizes a locality to levy and collect license taxes on businesses within a locality, subject to the limitations in
$ 58.1-3703(B). Section 58.1-3703(B)(1) prohibits the imposition of local license taxes on "public service corporations," subject to certain exceptions not applicable to the facts you present.

Sections 56-1 through 56-522 are statutes governing public service companies. Section 56-1 defines the phrase "public service corporation" to include "all persons authorized to transport passengers or property as a common carrier." Section 56-35 vests the S.C.C. with the power and duty of "supervising, regulating and controlling all public service companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies."

Section 56-278 generally provides that common carriers engaged in intrastate operation on any highway within the Commonwealth shall first obtain from the S.C.C. a certificate of public convenience and necessity authorizing such operation. Section 56-281 further provides that no certificate shall be issued to an applicant proposing to operate over the route of a current certificate holder until it has proven to the S.C.C. that the service rendered by the current holder over such route is inadequate to serve the public necessity and convenience.

II. Prior Opinion Concludes that Carrier Regulated Exclusively by I.C.C. Is Not Exempt from Local Business License Taxation; Subsequent Supreme Court Decisions Define Antidiscrimination Standard for Such Taxation


As discussed in the Cheatham Opinion, the Supreme Court has established four standards that a state tax statute must meet to withstand a challenge 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. Complete Auto Transit, Inc., 430 U.S. at 279; Cheatham Op., supra. If a taxing statute or ordinance fails to satisfy one of these four standards, it violates the Commerce Clause. Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

Although the facts you present differ from the facts in the Cheatham Opinion in that your inquiry concerns a trucking company holding both I.C.C. interstate authority and an S.C.C. intrastate certificate of public convenience and necessity, two decisions of the United States Supreme Court rendered subsequent to the Cheatham Opinion specifically define the third "antidiscrimination" standard in Complete Auto Transit, Inc. and raise questions concerning the imposition of a license tax against the company you describe. See Goldberg v. Sweet, 488 U.S. ____, 102 L. Ed. 2d 607, 109 S. Ct. 582 (1989); American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266 (1987).

III. Tax May Not Discriminate in Favor of Intrastate Commerce; Local Business License Tax in Facts Presented Invalid

In Scheiner, the Supreme Court held that Pennsylvania's flat taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on out-of-state
businesses competing in an interstate market as compared to the burden it imposed on its own resident carriers engaging in interstate commerce. 483 U.S. at 286. The Court reviewed whether the methods by which the Pennsylvania flat taxes were assessed discriminated against some participants in interstate commerce and concluded that the "'free trade purpose [of the Commerce Clause] is not confined to the freedom to trade with only one State; it is a freedom to trade with any State, to engage in commerce across all state boundaries.'" Id. at 282 n.13 (quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 335 (1977)).

In Goldberg, however, the Court upheld an Illinois exioise tax on a person's act or privilege of originating or receiving interstate or intrastate telecommunications in Illinois and provided a credit for taxpayers who had paid a tax in another state on the same telecommunication which triggered the Illinois tax. The Court in Goldberg noted:

The Illinois tax differs from the flat taxes found discriminatory in Scheiner in two important ways. First, whereas Pennsylvania's flat taxes burdened out-of-state truckers who would have difficulty effecting legislative change, the economic burden of the Illinois telecommunications tax falls on the Illinois telecommunications consumer, the insider who presumably is able to complain about and change the tax through the Illinois political process. It is not a purpose of the Commerce Clause to protect state residents from their own state taxes.

Second, whereas with Pennsylvania's flat taxes it was possible to measure the activities within the State because truck mileage on state highways could be tallied, reported, and apportioned, the exact path of thousands of electronic signals can neither be traced nor recorded. We therefore conclude that the [Illinois] Tax Act does not discriminate in favor of intrastate commerce at the expense of interstate commerce.

488 U.S. at __, 102 L. Ed. 2d at 620, 109 S. Ct. at 591. Based on the above, it is my opinion that a local license tax that exempts a trucking company holding both an S.C.C. certificate of convenience and necessity and an I.C.C. interstate authority, while taxing a competing, "exclusively interstate trucking company," cannot satisfy the standard that the tax "not discriminate in favor of intrastate commerce at the expense of interstate commerce." Id. This tax has the effect of directly benefiting one competing interstate company over another merely because the company benefited also has an S.C.C. intrastate certificate of convenience and necessity. It is further my opinion, therefore, that such a local business license tax discriminates against interstate commerce in favor of intrastate commerce and, as a result, violates the Commerce Clause of the Constitution of the United States.

See also 1987-1988 Att'y Gen. Ann. Rep. 511 (citing Cheatham Op. for the rule that the S 58.1-3703(B)(1) exemption for public service corporations does not extend to a common carrier regulated exclusively by the I.C.C.; Commerce Clause argument not raised or independently discussed).

Although Complete Auto Transit, Inc. v. Brady concerned a state tax statute, localities as well as states are prohibited by the Commerce Clause from adopting tax ordinances that discriminate against interstate commerce. See, e.g., Nippert v. Richmond, 327 U.S. 416 (1946).

TAXATION: LICENSE TAXES — TANGIBLE PERSONAL PROPERTY, MACHINERY, TOOLS — MERCHANTS' CAPITAL TAX.
Locality may impose license tax on every category of business except merchants, on whom merchants' capital tax may be imposed; may impose license tax on peddlers (term "peddler" does not include "merchant").

March 17, 1989

The Honorable Mayo K. Gravatt  
Commonwealth's Attorney for Nottoway County

You ask two questions concerning the interplay between the local business license tax and the local merchants' capital tax. You first ask whether a locality may impose a business license tax on every category of business except merchants and, at the same time, impose the merchants' capital tax on merchants. Your second question is whether a locality may impose both a license tax on peddlers and a merchants' capital tax on merchants.

I. Applicable Statutes

Section 58.1-3509 of the Code of Virginia permits a county, city or town to impose a merchants' capital tax. A locality also is authorized to impose a license tax on all businesses, trades, professions and occupations pursuant to § 58.1-3703. Section 58.1-3704 provides, however, that "[w]henever any county, city or town imposes a license tax on merchants, the same shall be in lieu of a tax on the capital of merchants." (Emphasis added.)

The Commonwealth's tax statutes currently do not define the term "merchant." A "peddler" is defined for license tax purposes as "any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same, or actually sell or barter the same." Section 58.1-3717(A).

II. Locality May Exclude Merchants From Business License Tax While Imposing Merchants' Capital Tax

A prior Opinion of this Office concludes that a license tax imposed on businesses, professions, trades and occupations under the authority of § 58.1-3703 (formerly § 58-266.1) may exclude merchants if the locality elects to impose a tax on the capital of merchants under §§ 58.1-3509 and 58.1-3510 (formerly §§ 58-832 and 58-833). See 1983-1984 Att'y Gen. Ann. Rep. 374. I am in agreement with this Opinion. It is my opinion, therefore, that a locality may impose a business license tax on every category of business except merchants and, at the same time, impose a merchants' capital tax on merchants.

III. "Peddlers" Are Not Merchants for Purposes of § 58.1-3704; Locality May Impose License Tax on Peddlers and Merchants' Capital Tax on Merchants

A response to your second inquiry depends upon whether a "peddler," as that term is defined in § 58.1-3717(A), is a "merchant," as that term is used in § 58.1-3704. While the term "merchant" currently is not defined by Virginia statute, the legislative history of statutes authorizing state and local license taxes is instructive as to the meaning of this term in § 58.1-3704.

When former § 58-266.1(5), the statutory predecessor to current § 58.1-3704, was enacted in 1964, the term "merchant" was not defined in the Code. At that time, however, there were several statutes in effect dealing with the license taxation of merchants. Statutes that relate to the same subject "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system,
or a single and complete statutory arrangement." *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957). Based on the above, the scheme of license taxation of merchants in effect when former § 58-266.1(5) was enacted may be examined to determine the meaning of the term "merchant" as used in that statute.

Wholesale and retail merchants were subject to a state license tax, as set forth in separate articles for each merchant. See former Art. 6, Ch. 7, Tit. 58, §§ 58-304 to 58-319 (Repl. Vol. 1959) (wholesale merchants); former Art. 7, Ch. 7, Tit. 58, §§ 58-320 to 58-335 (Repl. Vol. 1959) (retail merchants). Peddlers also were subject to a state license tax, but were classified in a separate article. See former Art. 9, Ch. 7, Tit. 58, §§ 58-340 to 58-345 (Repl. Vol. 1959). The definitions and classifications used in the administration of the local license tax historically have been based upon definitions and classifications used in the state license tax, even after repeal of the state license tax. When the term "merchant" was used in former § 58-266.1(5) (currently § 58.1-3704), it is clear that the General Assembly intended to refer only to wholesale and retail merchants and did not intend to include the separate classification of peddlers. Based on the above, it is my opinion that the term "peddler," as that term is defined in § 58.1-3717(A), does not include a "merchant," as that term is used in § 58.1-3704. It is further my opinion, therefore, that a locality may impose a license tax on peddlers and, at the same time, impose a merchants' capital tax on merchants.

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2. The state wholesale and retail merchants' license taxes were repealed in 1966. See Ch. 151, 1966 Va. Acts 258.
3. See, e.g., Dep't Taxation, Guidelines for Loc. Bus., Prof. & Occupational License Taxes, at 3 n.2 (Jan. 1, 1984), which provide that "the definition of wholesaler in these guidelines has been derived from the definition of 'wholesale merchant,' as found in Section 58-304, before its repeal in 1966". Similarly, the guidelines provide that "[t]he definition in these guidelines of the term 'contractor' includes all persons who were 'deemed contractors' in Section 58-297, before its repeal in 1982." Id. at 5 n.4.
4. A prior Opinion of this Office concludes that "peddlers at wholesale are taxable as merchants and are to be classified as wholesalers." 1982-1983 Att'y Gen. Ann. Rep. 512, 513. The specific inquiry in this prior Opinion was whether peddlers at wholesale were "wholesalers," as that term was used in a rate limitation statute. The analysis and conclusion of this prior Opinion, of course, are limited to the particular question asked and, therefore, do not apply to the facts you present.

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**TAXATION: MISCELLANEOUS TAXES - CONSUMER UTILITY TAXES.**

Mapping of locality constitutes installation expenditure if essential to establishment of E-911 system.

February 13, 1989

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

You ask whether the "mapping" of a locality prior to the implementation of an enhanced 911 emergency telephone system ("E-911 system") constitutes an installation expense pursuant to § 58.1-3813(D) of the Code of Virginia. You state that "mapping" a locality involves giving every road in the locality a street name and each building or house a street number. You further state that mapping is a requirement for the installation of an E-911 system.
Applicable Statute

Section 58.1-3813 authorizes the levy of a local tax on consumers of telephone service for the establishment of an E-911 system. Section 58.1-3813(B)(1) provides that an E-911 system "includes selective routing of telephone calls, automatic telephone number identification, and automatic location identification performed by computers." Section 58.1-3813(D) further provides:

Any such taxes imposed by this section shall be first utilized solely for the initial capital, installation and maintenance costs of the E-911 system. The jurisdiction shall reduce such tax when capital and installation costs have been fully recovered to the level necessary to offset recurring maintenance costs only.

Expenditure of E-911 System Special Tax
Limited to Capital, Installation and Maintenance Costs

Pursuant to § 58.1-3813(D), the special tax for the E-911 system is first to be utilized solely for the initial capital, installation and maintenance costs of the E-911 system. Once capital and installation costs are fully recovered, the tax must be reduced to a level covering only ongoing maintenance costs. Costs which may be paid with the special tax revenue, therefore, must be either for capital, installation or maintenance costs of the E-911 system.

Mapping Constitutes Installation Expenditure
if Essential to Establishment of E-911 System

Because there is no statutory definition of "installation," the ordinary meaning of the term must be used. Anderson v. Commonwealth, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944). The term "install" is defined as "[t]o set up or fix in position for use or service." Black's Law Dictionary 717 (5th ed. 1979).

Section 58.1-3813(D), as quoted above, refers to the "installation ... costs of the E-911 ... system." (Emphasis added.) In this context, the term "installation" clearly involves something more than merely setting up the physical equipment for the E-911 system in place. See Town of Greenland v. Bunker, 118 N.H. 783, 394 A.2d 321 (1978) ("installation" of mobile home for occupancy within meaning of zoning ordinance involves more than placing or storing mobile home in field and would include preparation of site and connection of sewer, water and electricity); Metzler v. Thye, 163 Cal. 95, 124 P. 721 (1912) (contractual duty of lessee to install elevator from basement to sidewalk included all preparations of premises needed to make elevator operational).

Based on the above, it is my opinion that installation costs of the E-911 system would include all necessary preparation to make it operational. Since "mapping" is an essential element of the establishment of an E-911 system, it is further my opinion that the cost of this activity may be paid as an installation cost pursuant to § 58.1-3813.

TAXATION: MISCELLANEOUS TAXES - FOOD AND BEVERAGE TAX.

County tax applicable to caterers who control premises where food and beverages sold and consumed.

June 23, 1989
Mr. Bernard J. Natkin  
County Attorney for Rockbridge County

You ask whether caterers are subject to a county food and beverage tax authorized by § 58.1-3833 of the Code of Virginia, which restricts this tax to food and beverages consumed on the "premises" where they are sold.

I. Applicable Statute

Section 58.1-3833(A) authorizes a county to levy a tax on food and beverages "sold for human consumption and consumed on such premises not to exceed four percent of the amount charged for such food and beverages."

II. Food and Beverage Tax Is Applicable to Caterers Who Control Premises Where Food and Beverages Are Sold and Consumed

The determination whether a county food and beverage tax applies to caterers requires an interpretation of the term "premises," as it is used in § 58.1-3833. Although neither the Supreme Court of Virginia nor prior Opinions of this Office have construed the term, the Supreme Court of Ohio has defined "premises," as it was used in an Ohio constitutional provision concerning excise taxation, as "the limited portion of a building, structure, enclosure or other area, where sales or purchases of foods for human consumption are made, which is in the actual possession or under the actual control of the vendor." Castleberry v. Evatt, 67 N.E.2d 861 (Ohio 1946).

Castleberry involved an interpretation of Article XII, § 12 of the Constitution of Ohio, which provided that "no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold." 67 N.E.2d at 862. The Court held that the purpose of this constitutional language was "to tax only sales of food which is sold and served in restaurants or other similar places under the control of the vendor." Id. at 863. The term "premises" refers to a distinct place of business open to the public and controlled by the vendor. People v. Rizzo, 47 A.D.2d 468, 367 N.Y.S.2d 523, 526 (1975) (construing statute permitting tax commission to examine books of person in possession or control of any "premises" where cigarettes are placed, stored, sold or offered for sale). See also Automatic Merchandising Council of N. J. v. Glaser, 127 N.J. Super. 413, 317 A.2d 734 (1974) (distinguishing statutory language referring to "premises where sold" from language referring to "for consumption off the premises"; the former language was held to refer to the sale of food and drink in restaurants, taverns or other establishments; the latter was held to refer to catering operations).

Based on the above, it is my opinion that caterers are subject to a county tax on the sale of food and beverages pursuant to § 58.1-3833 only when the caterer sells food for human consumption in a distinct place of business that is open to the public and over which the caterer exercises control.

1The primary question decided in Castleberry was whether the sale of milk through a vending machine located in an area in which caterer had no control was sold for human consumption "off the premises where sold" and, as a result, nontaxable. The Ohio Supreme Court held that the sale of milk through a vending machine was consumed "off premises" because the vendor had no control over the premises where the vending machine was located. 67 N.E.2d at 863.

2This conclusion is supported by a comparison of the "sold and consumed on the premises" limitation of the meals tax authorized by § 58.1-3833 with the meals tax provision in § 58.1-3840, which applies to certain cities and contains no similar limitation.
March 21, 1989

The Honorable Hunt A. Meadows III
Commissioner of the Revenue for Pittsylvania County

You ask several questions concerning the real estate tax assessment of a large parcel of land in your jurisdiction. A life estate, with the accompanying remainder interest, exists in a portion of the large parcel. First, you ask if the portion of the property in which the life estate exists should be assessed as a separate parcel for real estate tax purposes. Assuming that this smaller portion of the property is a separately taxable entity, and assuming also that the life tenant is delinquent in the payment of real estate taxes, you ask if that delinquency creates a lien against the remainder interest in the smaller tract upon the termination of the life estate.

Your third question presents a factual situation in which the entire large parcel described above has been assessed for real estate tax purposes simultaneously to the owner of the life estate and to the remainderman, who also owns the fee simple interest in the rest of the larger parcel. You state that the remainderman has paid all of the real estate taxes assessed on the entire large parcel, including the portion of that parcel containing the life estate, while the owner of the life estate paid none of the assessed taxes. You ask whether it is proper to invoke § 58.1-3984(B) of the Code of Virginia to relieve the owner of the remainder interest in the parcel from what appears to be a tax delinquency resulting from the failure of the owner of the life estate to pay the real estate taxes assessed in his name.

I. Applicable Statutes

Section 58.1-3281 requires the commissioner of the revenue to ascertain the ownership of real estate in his jurisdiction and provides, in part:

Each commissioner of the revenue shall commence, annually, on January 1, and proceed without delay to ascertain all the real estate in his county or city, as the case may be, and the person to whom the same is chargeable with taxes on that day. . . . [T]he owner of real estate on that day shall be assessed for the taxes for the year beginning on that day. [Emphasis added.]

Section 58.1-3344(1) provides that taxes are a lien on the fee simple estate, not merely on the interest of the owner:

Taxes assessed against real estate subject to taxes shall be a lien on the property and the name of the person listed as owner shall be for convenience in the collection of the taxes. The lien for taxes shall not be limited to the interest of the person assessed but shall be on the entire fee simple estate. There shall be no lien when for any year the same property is assessed to more than one person and all taxes assessed against the property in one of the names have been paid for that year. [Emphasis added.]

Section 58.1-3984(B) authorizes a commissioner of the revenue to apply to a court to correct an erroneous assessment and provides, in part:
In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment of any tax is improper or is based on obvious error and should be corrected in order that the ends of justice may be served ... the commissioner of the revenue shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer.

II. Smaller Parcel with Life Estate Assessed as Separate Parcel in Name of Life Tenant

As quoted above, § 58.1-3281 requires that the "owner" of real estate shall be assessed for the real estate taxes on his property. The Supreme Court of Virginia has defined the term "owner," as it is used in § 58.1-3281, to include "any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee." City of Richmond v. McKenny, 154 Va. 427, 430, 73 S.E.2d 414, 416 (1952). See 1985-1986 Att'y Gen. Ann. Rep. 300.

The Supreme Court of Virginia specifically has held that the term "owner" includes a life tenant. Ceroli v. Clifton Forge, 192 Va. 118, 125-26, 63 S.E.2d 781, 785 (1951); Stark v. City of Norfolk, 183 Va. 282, 32 S.E.2d 59 (1944). See also 1975-1976 Att'y Gen. Ann. Rep. 368, 369. A prior Opinion of this Office concludes that real estate taxes on property in which a life estate has been reserved should be assessed against the life tenant. See 1985-1986 Att'y Gen. Ann. Rep., supra. I am in agreement with this Opinion. It is my opinion, therefore, that the smaller parcel of land in which a life estate exists should be assessed separately for real estate tax purposes, and that the entire value of the smaller parcel of land should be assessed in the name of the life tenant.

III. Life Tenant's Delinquency in Payment of Real Estate Taxes Creates Lien Against Remainder Interest

After an amendment to § 58.1-3344 by the 1973 Session of the General Assembly, real estate taxes assessed against a life tenant are enforceable against the interest of a remainderman.¹ Based on the above, it is my opinion that real estate tax liens which attached to real property after July 1, 1973, are enforceable against remaindermen as well as life tenants. Accord Att'y Gen. Ann. Rep.: 1975-1976 at 381; 1974-1975 at 449.

IV. No Lien Arises When Property Assessed to More Than One Person and Taxes Paid; In Absence of Lien, No Judicial Action Necessary

As quoted above, § 58.1-3344(1) expressly provides that "[t]here shall be no lien when for any year the same property is assessed to more than one person and all taxes assessed against the property ... have been paid for that year." In the facts you present, since the full tax assessment on the property was mailed to both the life tenant and to the remainderman, and the remainderman paid the total amount of real estate taxes assessed, there is no statutory lien on the real estate.

By operation of § 58.1-3344(1), no real estate tax lien exists on the parcel of real estate in question. It is my opinion, therefore, that the unpaid real estate tax assessment of the life tenant has no effect on the remainder estate. It is further my opinion, therefore, that the judicial remedy provided in § 58.1-3984 should not be invoked because there is no erroneous assessment from which to relieve the remainderman.

¹See Ch. 467, 1973 Va. Acts 852, 854-55. Prior to this amendment, real estate taxes that attached during life tenancies were enforceable only against the life tenant because the underlying statutes created no such liability on the part of the remainder estate. Exceptions to this rule existed in a few city charters and for a limited number of cities and counties pursuant to former § 58-1024 (current § 58.1-3344). The 1973 amendment
broadened former § 58-1024 to include all localities and had the effect of overturning those portions of the cases cited in Pt. II of this Opinion which held that a delinquency in the tax assessed against a life tenant did not create a lien against the remainder interest.

TAXATION: REAL PROPERTY TAX — REVIEW OF LOCAL TAXES — COLLECTION BY TREASURERS, ETC.

Treasurer to mail real estate tax bill to owner of property as recorded in assessment book by commissioner of revenue; may invalidate and reissue bill within tax year when post-January 1 transfer of ownership of property occurs.

January 4, 1989

The Honorable F.R. Young Jr.
Treasurer for Grayson County

You ask whether a treasurer may send real estate tax bills to the contract purchasers of certain subdivided real estate when the deeds to these properties have not yet been delivered.

I. Facts

You state that certain subdivided real estate in Grayson County is being sold at auction, with each purchaser being given a contract for the purchase of the real estate if the full purchase price is not paid on the day of the sale. You further state that the contract obligates the purchaser to pay real estate taxes on the property, but that no deed to the property is delivered until the purchase price is paid in full. The contract purchasers have complete possession and use of the property from the day of the auction.

II. Applicable Statutes

Section 58.1-3281 of the Code of Virginia provides, in part:

Each commissioner of the revenue shall commence, annually, on January 1, and proceed without delay to ascertain all the real estate in his county or city, as the case may be, and the person to whom the same is chargeable with taxes on that day. The beginning of the tax year for the assessment of taxes on real estate shall be January 1 and the owner of real estate on that day shall be assessed for the taxes for the year beginning on that day.

Section 58.1-3912 further provides that "[t]he treasurer of every city and county shall ... send ... to each taxpayer assessed with taxes and levies ... as shown by an assessment book in such treasurer's office, a bill or bills."

Section 58.1-3916 provides, in 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 ....
III. Treasurer to Bill Taxpayer Based on Data in Assessment Book

Section 58.1-3281 sets January 1 as the beginning of the tax year for the assessment of real estate taxes and further provides that "the owner of real estate on that day [January 1] shall be assessed" by the commissioner of the revenue. The commissioner of the revenue, therefore, has the statutory duty to determine the ownership of real property in a particular jurisdiction for real estate tax purposes.

Section 58.1-3912 requires the treasurer to mail real estate tax bills "as shown by an assessment book[1] in such treasurer's office."

IV. Treasurer Authorized to Reissue Tax Bill if Transfer Is Recorded

If the ownership of real property changes after January 1, § 58.1-3916 authorizes, but does not mandate, the treasurer to invalidate a tax bill mailed pursuant to § 58.1-3912 and to reissue the bill to the new owner. Reissuance must take place in the tax year in which the transfer of property occurs and only applies to transfers of record in the local clerk's office. See 1986-1987 Att'y Gen. Ann. Rep. 307, 308-09.

V. Contract Purchaser in Facts Presented May Not Be Billed for Real Estate Taxes

Based on the above, it is my opinion that the real estate tax bill in the facts you present should be mailed to the owner of the property, as recorded in the assessment book prepared by the commissioner of the revenue. Pursuant to § 58.1-3916, these tax bills may be invalidated and new bills reissued if the treasurer becomes aware of a post-January 1 transfer of property, provided there is evidence on record of the transfer and reissuance occurs in the tax year in which the transfer occurs.

1The assessment book referred to in § 58.1-3912 is the land book prepared by the commissioner of the revenue. See §§ 58.1-3301, 58.1-3312 (duty of the commissioner to make out land book); 58.1-3310 (commissioner of revenue to distribute land book to treasurer within statutory time period); 58.1-3313 (land correctly charged to one person on land book not to be changed without evidence of record). See also §§ 58.1-3285 (tract subdivided into lots where plat recorded to be separately assessed and entered on land book as of January 1 of year next succeeding the year plat recorded); 58.1-3290 (tract conveyed to different owners in two or more parcels to be assessed and shown separately upon land book as of January 1 of year next succeeding year in which tract becomes property of several owners, whether plat recorded or not).

TAXATION: REAL PROPERTY TAX - EXEMPTIONS FOR ELDERLY AND HANDICAPPED.

Local ordinance that expands income and financial worth limitations for exemptions from real property taxation for elderly and handicapped applies to taxes for tax years beginning January 1, 1990, and thereafter.

August 16, 1989

Mr. David T. Stitt
County Attorney for Fairfax County

You ask whether a county ordinance adopted pursuant to § 58.1-3211(3) of the Code of Virginia after July 1, 1989, raising the income and financial worth limitations for
exemptions from real property taxation for the elderly and handicapped, would enable newly qualified taxpayers to avail themselves of tax relief for the second installment of real estate taxes for 1989.

I. Applicable Statutes

Section 58.1-3210 authorizes the governing body of a locality to adopt an ordinance exempting or deferring real estate taxes on property owned and occupied by the elderly or handicapped. Section 58.1-3211 requires that any program enacted have restrictions based on income and net worth. Effective July 1, 1989, § 58.1-3211(3) authorizes localities "having a 1980 population of more than 500,000 and any county, city or town adjacent thereto," to raise income and financial worth limitations for any exemption and deferral program. Chapter 555, 1989 Va. Acts 814, 815 (Reg. Sess.).

Section 58.1-3215(A) describes the effective period for such a tax exemption and, in a 1989 amendment, allows a prorated exemption:

An exemption or deferral enacted pursuant to § 58.1-3210 may be granted for any year following the date that the qualifying individual occupying such dwelling and owning title or partial title thereto reaches the age of sixty-five years or for any year following the date the disability occurred. Changes in income, financial worth, ownership of property or other factors occurring during the taxable year for which an affidavit is filed and having the effect of exceeding or violating the limitations and conditions provided herein or by county, city or town ordinance shall nullify any exemption or deferral for the remainder of the current taxable year and the taxable year immediately following. However, any locality may by ordinance provide a prorated exemption or deferral for the portion of the taxable year during which the taxpayer qualified for such exemption or deferral. [Emphasis indicates 1989 amendment.]

Section 58.1-3281 designates January 1 as tax day and provides, in part that "[t]he beginning of the tax year for the assessment of taxes on real estate shall be January 1 and the owner of real estate on that day shall be assessed for the taxes for the year beginning on that day." I.

II. Tax Day Is January 1

Section 58.1-3281 provides that the status of the taxpayer, as well as the property, is determined as of January 1 of each year. Prior Opinions of this Office consistently conclude that, because the status of a taxpayer is determined on January 1, a statutory tax exemption effective on July 1 does not entitle the taxpayer to any relief until the following calendar year. In the absence of specific statutory language to the contrary, the taxes are not prorated for the balance of the year in which the exemption was granted. See Op. to Hon. Gerald H. Gwaltney, Comm'r of Rev., Isle of Wight County (Mar. 30, 1989); Att'y Gen. Ann. Rep.: 1982-1983 at 529; 1972-1973 at 417. There is no language in §58.1-3211 or §58.1-3215 to demonstrate any legislative intent to modify this January 1 tax day.

III. New Ordinance Is Not Change of Circumstances Affecting Taxpayer's Qualifications

The 1989 amendment to §58.1-3215(A) permitting a locality to prorate an exemption or deferral is directed to those "qualifying individual[s]" who have a change of circumstances during the tax year, such as changes in income, financial worth or ownership of property. It is my opinion, however, that a change in the law which entitles a taxpayer to an exemption by raising the income levels for eligibility pursuant to §58.1-3211(3)
IV. Local Ordinance Effective Beginning January 1, 1990

As discussed above, January 1 is tax day unless there is specific statutory authority evidencing legislative intent to the contrary. Neither the 1989 amendment to § 58.1-3211 nor the 1989 amendment to § 58.1-3215 contains such specific authority. It is my opinion, therefore, that any ordinance enacted pursuant to § 58.1-3211 that expands the exemption by raising the income and financial worth levels to qualify for an exemption or deferral applies only to taxes for tax years beginning January 1, 1990, and thereafter.

1See Ch. 40, 1989 Va. Acts 76 (Reg. Sess.).

TAXATION: REAL PROPERTY TAX - SPECIAL ASSESSMENT FOR LAND PRESERVATION.

COUNTRIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.

Parcels shown on plat of division and remaining under common ownership may be combined to satisfy minimum acreage requirements when division of original tract not subject to local subdivision ordinance.

March 16, 1989

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You ask whether contiguous parcels of real estate shown on a recorded plat may be combined to form tracts that contain at least twenty acres devoted to forest use and, thereby, be eligible for use value assessment.

I. Facts

You provide two recorded plats that divide single tracts of land into multiple parcels, each of which is larger than five acres. You state that the division of property into lots greater than five acres in area does not constitute a subdivision under the county's subdivision ordinance. The plats, therefore, did not require the approval of the county subdivision agent prior to their recordation.

II. Applicable Statutes

Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244 of the Code of Virginia, provides for the use value assessment of real property to encourage the preservation of land for agricultural, horticultural, forest and open-space uses. Section 58.1-3233(2) requires that property devoted to forest use consist of at least twenty acres to qualify for use value assessment. Section 58.1-3233(2) further provides that "[t]he minimum acreage requirements for special classifications of real estate shall be determined by adding together the total area of contiguous real estate excluding recorded subdivision lots titled in the same ownership. For purposes of this section, properties separated only by a public right of way are considered contiguous."
Article 7, Chapter 11 of Title 15.1, §§ 15.1-465 through 15.1-485, provides for the orderly subdivision of land in Virginia localities. Section 15.1-465 requires that Virginia localities adopt a subdivision ordinance. Section 15.1-466 generally details the authorized provisions for local subdivision ordinances. Section 15.1-430(l) defines the term "subdivision" as follows:

'Subdivision,' unless otherwise defined in a local ordinance adopted pursuant to § 15.1-465, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.1-475.

The subdivision of property must be accomplished in compliance with the local subdivision ordinance. See §§ 15.1-473, 15.1-475.

III. Parcels Shown on Plat of Division Not Subject to Local Subdivision Ordinance and, Remaining Under Common Ownership, May Be Combined to Satisfy Minimum Acreage Requirements

A prior Opinion of this Office concludes that § 58.1-3233(2) authorizes the combination of contiguous parcels of real estate for the purpose of satisfying the minimum acreage requirement of this statute only when the contiguous parcels are titled in the same ownership. See 1987-1988 Att'y Gen. Ann. Rep. 138, 140. Compare 1986-1987 Att'y Gen. Ann. Rep. 306 (prior Opinion rendered before 1988 amendment to § 58.1-3233 concluding that landowner may not combine recorded subdivision lots to qualify for land use taxation). Recorded subdivision lots, whether under common ownership or separately owned, may not be combined to satisfy the minimum acreage requirements. Id.

I assume, therefore, for purposes of this Opinion, that the separate parcels shown on the plats you present remain under common ownership. If the resulting parcels are not under common ownership, the contiguous parcels may not be combined in any event to satisfy the minimum acreage requirement. See § 58.1-3233(2). The question presented by your inquiry, therefore, is whether the reference to "recorded subdivision lots" in § 58.1-3233(2) refers to a subdivision plat recorded under a county's subdivision ordinance or to any division of a tract of land.

The primary object of statutory construction is to ascertain and give effect to legislative intent. See Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). The purpose of a subdivision ordinance is "to assure the orderly subdivision of land and its development." Section 15.1-465. Among the concerns addressed by subdivision ordinances are the coordination of existing and planned streets, the provision of drainage, water, and sewerage systems, and the preservation of critical slopes. See § 15.1-466(A). See also 1986-1987 Att'y Gen. Ann. Rep. 121, 123. Section 15.1-430(l) defines the term "subdivision" but authorizes local governments to adopt a definition of "subdivision" that differs from the statutory definition based on existing local conditions. See also Board of Supervisors v. Land Company, 204 Va. 380, 131 S.E.2d 290 (1963).

The purpose of the use value assessment statutes is to create a financial incentive to encourage the preservation and proper use of real estate devoted to agricultural, horticultural, forest and open-space uses. See § 58.1-3229. The minimum acreage requirements of § 58.1-3233(2) manifestly are intended to limit eligibility for use value assessment to tracts of sufficient size to contribute to the overall goal of preserving valuable
agricultural, horticultural, forest and open-space areas. The evident purpose of the 1988 amendment to § 58.1-3233(2) was to permit a property owner to combine contiguous parcels he owns to satisfy the minimum acreage requirements.

If a property owner who has combined contiguous parcels for purposes of use value assessment subsequently transfers title to one of these parcels and the remaining parcel or parcels do not meet the minimum eligibility requirements of § 58.1-3233(2), the property owner would be subject to roll-back taxes pursuant to § 58.1-3241. If an existing tract of land is divided into large parcels that are not subject to the county subdivision ordinance and the resulting parcels remain under common ownership, the eligibility of the resulting combined parcels for use value assessment is consistent with the purpose of preserving the property for the protected uses. Id. On the other hand, the division of a tract under the subdivision ordinance contemplates the sale of the parcels to multiple owners.

Considering the purposes of both the use value assessment statutes and the subdivision enabling statutes, therefore, it is my opinion that the reference to recorded subdivision lots in § 58.1-3233(2) refers to a subdivision plat recorded under the local subdivision ordinance. It is further my opinion, therefore, that parcels resulting from a plat not subject to the local subdivision ordinance may be combined to satisfy the minimum acreage requirements if the resulting parcels remain under common ownership.


TAXATION: RETAIL SALES AND USE TAX — DEPARTMENT OF TAXATION — REVIEW OF STATE TAXES.

Virginia's sales and use tax scheme not violative of U.S. Constitution Commerce Clause. Agricultural exemption inapplicable to purchases of horses for racing. Racing operations have sufficient nexus to support use taxation. Proration of use tax question of fact to be determined by Tax Commissioner.

August 15, 1989

The Honorable Raymond R. Guest Jr.
Member, House of Delegates

You ask several questions concerning the use tax in Virginia as it concerns the factual situation described below.

1. Facts

A corporation owns and operates a thoroughbred horse breeding farm in Virginia, in addition to breeding or training facilities in Delaware, South Carolina and Kentucky. The company maintains a broodmare band in Virginia.

The corporation also purchases yearlings in Kentucky. You state that no Kentucky sales tax is paid on the Kentucky purchases. Within six months of the purchases, these yearlings are brought from Kentucky to the Virginia farm and are turned out with the offspring of the farm's broodmares.

All of the yearlings are raised in Virginia until about November 1 of the year following their birth, when they are shipped out of state to be trained and eventually raced.
When the offspring are retired permanently from racing, they are either retained for breeding, sold as breeding prospects or otherwise disposed of, depending on each horse's race record.

Virtually all of the company's breeding stock moves between its facilities in Kentucky and Virginia during the year. The racehorses move from racetrack to racetrack in states other than Virginia, although racehorses may return to the Virginia facility temporarily for rest and rehabilitation from injury before returning to the racetrack.

II. Applicable Statutes and Regulations

Section 58.1-604 of the Code of Virginia imposes a tax upon the use of tangible personal property in the Commonwealth. Such property is taxed "on the basis of its cost price if such property is brought within this Commonwealth for use within six months of its acquisition." Section 58.1-604(1). If the property is brought within the Commonwealth six months or more after its acquisition, the tax is based on the lower of its cost price or its current market value at the time of its first use in the Commonwealth. Section 58.1-604(1) further provides:

Such tax shall be based on such proportion of the cost price or current market value as the duration of time of use within this Commonwealth bears to the total useful life of such property (but it shall be presumed in all cases that such property will remain within this Commonwealth for the remainder of its useful life unless convincing evidence is provided to the contrary).

Section 58.1-608(2)(a) provides an exemption from the use tax for "breeding and other livestock . . . necessary for use in agricultural production for market and sold to or purchased by a farmer."

Section 58.1-203 grants the Tax Commissioner "the power to issue regulations relating to the interpretation and enforcement of the laws of this Commonwealth governing taxes administered by the Department [of Taxation]." Section 58.1-203(B) requires that the Tax Commissioner's regulations be promulgated in accordance with the Administrative Process Act.

Section 58.1-205 provides that, in any proceeding relating to the interpretation or enforcement of the tax laws of the Commonwealth, "[a]ny regulation promulgated as provided by subsection B of § 58.1-203 shall be sustained unless unreasonable or plainly inconsistent with applicable provisions of law." Section 58.1-205(2).

Pursuant to the authority granted by § 58.1-203, the Tax Commissioner has issued sales and use tax regulations, which provide, in part:

A. Generally. The [sales and use] tax does not apply to . . . breeding and other livestock . . . sold to farmers for use in agricultural production for market . . . A farmer not engaged in the business of producing agricultural products for market cannot claim any agricultural exemptions.

B. Farmer-horse breeder. The production for sale of colts on a horse farm is regarded as 'agricultural production.' Horses used exclusively for the purpose of breeding colts for sale . . . can be purchased tax exempt by the farmer-horse breeder.

Horses purchased for racing or showing are subject to the tax since they are not used exclusively for breeding purposes.
III. Agricultural Exemption Inapplicable to Purchases of Horses for Racing

Your first question is whether the agricultural exemption in § 58.1-608(2)(a) operates to exempt yearlings, which have been purchased in Kentucky and brought into Virginia shortly after purchase, from the use tax imposed pursuant to § 58.1-604. Although the statutory exemption for agricultural products in § 58.1-608(2)(a) has been amended several times since its initial enactment, it has provided consistently that only property acquired "for use in agricultural production for market" is entitled to the exemption. Words in statutes are to be given their usual, commonly understood meaning. 1987-1988 Att'y Gen. Ann. Rep. 153, 154. The common meaning of the term "market" is a place where merchandise is sold. The American Heritage Dictionary 767 (1985). It is my opinion, therefore, that the phrase "for market," as it is used in § 58.1-608(2)(a), is synonymous with the phrase "for sale."

It is further my opinion that Tax Regs. § 630-10-4(A) and (B), quoted above, confining the agricultural exemption to horses used exclusively for the purpose of breeding horses "for sale," is a reasonable interpretation by the Tax Commissioner of the statute and is in conformity with the established principle that tax exemptions are to be narrowly construed. See Commonwealth v. Research Analysis, 214 Va. 161, 198 S.E.2d 622 (1973). Although the yearlings purchased in Kentucky eventually may be used for breeding, they are purchased for racing, not exclusively for breeding. Based on the above, it is my opinion that the purchase of these yearlings is not exempt from the sales and use tax. Likewise, under § 58.1-608(2)(a), only the feed and supplies purchased for horses used exclusively for breeding other horses for sale are exempt from sales tax.

IV. Whether Use Tax May Be Prorated Pursuant to § 58.1-604 Is Question of Fact to Be Determined by Tax Commissioner

If the purchase of the yearlings is not exempt from use tax under § 58.1-608(2)(a), you ask whether the use tax may be prorated, as provided in § 58.1-604. It is presumed in § 58.1-604 that property brought within the Commonwealth will remain within the Commonwealth for its entire useful life. If the taxpayer can establish the contrary by "convinced evidence," however, the statute provides for proration of the use tax based on the duration of time of use within the Commonwealth.

Whether convincing evidence has established that property will not remain within the Commonwealth for the remainder of its useful life is a question of fact to be determined by the Tax Commissioner pursuant to the authority granted by §§ 58.1-601(A) and 58.1-1821.

V. Use Tax Imposed Under § 58.1-604 in Facts Presented Does Not Violate Commerce Clause of Constitution of United States

You next ask whether the yearlings may be taxed as soon as they enter Virginia, before "interstate commerce is complete," consistent with the Commerce Clause of the Constitution of the United States. The facts you present indicate that the destination of the yearlings purchased in Kentucky is the corporation's farm in Virginia and that the yearlings are not merely passing through Virginia in the stream of commerce.

The Supreme Court of the United States consistently has upheld the validity of a state's sales and use tax in facts similar to the facts you present. In Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933), for example, the state taxed the purchase of gasoline brought into the state to be stored and later to be withdrawn and shipped both within and
without the state. The Supreme Court upheld the tax, holding that once the gasoline was unloaded, it "ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation." *Id.* at 266. The fact that part of the gasoline was later to be withdrawn and transported outside the state "did not affect the power of the state to tax it all before that transportation commenced." *Id.* (emphasis added).


Virginia's sales and use tax scheme also does not burden interstate commerce by subjecting transactions to double taxation. The taxpayer is not subject to the payment of both a sales and use tax on the same transaction. See § 58.1-604(3). The taxpayer is entitled to a credit equal to the amount of tax paid in the state of purchase on the use in Virginia of property purchased in another state. See § 58.1-611.

**VI. Sufficient Nexus Exists to Support Use Taxation**

You also ask whether the taxpayer's racing operations have a "substantial nexus" to Virginia to support the taxation of horses purchased for racing or to support taxation without apportionment of the purchase price based on use.

Section 58.1-602 defines "sale" as "any transfer of title or possession" of tangible personal property. "Use" is defined as "the exercise of any right or power over tangible personal property incident to the ownership thereof." *Id.* The use tax is complementary to the sales tax, one taxing the transfer of ownership and the other taxing the use of the property incident to such transfer. The basis for either the sales or use tax is the transaction which transfers ownership. In the facts you present, if the taxpayer had purchased the yearlings in Virginia, he would have been subject to the payment of sales tax on the full transaction. It is my opinion, therefore, that the taxpayer to whom your inquiry refers likewise is subject to the payment of the use tax on the entire purchase, computed on the basis of the cost or current market value of the horses.

**VII. Conclusion**

In summary, it is my opinion that Virginia's sales and use tax scheme is not in conflict with the Commerce Clause of the Constitution of the United States. The transaction you present is subject to the use tax because the facts do not satisfy the exemption requirements in § 58.1-608(2)(a) and the applicable regulations of the Tax Commissioner. Whether the use tax may be prorated is a question of fact to be determined by the Tax Commissioner.

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1 The "use" language in § 58.1-608(2)(a) should not be confused with the "use" language in § 58.1-604. Under § 58.1-604, the tax liability attaches when the property is brought within the Commonwealth for use, regardless of what that use might be. The "first use" language in § 58.1-604 establishes the time for determining the current market value of property brought into the Commonwealth six months or more after its acquisition.

Under § 58.1-608(2)(a), the property must be acquired to be "used" for agricultural production for market for the exemption to apply. This exemption contains no "first use" language, and Tax Regs. § 630-10-4(3) contains an "exclusive use" requirement.
You also ask whether the use tax may be prorated on the basis of the use to which the horses will be put during their useful lives, with the tax applying only to the percentage of their lives that will be spent racing. No existing statute or regulation authorizes such a proration of the use tax.

Although the tax is computed on the basis of the cost or market value of the property, the tax is not the same as an annually recurring tax on personal property. See Sullivan v. United States, 395 U.S. 169 (1969). Neither is the tax equivalent to a license tax or other tax on the privilege of doing business in the state. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

TAXATION: REVIEW OF LOCAL TAXES.

Treasurer's list should include parcels of real estate determined to be placed incorrectly on commissioner of revenue's land book or are nonexistent.

April 7, 1989

The Honorable Mary Fary Altemus
Treasurer for Gloucester County

You ask what parcels of real estate are to be included on the list the local treasurer is required to prepare pursuant to § 58.1-3921(1) of the Code of Virginia.

I. Applicable Statutes

Section 58.1-3921 requires the treasurer to make out four lists involving certain real estate and uncollectable and delinquent taxes in a jurisdiction after a determination is made concerning which taxes assessed in the locality cannot be collected. One of the lists required by this statute is "[a] list of real estate on the [commissioner of the revenue's] land book improperly placed thereon or not ascertainable, with the amount of taxes charged thereon." Section 58.1-3921(1). Section 58.1-3924 further provides, in part:

A copy of each of the four lists mentioned in § 58.1-3921 shall be submitted by the treasurer to the governing body of his county, city or town. Such lists shall be submitted at the first meeting of the governing body held after the treasurer has completed the lists.

The treasurer may, or shall at the direction of the governing body, certify to the commissioner of the revenue a copy of the list of real estate on the commissioner's land book improperly placed thereon or not ascertainable. The commissioner of the revenue shall correct his land book accordingly.

II. List Should Include Parcels Treasurer Determines Do Not Exist or Are Placed Incorrectly on Land Book

Section 58.1-3921 does not define either the phrase "improperly placed" or "not ascertainable," as they are used in § 58.1-3921(1). The term "ascertainable" has been defined as "capable of being discovered, observed or established." Scott v. Western International Surplus Sales, Inc., 267 Or. 512, 515, 517 P.2d 661, 663 (1973). See also Allen v. Van Buren Township of Madison County, 243 Ind. 665, 674, 184 N.E.2d 25, 29 (1962) ("ascertainable" means to render certain, establish as certainty, establish, fix, determine, with certainty, to make certain—exact); Wicecarver v. Mercantile Town Mut. Ins. Co., 137 Mo. App. 247, 257, 117 S.W. 698, 702, (1909) ("ascertain" means to make a thing certain to the mind; to free from obscurity, doubt, or change; to make sure of, to
fix; to determine). The term "improper" means "not in accord with fact, truth, or right procedure: incorrect." Webster's Ninth New Collegiate Dictionary 606 (1986).

In applying these definitions to § 58.1-3921(1), many reasons may exist which result in a treasurer's inability to determine the existence of a parcel of land or whether the parcel has been incorrectly placed on the land book. Parcels which do not exist, for example, may appear on the land book as a result of clerical recording errors, erroneous surveys and inaccurate deed recitals. See 1987-1988 Att'y Gen. Ann. Rep. 556. With the guidelines and definitions discussed above, however, any determination whether a parcel has been placed incorrectly on the land book maintained by the commissioner of the revenue or, in fact, does not exist is a factual one to be made by the local treasurer. It is my opinion, therefore, that the parcels of real estate to be included on the list prepared by the treasurer pursuant to § 58.1-3921(1) should include those parcels determined by the treasurer to be placed incorrectly on the land book or which do not exist, such determination to be based upon the definitions and guidelines discussed in this Opinion.

TAXATION: REVIEW OF LOCAL TAXES - BILL IN EQUITY FOR SALE OF DELINQUENT TAX LANDS.

CIVIL REMEDIES AND PROCEDURE: ACTIONS - GENERAL PROVISIONS FOR JUDICIAL SALES.

Owner's right of redemption by payment of taxes and costs exists prior to date set for judicial sale.

October 25, 1989

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether the original owner of real property that has been sold for payment of delinquent taxes pursuant to §§ 58.1-3965 through 58.1-3974 of the Code of Virginia may redeem this property by paying all delinquent taxes and costs within the twelve-month period following confirmation of the judicial sale.

I. Applicable Statutes

Sections 58.1-3965 through 58.1-3974 establish a statutory procedure for the judicial sale of real property for delinquent taxes, initiated by the filing of a bill in equity. The title acquired by the purchaser at such sale is governed by the rules applicable to titles of purchasers at judicial sales generally. See § 58.1-3987.

Section 58.1-3974 establishes an original owner's right of redemption of real property that is the subject of proceedings to sell the property for payment of delinquent taxes:

Any owner of the real estate . . . or his or their heirs, successors and assigns, shall have the right to redeem such real estate prior to the date set for a judicial sale thereof by paying into court all taxes, penalties and interest due with respect to such real estate, together with all costs including costs of publication and a reasonable attorney's fee set by the court. [Emphasis added.]

Section 8.01-113, a statute applicable to judicial sales generally, provides, in part:
If a sale of property is made under a decree of a court, and such sale is confirmed, the title of the purchaser at such sale shall not be disturbed unless within twelve months from such confirmation the sale is set aside by the trial court or an appeal is taken to the Court of Appeals or allowed by the Supreme Court, and a decree is therein afterwards entered requiring such sale to be set aside.

II. Owner's Right of Redemption by Payment of Delinquent Taxes and Costs Exists Only Prior to Judicial Sale

Section 58.1-3974 creates a statutory right of redemption for an owner to redeem real property to be sold for delinquent taxes by the payment of all taxes and costs due. This right, however, is limited in time—payment must occur prior to the date set for the judicial sale.

Section 8.01-113 creates a twelve-month period after the confirmation of a judicial sale during which the sale may be set aside. "After confirmation, a judicial sale cannot be set aside 'except for fraud, mistake, surprise, or other cause for which equity would give like relief, if the sale had been made by the parties in interest, instead of by the court.'" Branton v. Jones, 222 Va. 305, 308, 281 S.E.2d 799, 800 (1981) (quoting Traylor v. Atkinson, 130 Va. 548, 555-56, 108 S.E. 199, 202 (1921), quoting Berlin v. Melhorn, 75 Va. 639, 641 (1881)). Based on the above, it is my opinion that the payment of delinquent real estate taxes and costs is not an event to which § 8.01-113 applies. It is my further opinion, therefore, that § 8.01-113 does not authorize the owner of real estate which is the subject of a delinquent tax sale to redeem this property by paying all delinquent taxes and costs on the property within the twelve-month period following confirmation of the sale.

TAXATION: STATE RECORDATION TAX.

Exemption for permanent loan deed of trust not available when note securing construction loan deed of trust assumed by maker of note securing permanent loan deed of trust; statutory requirement that construction and permanent notes be made by same person not satisfied.

September 12, 1989

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether the exemption from recordation tax pursuant to § 58.1-804 of the Code of Virginia for a permanent loan deed of trust applies to a particular fact situation.

I. Facts

In 1987, a limited partnership (the "First LP") executed a construction loan deed of trust encumbering certain real property located in the Commonwealth. The First LP was the maker of the construction note evidencing this obligation. Within one month after the recordation of the construction loan deed of trust, the First LP conveyed the real property securing this deed of trust to a second limited partnership (the "Second LP"), which assumed the obligations of the First LP under the construction note and the construction loan deed of trust. The First LP is the sole general partner of the Second LP and receives not less than 50% of the profits of the Second LP.
You state that, in 1989, the Second LP executed a permanent loan deed of trust encumbering substantially the same real property which secured the construction loan deed of trust, and which also secured a permanent note. The permanent note was executed by the Second LP. The obligees of the construction note and the permanent note are not the same party. You further state that the proceeds from the permanent note were used to pay off the construction note, and that the term of the permanent note was greater than three years.

The First LP paid all applicable recordation taxes when the construction loan deed of trust was recorded, and the principal amount of the permanent note was less than the principal amount of the construction note.

II. Applicable Statutes

Section 58.1-804(C) provides an exemption from recordation tax for permanent loan deeds of trust. The phrase "permanent loan deed of trust or mortgage" is defined in § 58.1-804(A) as

a deed of trust or mortgage upon real estate, the terms of which provide that the principal sum owing under the instrument giving rise to the deed of trust or mortgage shall become due and payable more than three years from the date of such instrument, and such deed of trust or mortgage secures an instrument made by the same persons who made the instrument which the construction loan deed of trust or mortgage secured ... [Emphasis added.]

III. Construction and Permanent Notes in Facts Presented

Were Not "Made by Same Person" for Purposes of § 58.1-804

The clear language of § 58.1-804 requires the same maker for the note securing the construction loan deed of trust and the note securing the permanent loan deed of trust for the recordation tax exemption to apply. In the facts you present, the construction note was made by the First LP and the permanent note was made by the Second LP. It is my opinion that the assumption of the construction note by the Second LP does not operate to classify the Second LP as the same person as the First LP for purposes of the exemption in § 58.1-804. It is further my opinion, therefore, that the permanent note made by the Second LP, and the construction note made by the First LP, are not "made by the same persons," as § 58.1-804 requires.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. - MERCHANTS' CAPITAL TAX.

MOTOR VEHICLES: MOTOR VEHICLE DEALERS.

Automobile dealership's demonstrator automobile classified as inventory taxable as merchants' capital; commissioner of revenue determines whether demonstrator automobile taxable as merchants' capital or tangible personal property.

November 6, 1989

The Honorable G. Steven Agee
Member, House of Delegates

You ask whether a motor vehicle owned by an automobile dealership and used as a demonstrator should be classified as tangible personal property or as merchants' capital for local tax purposes.
I. Facts

You indicate that a Virginia corporation (the "dealer") owns an automobile dealership in a Virginia city. A demonstrator automobile is provided to the spouse of the president of the dealership for her temporary use. The spouse is a member of the dealer's board of directors and also holds a motor vehicle sales license with the dealer, although she is not a full-time sales person with the dealership. A demonstrator automobile is provided for the spouse's use for approximately one month, to avoid excess mileage and excess devaluation of the automobile. The automobile can be recalled from the spouse by the dealership at any time for sale to a customer. You state that the spouse occasionally uses the demonstrator automobile to run errands for the dealership.

II. Applicable Statutes

Section 46.2-1550 designates the permissible use of dealer's license plates and provides, in part, that "[d]ealer's license plates may be used on motor vehicles... owned by... licensed motor vehicle... dealers in the Commonwealth... when operated on the highways of Virginia by dealers, corporate officers, representatives, and sales persons or full-time employees of... dealers."

Section 58.1-3500 defines and segregates tangible personal property for purposes of local taxation, and provides:

Tangible personal property shall consist of all personal property not otherwise classified by § 58.1-1100 as intangible personal property or by § 58.1-3510 as merchants' capital. Such tangible personal property is hereby segregated for and made subject to local taxation only pursuant to Article X, § 4 of the Constitution of Virginia.

Section 58.1-3510(A) defines the term "merchants' capital" as the "[i]nventory of stock on hand... and all other taxable personal property of any kind whatsoever... except tangible personal property not offered for sale as merchandise, which tangible personal property shall be reported and assessed as such."

III. Inventory Which is Classified Merchants' Capital Is Excluded from Taxation as Tangible Personal Property

Merchants' capital and tangible personal property are two separate classes of property in Virginia which have been segregated for local taxation only. See § 58.1-3000. As discussed above, § 58.1-3510 provides that merchants' capital includes inventory of stock on hand and all other taxable personal property except tangible personal property not offered for sale as merchandise. "Merchants' capital," as that term is defined in § 58.1-3510(A), is specifically excluded from the definition of "tangible personal property" in § 58.1-3500.

IV. Availability for Sale and Nature of Use Determine Whether Property Retains its Status as Inventory

Any determination of the proper classification of the demonstrator automobile in the facts you present depends upon whether the automobile retains its status as inventory of stock on hand, subject to the merchants' capital tax, or whether it becomes tangible personal property. The preliminary determination to be made is whether the temporary use of the demonstrator automobile by the spouse of the dealership's president converts the classification of the vehicle from merchants' capital to tangible personal property. Prior Opinions of this Office discuss the factors to be considered in making this determination.
A prior Opinion of this Office concludes that demonstrator automobiles used by salesmen to drive to and from work, but which also are test driven by prospective customers, remain merchants' capital for local tax purposes, despite their temporary use by the salesmen. See 1984-1985 Att'y Gen. Ann. Rep. 369. The key factor in this conclusion was that these demonstrator automobiles were available for sale to customers at all times. In such cases, the demonstrator automobiles regularly are kept on the premises of the dealership and, therefore, are available for immediate sale or customer demonstration use. This prior Opinion also considered whether the user essentially had permanent use of the automobile by (a) controlling when and how it was used, or (b) using the automobile for an extended period of time, such as for an entire model year. Id. See also 1977-1978 Att'y Gen. Ann. Rep. 429 (dealer's automobile lost its status as inventory and became taxable as tangible personal property when the daughter of the dealer continuously used the vehicle throughout a nine-month school year in an out-of-town location).

The conclusion reached in the prior Opinion was based, in part, upon a finding by the assessing officer that, even though the automobile eventually would be sold, it was physically removed from the showroom for general use on the streets and highways.

V. Determination Whether Demonstrator Automobile Is Taxable as Merchants' Capital or Tangible Personal Property Is Factual Determination for Commissioner of Revenue

In the facts you present, the removal of the automobile from the lot for personal use on the streets and highways suggests the automobile in question is no longer inventory and would be taxable as tangible personal property. The short duration of the use and the ability of the dealership to recall the automobile at any time for sale to a customer, however, mitigate against that conclusion. The determination of the merchants' capital or tangible personal property status of a particular automobile owned by an automobile dealership is a factual one to be made based upon the factors discussed above. Prior Opinions of this Office consistently conclude that any decision concerning the classification of personal property for tax purposes "is a factual one to be made by the commissioner of the revenue." 1987-1988 Att'y Gen. Ann. Rep. 590, 591. See also id. 532, 533; id. 534, 536. It is my opinion, therefore, that the determination whether the demonstrator automobile in the facts you present should be classified as "tangible personal property" or as "merchants' capital" for local tax purposes should be made by the local commissioner of the revenue based on the factors discussed in this Opinion.

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TAXATION: TAX EXEMPT PROPERTY.

Determination of tax exempt status of property on which sanitary landfill facility constructed must be made by state certifying authority and by local commissioner of revenue.

June 14, 1989

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask whether certain property on which a contractor is constructing a sanitary landfill facility for the New River Resources Authority qualifies for the tax exemption authorized by § 58.1-3660 of the Code of Virginia. You state that the sanitary landfill facility is being constructed in a manner that is designed to protect the ground water in the area and to prevent trash or undesirable gases from escaping into the atmosphere.
I. Applicable Statutes

Section 58.1-3660 authorizes the governing body of a county, city or town to enact an ordinance exempting or partially exempting from taxation "certified pollution control equipment and facilities." Section 58.1-3660(B) defines "certified pollution control equipment and facilities" as any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth and which the state certifying authority having jurisdiction with respect to such property has certified to the Department of Taxation as having been constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination.

The "state certifying authority" is defined as "the State Water Control Board, for water pollution, and the State Air Pollution Control Board, for air pollution, and shall include any interstate agency authorized to act in place of a certifying authority...." Id.

II. Determination of Tax Exempt Status of Facility Must Be Made by State Certifying Authority and by Commissioner of Revenue

In addition to the adoption of an ordinance by the local governing body, two requirements must be satisfied before property is exempt from local taxation pursuant to § 58.1-3660: (1) the property must be constructed, reconstructed, erected, or acquired for pollution abatement purposes; and (2) the property must be used primarily for pollution abatement or prevention purposes.

The first requirement is satisfied by the appropriate authority certifying to the Department of Taxation that the property was constructed, reconstructed, erected, or acquired in conformity with the applicable state program or requirements. This determination is to be made by the certifying authority, as defined in § 58.1-3660(B).

A prior Opinion of this Office further recognizes that eligibility for tax exemption pursuant to § 58.1-3660 requires, not only that property be certified at the state level, but also that property be "used primarily" for pollution abatement purposes. Opinion to Hon. Gerald H. Gwaltney, Comm'r of Revenue, Isle of Wight County (Mar. 30, 1989) (the "Gwaltney Opinion").

The availability of the exemption is expressly contingent on the actual use of the property for pollution abatement purposes. A one-time certification by a state agency obviously is a poor vehicle by which to make a use determination based on the actual use of property that may change over time. In analogous circumstances, the question of whether potentially tax exempt property actually is being used for tax exempt purposes is treated as a question of fact to be determined by the local assessing official.

Id. (emphasis in original). Based on the above, the Gwaltney Opinion concludes that the local commissioner of the revenue is the official authorized to determine the factual question whether certified property actually is being used primarily for pollution abatement or prevention purposes. See also 1987-1988 Att'y Gen. Ann. Rep. 69, 72 (Opinion from Attorney General not appropriate when interpretation or determination reserved to another entity).
1989 REPORT OF THE ATTORNEY GENERAL

Whether the property in question will qualify for a tax exemption pursuant to § 58.1-3660, therefore, is a decision to be made by the appropriate certifying authority and by the local commissioner of the revenue, based on a review of all relevant facts.

TAXATION: TAX EXEMPT PROPERTY.
CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE - EXEMPT PROPERTY.

Exclusive use for charitable purposes required for Ruritan National, Inc. property tax exemption; portions used for exempt and nonexempt activities taxable.

March 21, 1989

Mr. Russell O. Slayton, Jr.
County Attorney for Greensville County

You ask several questions concerning certain real property located in Greensville County and owned by the Ruritan-Greensville County Agricultural Fair Association (the "Association" or the "Property"). You first ask whether the tax exemption in § 58.1-3650.16 of the Code of Virginia for property owned by the Ruritan National, Incorporated, and "local affiliates thereof" applies to the Property.

You also state that a portion of the Property is used continuously for nonexempt activities and that another portion of the Property is used for exempt activities on some occasions and, at other times, for nonexempt activities. You ask whether any of these portions of the Property is exempt from taxation.

I. Applicable Statutes

Property tax exemptions are provided by Article X, § 6 of the Constitution of Virginia (1971). Article X, § 6(a)(6) authorizes the General Assembly to provide exemptions for

[property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly and subject to such restrictions and conditions as may be prescribed.

The specific language of the exemption granted by the General Assembly pursuant to Article X, § 6(a)(6) that is relevant to the facts you present provides that "[t]he Ruritan National, Incorporated, and local affiliates thereof are hereby determined to be benevolent within the meaning of Article X, § 6(a)(6) of the Constitution of Virginia. Property owned by such organizations and used exclusively for charitable purposes is hereby determined to be exempt from taxation." Chapter 875, 1984 Va. Acts 1178, 1411.

II. "Affiliate" Must Have Close Connection with National Organization to Qualify for Exemption

In order for the Association to be a local affiliate of the Ruritan National, Incorporated, and to satisfy the exemption in § 58.1-3650.16, there must be "a condition of being united; being in close connection, allied, associated, or attached as a member or branch." Black's Law Dictionary 54 (5th ed. 1979) (definition of term "affiliate"). Whether the relationship between The Ruritan National, Incorporated, and the Association meets this...

III. Exemptions from Property Taxation Also Must Satisfy Use Requirement

Article X, § 6(a)(6) authorizes the General Assembly to exempt property by designation when the property is used by its owner for charitable purposes, and subject to such restrictions and conditions as the legislature may prescribe. In § 58.1-3650.16, the General Assembly has conditioned the exemption for Ruritan National, Incorporated, and its affiliates on the Property being "used exclusively for charitable purposes." See 1982-1983 Att'y Gen. Ann. Rep. 534 (discussing criteria for determination of exclusive educational or charitable use). Based on the above, it is my opinion that both the portion of the Property used continuously for nonexempt purposes and the portion of the Property used for both exempt and nonexempt activities are clearly subject to taxation. See 1984-1985 Att'y Gen. Ann. Rep. 324 (church property not necessarily exempt from taxation).

IV. Summary

In summary, it is my opinion that the question whether the Property is owned by an "affiliate" of Ruritan National, Incorporated, is a factual one to be determined by the commissioner of the revenue. If the commissioner determines that such affiliate status does, in fact, exist, the portions of the Property used partially or continuously for nonexempt activities are taxable because they fail to meet the requirements in § 58.1-3650.16 that the property be "used exclusively for charitable purposes."

1 The text of this exemption in § 58.1-3650.16 is not set out in the Code.

TAXATION: TAX EXEMPT PROPERTY — LOCAL TAXES — TANGIBLE PERSONAL PROPERTY, MACHINERY, TOOLS.

COMMISSIONS, BOARDS, ETC., GENERALLY: ADMINISTRATIVE PROCESS ACT.

RULES OF VIRGINIA SUPREME COURT: APPEALS PURSUANT TO ADMINISTRATIVE PROCESS ACT.

County may not appeal decision of State Water Control Board concerning certification of property because timely notice of appeal not filed. Authority of commissioner of revenue to determine whether certified property used primarily for pollution abatement purposes. Separate tax rates for certified real property prohibited, for certain personal property permitted.

March 30, 1989

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

You ask several questions concerning the property tax exemption for certified pollution control equipment and facilities in § 58.1-3660 of the Code of Virginia.

I. Facts

Isle of Wight County (the "County") has adopted an ordinance exempting certified pollution control equipment and facilities from local taxation pursuant to § 58.1-3660.
See Isle of Wight County, Va., Code § 15-5 (1986). A commercial agricultural enterprise has constructed hog farms in the County to raise hogs from the breeding stage to the finishing stage. The State Water Control Board (the "Board") has certified to the Department of Taxation that certain specific facilities should be classified as pollution control equipment or facilities.

II. Applicable Statutes

Section 58.1-3008 authorizes different rates of levy on different classes of property and provides:

The governing body of any county, city or town ... may impose different rates of levy on real estate, merchants' capital, tangible personal property or any separate class thereof authorized under Chapter 35 (§ 58.1-3500 et seq.), and machinery and tools ....

Section 58.1-3660 further provides, in part:

A. Certified pollution control equipment and facilities, as defined herein, are hereby declared to be a separate class of property and shall constitute a classification for local taxation separate from other such classification of real or personal property and such property. The governing body of any county, city or town may, by ordinance, exempt or partially exempt such property from local taxation.

B. As used in this section:

'Certified pollution control equipment and facilities' shall mean any property, including real or personal property, equipment, facilities, or devices, used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth and which the state certifying authority having jurisdiction with respect to such property has certified to the Department of Taxation as having been constructed, reconstructed, erected, or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution or contamination.

III. County May Not Appeal Board's Decision Concerning Property in Question Because Timely Notice of Appeal Not Filed

You first ask whether the County may appeal the Board's decision concerning the certification of the property in question.


In this instance, the Board certification letter is dated November 4, 1988. The County has not noted an appeal to the Board's action. As a result, the County has not filed a notice of appeal within 30 days of the Board's action, as required by §§ 9-6.14:16 and Rule 2A:2. It is my opinion, therefore, that the County may not now appeal the Board's decision concerning the certification of the property in question.
IV. Commissioner of the Revenue Has Authority to Determine Whether Certified Property is Used Primarily for Pollution Abatement Purposes

You next ask whether the commissioner of the revenue has the authority to classify as exempt property only those items that are used primarily for the purpose of abating or preventing pollution.

Section 58.1-3660(A) provides that certified property is declared to be a separate class of property. The definition in § 58.1-3660(B), quoted above, requires that certified property both (1) be "used primarily" for pollution abatement purposes and (2) be certified as having been constructed, reconstructed, erected, or acquired in conformity with state pollution abatement programs or requirements. The manifest purpose of § 58.1-3660 is to authorize and implement a local tax incentive program for pollution control equipment or facilities. The definition in § 58.1-3660(B), however, indicates that the state certification procedure is directed at whether property has been "constructed, reconstructed, erected, or acquired in conformity with the state program or requirements" for pollution abatement.

Eligibility for tax exemption pursuant to § 58.1-3660, therefore, requires not only that property be certified at the state level, but also that the property be "used primarily" for pollution abatement purposes. Items of property eligible for certification in many instances lend themselves to multiple uses. The availability of the exemption is expressly contingent on the actual use of the property for pollution abatement purposes. A one-time certification by a state agency obviously is a poor vehicle by which to make a use determination based on the actual use of property that may change over time. In analogous circumstances, the question of whether potentially tax exempt property actually is being used for tax exempt purposes is treated as a question of fact to be determined by the local assessing official. See, e.g., Att'y Gen. Ann. Rep.: 1985-1986 at 276 (educational uses); id. 282 (local business license); id. 299 (forestal use); 1984-1985 at 320, 324 (charitable and educational uses).

Based on the above, it is my opinion that the commissioner of the revenue has the authority to determine whether certified property actually is being used primarily for pollution abatement purposes.

V. Section 58.1-3008 Prohibits Separate Tax Rates for Certified Real Property; Separate Rates for Certain Personal Property Permitted

Your third question is whether the board of supervisors may set a separate rate of taxation on property classified as certified property. Certified property may include both real and personal property. See § 58.1-3660.

Section 58.1-3008, quoted above, details when different rates of levy may be imposed upon different classes of property and requires that only one rate of levy be imposed upon real estate. See Att'y Gen. Ann. Rep.: 1977-1978 at 437 (no different real estate tax rate permitted for different types of real estate); 1971-1972 at 421 (no different tax rate for improved and unimproved real estate permitted). Section 58.1-3008, however, does authorize a local governing body to impose a different tax rate upon classes of tangible personal property as authorized in §§ 58.1-3500 through 58.1-3521, and upon machinery and tools. Section 58.1-3660 does not expressly authorize the imposition of a different tax rate upon personal property certified pursuant to this statute.

Based on the above, it is my opinion that the board of supervisors is not authorized to set a separate rate of taxation on real property classified as certified property. Different rates on personal property so classified may apply, provided such property falls within the categories authorized by § 58.1-3008 to be taxed at different rates and a local ordinance adopting such rate differentials exists.
VI. Exemption from Taxation for Certified Property Not Available

Until January 1 Following Year in Which Ordinance Adopted

Your final question is whether the exemption of certified property is effective on the next assessment date.

With certain exceptions not applicable to your jurisdiction, §§ 58.1-3103, 58.1-3281 and 58.1-3515 provide that real and tangible personal property taxes are assessed as of January 1. The status of the owner, as well as the property, is fixed for the entire year on that day. It is my opinion, therefore, that any exemption from local taxation for certified property will not be effective until January 1 of the year following the year in which an ordinance providing the exemption is passed. Accord 1982-1983 Att'y Gen. Ann. Rep. 529. In this instance, the County already has adopted an ordinance exempting certified property from local taxation. The Board's certification of the property in question was accomplished by letter dated November 4, 1988. It is also my opinion, therefore, that the exemption from local taxation of the certified property in question was effective on the next assessment date following the Board's certification decision.

1See ltr. from Donald B. Richwine to Ronald L. Holt (Nov. 4, 1988).
2The term "case decision" is defined in § 9-6.14:4(D) as "any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit."
4See, e.g., § 58.1-3505(B) (authorizing localities to provide different rate of taxation upon certain named categories of tangible personal property).

TAXATION: TAX EXEMPT PROPERTY — REAL PROPERTY TAX.

Property that generates substantial net profits from lessee loses tax exempt status.

November 7, 1989

The Honorable David L. Berry
Commissioner of the Revenue for Rockingham County

You ask several questions concerning exemption from real property taxation for three organizations claiming religious or charitable exemptions.
I. Applicable Statutes

Section 58.1-3617 establishes the religious or charitable organization's exemption from property taxation, subject to certain use restrictions:

Any church, religious association or religious denomination operated exclusively on a nonprofit basis for charitable, religious or educational purposes is hereby classified as a religious and charitable organization. Notwithstanding § 58.1-3609, only property of such association or denomination used exclusively for charitable, religious or educational purposes shall be so exempt from taxation.

Section 58.1-3281 provides, in part, that "[t]he commissioner of the revenue, before making out his land book, shall assess the value of any building and enclosure not previously assessed, found to be of the value of $100 and upwards. The value shall be added to the value at which the land was previously charged."

Otherwise exempt property is taxable pursuant to § 58.1-3603(A) when a tax exempt building or land, or part thereof, is leased or otherwise is a source of revenue or profit. If only a portion of the property is a source of revenue or profit and the remainder is used by an exempt organization for tax exempt purposes, only the portion of the property which is the source of revenue or profit is taxable.

Section 58.1-3650(A) provides:

The real and personal property of an organization designated by a section within this article [Article 4, Chapter 36 of Title 58.1] and used by such organization exclusively for a religious, charitable, patriotic, historical, benevolent, cultural or public park and playground purpose as set forth in Article X, § 6(a)(6) of the Constitution of Virginia, the particular purpose for which such organization is classified being specifically set forth within each section, shall be exempt from taxation so long as such organization is operated not for profit and the property so exempt is used in accordance with the purpose for which the organization is classified.

II. Property of Massanetta Springs, Inc. Conference Center of the Synod of the Virginias (P.C. U.S.A.)

A. Facts

Massanetta Springs, Inc. Conference Center of the Synod of the Virginias (P.C. U.S.A.) ("Massanetta Springs") owns over 100 acres of real estate in Rockingham County, on portions of which 60 cottages have been built. You state that Massanetta Springs typically leases an unimproved lot, and the sample lease you provide permits the lessee to construct and maintain a cottage and other improvements on the lot, in addition to authorizing the lessee to sell the cottage with the permission of the lessor. Some of the cottages are built and used as a full-time residence by the lessees. Other cottages are used as rental property. Several of the cottages have been built by churches that use them for church-related activities, such as summer Bible conferences, youth ski trips and weekend retreats.

You ask whether either the land or the cottages in the facts you present are taxable and, if so, whether Massanetta Springs or the lessees who built the cottages are liable for the tax.
B. Value of Buildings and Improvements Constructed
by Lessee on Land of Lessor Assessed to Lessor

Pursuant to § 58.1-3015, real property is taxed to the owner of the property. Section 58.1-3281 provides that the value of previously unassessed improvements in excess of $100 shall be added to, and included in, the value of the land previously assessed. A prior Opinion of this Office concludes that the value of buildings and improvements constructed by a lessee upon the real property of a lessor should be added to the value of the land and assessed to the lessor, as the owner of the land. See 1968-1969 Att'y Gen. Ann. Rep. 224. The analysis of your property tax exemption inquiries, therefore, begins with the premise that the cottages and land are assessed to Massanetta Springs as the owner (lessor) of the property.

C. Property Used Exclusively for Religious Purposes Is Exempt from Taxation; Property Used as Permanent Residences, Vacation Homes or Rental Property Is Not Exempt

Exemption from property tax pursuant to § 58.1-3617 requires that the property be used exclusively for charitable, religious or educational purposes. In the facts you present, two categories of property use must be examined. Some of the lots contain cottages that are constructed by churches and used for church-related activities. Other lots contain cottages constructed by private individuals for use as permanent and vacation residences, as well as rental property.

With respect to the cottages constructed by churches, the use of this property for Bible conferences, youth ski trips and weekend retreats would qualify as an exempt use. It is my opinion, therefore, that the provisions of § 58.1-3617 apply to exempt this property from taxation. Tax exemption pursuant to § 58.1-3617, however, is subject to the limitations in § 58.1-3603, discussed below.

With respect to the land with cottages built and used by private individuals, the use does not appear to be for a religious or charitable purpose. It is my opinion, therefore, that such property is taxable and that Massanetta Springs is liable for real property taxes on the value of land and buildings used by individuals as permanent residences, vacation homes and rental property.

D. Otherwise Exempt Property of Massanetta Springs Is Taxable if it Generates Substantial Net Profits

The property tax exemption granted pursuant to § 58.1-3617 is limited by § 58.1-3603(A), which provides that, if tax exempt land or a part thereof becomes a source of revenue or profit for its owner, it loses its tax exempt status. Leasing by the tax exempt owner does not automatically subject the otherwise tax exempt property to taxation. The Supreme Court of Virginia has construed the terms "revenue" and "profit" to mean "substantial net profit." Norfolk v. Nansemond Supervisors, 168 Va. 606, 620, 192 S.E. 588, 594 (1937); Newport News v. Warwick County, 159 Va. 571, 593-98, 166 S.E. 570, 578-79 (1933). As a result, the property loses its tax exempt status only if the owner derives a substantial net profit from a lease after deducting all expenses. See Att'y Gen. Ann. Rep.: 1987-1988 at 601; 1975-1976 at 339, 340; 1973-1974 at 399.

Whether an owner has derived a substantial net profit is a question of fact for the commissioner of the revenue to determine. See 1987-1988 Att'y Gen. Ann. Rep., supra, at 602-03. If you determine that Massanetta Springs derives a substantial net profit from its leases on property exempt pursuant to § 58.1-3617, it is my opinion that the value of the land and buildings would be taxable to Massanetta Springs.
III. Property of Sunnyside Presbyterian Home and Retirement Village Ltd.

A. Facts

The second organization your inquiry concerns is Sunnyside Presbyterian Home ("Sunnyside"), which recently built a retirement apartment complex in which it sells the right to lifetime occupancy in complex units. A third organization, Retirement Village Ltd. (the "Village"), operates a "life lease" village in which it leases homes for occupancy, or allows individuals to build homes on village real estate. You state that both Sunnyside and the Village are exempt from income taxation pursuant to § 501(c)(3) of the Internal Revenue Code (West Supp. 1989).

You ask whether Sunnyside is exempt from real property taxation on the apartment complex and whether the Village also is exempt from this taxation on the "life lease" homes.

B. Property Owned by Organization Exempt from Federal Income Taxation Is Subject to Real Property Taxation, Unless Exemption Authorized by Virginia Constitution or Statute Applies

The exemption of an organization from federal income taxation pursuant to Internal Revenue Code § 501(c)(3) has no bearing on whether the property of the organization is exempt from local property taxation. Property owned by an organization exempt from federal income taxation is subject to local real property taxation, unless a Virginia constitutional or statutory exemption applies. Manassas Lodge v. Prince William, 218 Va. 220, 237 S.E.2d 102 (1977); 1981-1982 Att'y Gen. Ann. Rep. 373.

C. No Constitutional or Statutory Authority Exists to Exempt Sunnyside or Village Property; Organizations May Seek Designation Pursuant to § 58.1-3650

I have reviewed the Constitution and Code of Virginia to determine whether the apartment complex owned by Sunnyside and the "life lease" homes owned by the Village are exempt from local property taxation. I find no existing constitutional or statutory authority under which Sunnyside or the Village may claim a tax exemption. Either organization, of course, may obtain an exemption by specific designation of the General Assembly pursuant to § 58.1-3650.

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1I assume, for purposes of this Opinion, that you have determined that Massanetta Springs qualifies as a religious organization pursuant to § 58.1-3617.

2See also § 58.1-3280 (land is to be assessed with its improvements). In certain circumstances, land and improvements owned separately may be separately assessed. See § 58.1-3282 (land owned by public service corporation or political subdivision of the Commonwealth and improvements thereon owned by another may be assessed separately).

3Section 58.1-3203 provides that, if the lessor is tax exempt, the leasehold interest is taxable to the lessee. In this case, however, the interest of the lessee church is exempt from the tax pursuant to § 58.1-3617 because of its exclusive use for a religious purpose.

4Although the locality will look to Massanetta Springs as the party ultimately responsible for the payment of the tax, the lessee may have a contractual duty pursuant to the lease actually to pay the tax.

TRADE AND COMMERCE: HORSE RACING AND PARI-MUTUEL BETTING.
CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS - QUALIFICATIONS OF VOTERS.

ELECTIONS: APPORTIONMENT OF REPRESENTATIVES.

Postcard described qualifies as petition to circuit court for referendum vote on pari-mutuel betting question.

August 29, 1989

The Honorable Charlton E. Gnadt
Clerk, Circuit Court of Prince William County

You ask whether a postcard containing the information described below is acceptable as a petition pursuant to § 59.1-391 of the Code of Virginia.

I. Facts

You state that postcards are being mailed to residents of Prince William County by a local organization that favors pari-mutuel betting on horse racing. These postcards contain the following language:

The undersigned, being qualified voters in Prince William County, petition the Circuit Court for Prince William County to order a referendum vote on the following question:

'Shall pari-mutuel betting on horse racing be permitted in the County of Prince William in accordance with Chapter 29 of Title 59.1 (§ 59.1-364 et seq.) of the Code of Virginia?'

The postcards request that qualified voters sign and date the card, print their name and address on it, and return the card to the organization.

II. Applicable Statute

Section 59.1-391 provides, in part:

The [Virginia Racing] Commission shall not grant any initial license to construct, establish or own a racetrack until a referendum approving the question is held in each county or city in which such track or its facilities are to be located, in the following manner:

1. A petition, signed by five percent of the qualified voters of such county or city, shall be filed with the circuit court of such county or city, asking that a referendum be held on the question, 'Shall pari-mutuel betting be permitted in name of such county or city in accordance with Chapter 29 of Title 59.1 (§ 59.1-364 et seq.) of the Code of Virginia?'

III. Postcard Acceptable as Petition for Referendum if Statutory Content Requirements Satisfied

Section 59.1-391 contains the statutory requirements for a petition to the circuit court requesting that a referendum on pari-mutuel betting be conducted. These requirements are that the petition (1) be signed by five percent of the qualified voters of the county or city, (2) be filed with the circuit court of the county or city, and (3) ask that a referendum be held on the question, 'Shall pari-mutuel betting be permitted in name of
such county or city in accordance with Chapter 29 of Title 59.1 (§ 59.1-364 et seq.) of the Code of Virginia? "Section 59.1-391(1).

A "petition" is defined as "[a] formal written request addressed to some governmental authority." 1984-1985 Att'y Gen. Ann. Rep. 316, 318 (quoting Black's Law Dictionary 1031 (5th ed. 1979)). Section 24.1-1(10) defines the phrase "qualified voter" as "a person who has qualified to vote pursuant to the Constitution and statutes of the Commonwealth." Article II, § 1 of the Constitution of Virginia (1971) provides, in part:

In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be eighteen years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article. . . .

After the petition is filed, the circuit court must determine whether the statutory requirements of § 59.1-391 have been met and whether the signatures on the petition for referendum are the signatures of qualified voters. If a signature appearing on a petition is not that of a qualified voter, the signature will be void. Section 59.1-391 does not require that a petition contain the printed name of a signatory, the signatory's address or the date on which the petition was signed. This statute also does not require that the petition be submitted in any particular form.

The postcard you describe does constitute a formal written request addressed to the circuit court and complies with the requirement in § 59.1-391 that the petition request that a referendum be held on the pari-mutuel betting question. The inclusion on the postcard of the printed name of the signatory is not required, but obviously is intended to help prevent illegible signatures from being stricken. The address of the signatory and the date the card is signed likewise are not required by statute, but this also would assist the circuit court in determining whether a voter is qualified on the date the petition is filed. The qualifications of a voter are to be judged as of the day the petition is filed. 1971-1972 Att'y Gen. Ann. Rep. 188.

Based on the above, it is my opinion that the postcard you describe qualifies as a petition to the circuit court requesting a referendum vote pursuant to § 59.1-391.

TRADE AND COMMERCE: VIRGINIA CONSUMER PROTECTION ACT.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING FRAUD - FALSE PRETENSES.

Authority of court to decline to enforce contract which, on its face, violates Act. Act or practice in violation of Act not criminal; another statute may make conduct criminal.

February 24, 1989

The Honorable J.R. Zepkin
Judge, Ninth Judicial District

You ask two questions concerning the authority of a court pursuant to the Virginia Consumer Protection Act of 1977, §§ 59.1-196 through 59.1-207 of the Code of Virginia (the "Act"). Specifically, you ask whether a court may find a contract unenforceable when, on its face, the contract violates a statute incorporated by reference in the Act. You also ask whether a contract found by the court to be "unlawful" because of such a statutory violation also is in violation of the criminal law, and if so, what the permissible punishment is.
I. Applicable Statute

The Act was enacted as remedial legislation by the General Assembly to promote fair and ethical standards in dealings between suppliers and the consuming public. See § 59.1-197. Section 59.1-200 details certain practices which are expressly prohibited by the Act:

The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

** **

18. Any violation of the Virginia Health Spa Act, Chapter 24 (§ 59.1-294 et seq.) of this title [Title 59.1];

19. Any violation of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et seq.) of this title;

20. Any violation of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et seq.) of this title; and

21. Any violation of the Virginia Lease-Purchase Agreement Act, Chapter 17.4 (§ 59.1-207.15 et seq.) of this title.

Other statutes not referenced in the Act also provide that a violation of those statutes constitutes a prohibited practice pursuant to § 59.1-200. See, e.g., § 6.1-369.10(A) ("[e]ach sale of the services of a credit services business that violates any provision of [the Virginia Credit Services Businesses Act] is a prohibited practice under § 59.1-200").

II. Court Has Authority to Decline to Enforce Contract Which, on Its Face, Violates Act

Your first question, concerning the authority of a court to decline to enforce a contract found by the court to be "unlawful" pursuant to § 59.1-200, pertains to contracts which, on their face, conflict with or omit contractual provisions which are prescribed by statute, the violation of which constitutes a practice prohibited by § 59.1-200. See, e.g., § 59.1-200(18)-(21).

"The general rule of law is that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract he cannot recover." Watters & Martin v. Homes Corp., 136 Va. 114, 126, 116 S.E. 366, 370 (1923). Accord Blick v. Marks, Stokes and Harrison, 234 Va. 60, 64, 360 S.E.2d 345, 348 (1987); Cohen v. Mayflower Corp., 196 Va. 1153, 1160, 86 S.E.2d 860, 864 (1955); Roller v. Murray, 112 Va. 780, 782, 72 S.E. 665, 666 (1911). When a contract violates "a police statute enacted for the public protection," such as a consumer protection law, it is void. Bowen Elec. Co. v. Foley, 194 Va. 92, 100, 72 S.E.2d 388, 393 (1952). Based on these principles, the Supreme Court of Virginia has held that an unlicensed real estate agent may not enforce a contract to collect fees, and a contractor who has not registered the fictitious name of his business may not enforce a construction contract, because to do so would be against the Commonwealth's policy of protecting the public from fraud. See Greenco v. Nathaniel Greene, 218 Va. 228, 231, 237 S.E.2d 107, 110 (1977); Colbert v. Ashland Construction Co., 176 Va. 500, 11 S.E.2d 612 (1940).

There are exceptions to the general rule that a contract made in violation of a statute is void, based upon the intent of the legislature. Blick, 234 Va. at 64, 360 S.E.2d at 348; Watters & Martin, 136 Va. at 127, 116 S.E. at 370. An exception to the general rule has been held to arise, for example, when an innocent party to the contract maintains an action for its breach. See Cohen, 196 Va. at 1162-63, 86 S.E.2d at 865."
You do not indicate in your inquiry whether the party seeking to enforce the consumer contract is the supplier or the consumer. If a supplier is seeking to uphold a contract which conflicts with the statutory requirements for certain consumer contracts, it is my opinion that the contract is void and may not be enforced.

If, however, a consumer institutes an action for damages for the breach of such a contract, it is my opinion that the contract is voidable, not void, and that such an action may be maintained. The Supreme Court of Virginia has held that, when a contractor was a party to a contract that was illegal because the contractor was unlicensed, an action for damages could be maintained by an innocent party to the contract.

It would be a rare or nonexistent case in which such an innocent person could not maintain some kind of action for a breach of the agreement by the guilty party.

This view is based upon the principle that such innocent party is among the class of persons designed to be protected by such statutes, that he is not in pari delicto with the unlicensed party, and is therefore entitled to relief. Or, to state the matter another way, to deny relief to the innocent party in such cases would defeat the purpose of the statute and penalize the person intended to be protected thereby.

Cohen, 196 Va. at 1162-63, 86 S.E.2d at 865.

Although it is generally true that, when a contract covers several subjects or incorporates many provisions, those which are invalid may be severed, this is not the case when the illegality is so interwoven with the valid portions of the contract that severance is impossible. Alston Studios, Inc. v. Lloyd V. Gress & Associates, 492 F.2d 279, 285 (4th Cir. 1974). Those portions of the Act that require certain provisions to be included in consumer contracts do so to protect the consumer from fraud and misrepresentation by ensuring that certain information is disclosed to the consumer at the appropriate time. Unless the facts of a particular case dictate otherwise, therefore, it is further my opinion that, when conformity to statutory requirements is necessary to preserve the integrity and legality of a consumer contract as a whole, contractual provisions which conflict with the statute may not be severed and the remaining provisions enforced. To do so would defeat the intent of the General Assembly and expose the consumer to fraud or misrepresentation.

III. Act Is Not Criminal Statute

Your second question requires a determination whether the term "unlawful" in § 59.1-200 makes an act or practice that is in violation of the Act a criminal act and, if so, what the permissible punishment would be.

The term "unlawful" is defined as "[t]hat which is contrary to, prohibited, or unauthorized by law. ... While necessarily not implying the element of criminality, it is broad enough to include it." Black's Law Dictionary 1377 (5th ed. 1979). See also Conine v. Leikam, 570 P.2d 1156, 1159 (Okla. 1977) ("unlawful," as applied to agreements, means that they are ineffectual in law); State v. Noble, 90 N.M. 360, 364, 563 P.2d 1153, 1157 (1977) ("unlawful" means not authorized by law).

The Act contains none of the traditional criminal penalties, such as a fine or imprisonment, nor does it make a violation of its provisions a felony or a misdemeanor. The Act does, however, provide for equitable remedies, as well as civil penalties. See, e.g., §§ 59.1-203 (injunctive actions brought by state or local governments); 59.1-204 (private actions for damages, attorney's fees and court costs); 59.1-205 ("public" actions
for additional relief as may be necessary to restore to any identifiable person any money or property which may have been acquired from such person); 59.1-206 ("public" actions for civil penalties and attorney's fees). It is my opinion, therefore, that an act or practice which is in violation of the Act is not, by itself, a criminal act. Another statute may, of course, make the conduct criminal. See, e.g., § 18.2-178 (larceny by false pretense). Since I conclude that a criminal prosecution may not be maintained based solely on the Act, a response to your question concerning permissible punishment is unnecessary.

1The Act, specifically in § 59.1-200, does not expressly make any contract illegal. The commission of the "fraudulent acts or practices" detailed in § 59.1-200 may result in a contract being procured or performed in a fraudulent manner. You state, however, that your inquiry does not refer to this type of contract, which may appear legal on its face, but instead refers to contracts which, by their terms, violate contractual provisions prescribed by statute and incorporated by reference in the Act.

2Consumer protection legislation generally is considered to be a valid exercise of a state's police power. See, e.g., In re Charter First Mortg., Inc., 42 Bankr. 380, 382 (D. Ore. 1984).

3Another exception exists when the innocent party knows that the statute is violated and no defect exists in the contract's performance. Grenco, 218 Va. at 232, 237 S.E.2d at 110.

4Certain actions or practices which are actionable under the Act because they are fraudulent or deceptive also may support a criminal prosecution. The possibility of criminal prosecution, of course, will depend on the particular facts of a particular case. In addition to criminal prosecution for violation of a specific statute, an action based on common law fraud also may be available. See Jefferson Stand. Ins. Co. v. Hedrick, 181 Va. 824, 27 S.E.2d 198 (1943); Clay v. Butler, 132 Va. 464, 112 S.E. 697 (1922).
Section 63.1-220.3(B) details six determinations that a juvenile and domestic relations district court must make prior to accepting the consent of the birth parent or legal guardian to placement of the child for adoption directly with the adoptive parents of his choice.

Section 63.1-231 provides for the adoption of a child by the new spouse of the natural or adoptive parent in four different situations:

(a) When the spouse of a natural parent of a legitimate infant or the spouse of a parent by adoption of an infant has died, and the surviving natural parent or parent by adoption marries again and the new spouse desires to adopt the infant, on a petition filed by the surviving natural parent or parent by adoption and new spouse for the adoption and change of name of the infant.

(b) When a natural parent of a legitimate infant or a parent by adoption of an infant is divorced and marries again and the natural parent or parent by adoption desires the new spouse to adopt the infant, on a petition filed by the natural parent or parent by adoption and the new spouse for the adoption and change of name of the infant.

(c) When the custodial natural parent of an infant born out of wedlock marries and the new spouse of such custodial natural parent desires to adopt such child, on a petition filed by the custodial natural parent and spouse for the adoption and change of name of the infant.

(d) When a single person who has adopted an infant thereafter marries and desires his or her spouse to adopt the infant, on a petition filed by the adoptive parent and the spouse for the adoption and change of name of the infant.

The jurisdiction for the filing of an adoption petition is set forth in § 63.1-221:

Proceedings for the adoption of a minor child and for a change of name of such child shall be instituted only by petition to a court of record having chancery jurisdiction in the county or city in which the petitioner resides or in the city or county in which is located the child-placing agency which placed the child.

II. Requirements of § 63.1-220.3 Do Not Apply to Petition for Adoption Filed Pursuant to § 63.1-231

A birth parent or legal guardian who files a petition in a juvenile and domestic relations district court pursuant to § 63.1-220.3 is seeking the judicial approval of a consent signed by the birth parent or legal guardian to a direct placement adoption. By its terms, this statute applies only to the placement of a child with a third party by the birth parent or legal guardian who is thereby seeking to be relieved of the care and custody of the child. If the consent is approved by the juvenile court, this procedure leads to the termination of the parental rights of the birth parent or legal guardian. See 1986-1987 Att'y Gen. Ann. Rep. 157 (construing former § 63.1-204(C)(2), the predecessor statute to § 63.1-220.3). Persons other than the birth parent or legal guardian then would initiate a petition for adoption.

A petition for stepparent adoption filed in a circuit court pursuant to § 63.1-231 always is initiated by the natural parent or parent by adoption and a new spouse. In such a petition, the new spouse of the natural parent or parent by adoption is seeking to be
named as the parent of the child, and no "placement" of the child is involved. The petition does not seek judicial approval of the consent by a natural parent or parent by adoption to a direct placement adoption with a third party pursuant to § 63.1-220.3, nor does it seek the termination of the petitioner's parental rights.

Based on the above, it is my opinion that the provisions of § 63.1-220.3 do not apply to a petition for adoption filed pursuant to § 63.1-231.


WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT.

Person being interviewed by local department of social services concerning child abuse or neglect allegation or participating in informal conference has no absolute right to record such proceedings; local department may refuse to permit such recording.

March 17, 1989

The Honorable S. Vance Wilkins Jr.
Member, House of Delegates

You ask whether a person being interviewed by a local department of social services or welfare (the "local department") concerning an allegation of child abuse or neglect has the right to record the investigatory interview or informal conference held pursuant to § 63.1-248.6:1(A) of the Code of Virginia or, conversely, whether the local department may refuse to permit such a recording.

I. Applicable Statutes

Section 63.1-248.6(D)(1) requires a local department to investigate immediately complaints of child abuse or neglect. Section 63.1-248.6:1 provides for the appeal of actions or decisions by a local department:

A. A person who is the subject of a report pursuant to this chapter [Chapter 12.1 of Title 63.1] and who is suspected of or is found to have committed the abuse or neglect complained of may, within thirty days of being so notified, request the local department rendering such report to amend such report and the local department's related records. The local department shall hold an informal conference or consultation in order for such person to informally present factual data, arguments or submissions of proof to such local department. If the local department refuses the request for amendment or fails to act within thirty days after receiving such request, the person may, within thirty days thereafter, petition the Commissioner [of Social Services], who shall grant a hearing to determine whether it appears, by a preponderance of the evidence, that such report or record, in whole or in part, contains information which is irrelevant or inaccurate regarding the commission of abuse or neglect by the person who is the subject of the report or record and therefore shall be amended.
B. The Commissioner shall designate and authorize one or more members of his staff to conduct such hearings. The decision of any staff member so designated and authorized shall have the same force and effect as if the Commissioner had made the decision. The State Board of Social Services shall promulgate such regulations as are necessary for the conduct of such hearings. Such hearing officers are empowered to order the amendment of such report or records as is required to make them accurate and consistent with the requirements of this chapter or the regulations promulgated thereunder. If aggrieved by the decision of the hearing officer, such person may obtain further review of the decision in accordance with Article 4 (§ 9-6.14:15 et seq.) of the Administrative Process Act.

II. Local Department May Select Reasonable Method of Conducting Interviews or Informal Conferences

Section 63.1-248.6:1(D)(1) requires that an immediate investigation be made of a report or complaint of child abuse or neglect, but there are no statutory requirements for the particular conduct of that investigation. Regulations adopted by the State Board of Social Services pursuant to § 63.1-248.6:1(B) provide that any such investigation must include an interview with the person who is alleged to have abused or neglected the child, but they do not specify how this interview should be conducted. See 7-A Va. Dep't Welfare, Manual of Pol'y & Proc. for Loc. Welfare Depts § III, Ch. A, Pt. 3(c)(3), at 12 (Oct. 1980).

Section 63.1-248.6:1(A) also permits an informal conference with the local department for the person alleged to have committed such child abuse or neglect to "present factual data, arguments or submissions of proof." Like § 63.1-248.6(D)(1), however, this statute does not contain any requirements for the conduct of this informal appeals conference, except to provide that the conference must be held, and a decision rendered, within thirty days after the receipt of the request to hold the conference. The State Board of Social Services has enacted regulations pertaining to these conferences, but these regulations are silent as to the conduct of such a conference, except to provide that the appellant may submit any additional documentation or arguments deemed relevant.

When a grant of authority is silent with respect to its mode or manner of execution, a public body may choose any reasonable method to exercise that authority. Commonwealth v. Arlington County Bd., 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977). Since the relevant statutes, as well as the regulations adopted by the State Board of Social Services, are silent concerning the conduct of interviews and informal conferences, it is my opinion that a local department may choose a reasonable method to conduct these interviews and conferences. In the absence of any constitutional or statutory authority conferring an absolute right to record the interview or the informal conference, I cannot, as a matter of law, conclude that the prohibition by a local department of the recording of these interviews and informal conferences is unreasonable. I also note, however, that any interview with a person alleged to have committed abuse or neglect is consensual in nature, and the individual may refuse to participate if he chooses to do so.

Based on the above, it is my opinion that a person being interviewed by a local department or participating in an informal conference concerning an allegation of child abuse or neglect does not have the absolute right to record such interview or informal conference. It is further my opinion that a local department reasonably may refuse to permit such recording.
Your inquiry uses the term "hearing" rather than "informal conference," as used in § 63.1-248.6:1(A). As discussed in Pt. II of this Opinion, the "hearing" conducted pursuant to § 63.1-248.6:1 is required by regulation to be recorded. See infra note 2.

The regulations of the State Board of Social Services were adopted as emergency regulations. See 4 Va. Regs. Reg. 2656-57, V.R. 615-45-2 (Aug. 15, 1988). Section 63.1-248.6:1 also permits a further appeal to the Commissioner of Social Services. Upon such appeal, a hearing must be held before a designee of the Commissioner. The same regulations referenced above specifically require the recording of this proceeding by the hearing officer either by audio taping or by stenographic means, and further provide for the appellant to have access to such record. 4 Va. Regs. Reg., supra.

WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT.

Responsibility of local department of social services or welfare limited to investigation of allegations of acts committed by parent or other person responsible for care of child.

February 28, 1989

The Honorable Roy F. Evans Jr.
Commonwealth's Attorney for Smyth County

You ask whether it is the responsibility of a local department of social services or welfare ("local department") to investigate all allegations of abuse or neglect of children, or only those allegations of abuse or neglect of children that involve a parent or guardian.

I. Applicable Statutes

Section 63.1-248.6 of the Code of Virginia, which requires a local department to establish child-protective services, provides:

A. Each local department shall establish child-protective services under a departmental coordinator within such department or with one or more adjacent local departments which shall be staffed with qualified personnel pursuant to regulations promulgated by the State Board of Social Services. The local department shall be the public agency responsible for receiving and investigating complaints and reports, except that (i) in cases where the reports or complaints are to be made to the juvenile and domestic relations district court, the court shall be responsible for the investigation and, (ii) in cases where an employee at a private or state-operated hospital, institution or other facility, or an employee of a school board is suspected of abusing or neglecting a child in such hospital, institution or other facility, or public school, the local department shall request the [State] Department of Social Services to assist in conducting the investigation in accordance with rules and regulations approved by the State Board.

***

D. The local department shall upon receipt of a report or complaint:

1. Make immediate investigation.

Section 63.1-248.2 provides, in part:
The following terms, when used in this chapter, shall have the meanings respectively set forth below unless a different meaning is clearly required by the context:

A. 'Abused or neglected child' shall mean any child less than eighteen years of age:

1. Whose parents or other person responsible for his care creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement, impairment of bodily or mental functions;

2. Whose parents or other person responsible for his care neglects or refuses to provide care necessary for his health; provided, however, that no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child;

3. Whose parents or other person responsible for his care abandons such child;

4. Whose parents or other person responsible for his care commits or allows to be committed any act of sexual exploitation or any sexual act upon a child in violation of the law; or

5. Who is without parental care or guardianship caused by the unreasonable absence or the mental or physical incapacity of the child's parent, guardian, legal custodian or other person standing in loco parentis.

D. 'Report' shall mean an official document on which information is given concerning abuse and neglect and which is required to be made by persons designated herein and by local departments in those situations in which investigation of a complaint from the general public reveals suspected abuse or neglect.

E. 'Complaint' shall mean any information or allegation of abuse or neglect made orally or in writing other than the reports referred to above. [Emphasis added.]

II. Application of Rules of Statutory Construction Results in Limitation of Definitions of "Abuse" and "Neglect" for Purposes of Local Department's Responsibility

A local department has the responsibility to investigate "reports and complaints." See § 63.1-248.6(D). The terms "report" and "complaint" are defined as information concerning "abuse or neglect." See § 63.1-248.2(D)-(E). The terms "abuse" and "neglect" are not specifically defined in Title 63.1. The term "abused or neglected child", however, is defined as a child "[w]hose parents or other person responsible for his care" commits one or more of the acts detailed in the statute. See § 63.1-248.2(A).

If the legislative intent or meaning of a statute is unclear, "the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases." 2A N. Singer, Sutherland Stat. Const. § 47.16 (4th ed. 1984). When parallel

Applying these principles of statutory construction to § 63.1-248.2, it is my opinion that the terms "abuse" and "neglect" refer to those acts defined in § 63.1-248.2(A) which are committed by a parent or other person responsible for the care of the child.

III. Administrative Interpretation by State Department of Social Services Entitled to Great Weight

The State Department of Social Services has adopted an interpretation of § 63.1-248.6 which restricts child abuse and neglect investigations by a local department to acts committed by the child's parent or other person responsible for the child's care.

Prior to deciding to investigate a complaint, the worker must be certain that the complaint is valid.

1) A valid complaint must meet all of the following criteria:

   a) The alleged abuser must be the child's parent or other person responsible for his/her care.

   b) The alleged abuser must be the child's parent or other person responsible for his/her care.


IV. Responsibility of Local Department Limited to Acts Committed by Parent or Other Person Responsible for Care of Child

Based on the above, it is my opinion that the responsibility of a local department in child abuse and neglect matters is limited to the investigation of allegations of acts committed by a parent or other person responsible for the care of a child.

*All law-enforcement agencies, however, as well as appropriate state and local departments that deal with child abuse and neglect issues, are required to work cooperatively in the detection and prevention of child abuse. See § 63.1-248.17. The conclusion in this Opinion concerning the legal responsibility of a local department in the investigation of child abuse and neglect allegations pursuant to § 63.1-248.6 should not be construed to dilute this responsibility for a cooperative effort against this problem among appropriate agencies and departments. The problem of child abuse and neglect is one that must be solved through concerted, cooperative work among law-enforcement officials, social service departments and all other state and local government agencies concerned with this issue.*
WILLS AND DECEDE NTS’ ESTATES: WILLS – PROBATE.

Clerk of circuit court may probate later dated will after previous will of same testator admitted to probate.

February 10, 1989

The Honorable Hayden H. Horney
Clerk, Circuit Court of Wythe County

You ask whether, after a previous will of the same testator has been admitted to probate, the clerk of the circuit court may probate a later dated will.

I. Applicable Statute

Section 64.1-77 of the Code of Virginia provides, in part, that "[t]he clerk of any court, having jurisdiction of the probate of wills ... may ... admit wills to probate."

II. Virginia Supreme Court Has Held Probate of Second Will Proper

The Supreme Court of Virginia has consistently held that the probate of an earlier will does not preclude the probate of a later will executed by the same testator. Brads- shaw v. Boneley, 194 Va. 794, 75 S.E.2d 609 (1953); In Re Will of Bentley, 175 Va. 456, 9 S.E.2d 308 (1940); Gordon v. Whitlock, 92 Va. 723, 24 S.E. 342 (1896); Schultz v. Schultz & als., 51 Va. (10 Gratt.) 358 (1853). The rationale for this rule is well stated in Bentley that "a man's last will may consist of several different testamentary papers of different dates and ... it is not indispensable that they should be probated at the same time." 175 Va. at 461, 9 S.E.2d at 310.

A prior Opinion of this Office concludes that a clerk of a circuit court must admit a will to probate unless, at the time the will is presented for probate, it appears that the writing has not been duly executed or is not the last will and testament of the decedent. See 1982-1983 Att’y Gen. Ann. Rep. 766, 768. See also First Church of Christ v. Hutch- ings, 209 Va. 158, 160, 163 S.E.2d 178, 180 (1968); Queensbury v. Vial, 123 Va. 219, 221-22, 96 S.E. 173, 174 (1918) (clerk's order admitting will to probate is an adjudication not only that the will was duly executed, but of all the other questions necessary to the validity of a testamentary act).

Based on the above, it is my opinion that the clerk of a circuit court may probate a later dated will after a previous will of the same testator has been admitted to probate.
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