OPINIONS
of the
ATTORNEY GENERAL
and
REPORT
to the
GOVERNOR OF VIRGINIA
from January 1, 1990 to December 31, 1990
Commonwealth of Virginia
Office of the Attorney General
Richmond
1990
THE 1990 REPORT OF THE ATTORNEY GENERAL

was prepared by

BARBARA H. SCOTT

with editorial assistance by

JANE A. PERKINS
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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. 1990).

**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, 1990 to December 31, 1990. Opinions begin on the page on which the headnote first appears.
LETTER OF TRANSMITTAL

January 2, 1991

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, 1990, through December 31, 1990, and includes all 127 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 15,800 court cases and administrative proceedings involving practically every aspect of state government. Attorneys in the Office have provided daily advice on thousands of questions posed by state agencies and institutions and by local officials, and have participated in seminars and informational programs held across the Commonwealth on legal topics of statewide concern, at the request of bar associations, state and local government organizations, and other groups.

The energy and dedication of the men and women in the Office of the Attorney General make it possible for me to meet those commitments. Their outstanding efforts enable us not only to meet the needs of the Commonwealth, but to make Virginia a national leader in the field of law.

With kindest regards, I am

Sincerely,

Mary Sue Terry
Attorney General
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<td>Freddie A. Dixon</td>
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<td>Terence E. Noziglia</td>
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<tr>
<td>John J. Richardson II</td>
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<td>Office Tec.</td>
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ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 1990

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

1J.D. Hank Jr. .............................................. 1918-1918
John R. Saunders .......................................... 1918-1934

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

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

2Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. John R. Saunders and served until October 6, 1947.
<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>Term</th>
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<tbody>
<tr>
<td>3</td>
<td>Harvey B. Apperson</td>
<td>1947-1948</td>
</tr>
<tr>
<td>4</td>
<td>J. Lindsay Almond Jr.</td>
<td>1948-1957</td>
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<tr>
<td>5</td>
<td>Kenneth C. Patty</td>
<td>1957-1958</td>
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<td></td>
<td>A.S. Harrison Jr.</td>
<td>1958-1961</td>
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<td>6</td>
<td>Frederick T. Gray</td>
<td>1961-1962</td>
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<td>Robert Y. Button</td>
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<td>Andrew P. Miller</td>
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<td>Anthony F. Troy</td>
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<td>Gerald L. Baliles</td>
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<td>8</td>
<td>William G. Broaddus</td>
<td>1985-1986</td>
</tr>
<tr>
<td></td>
<td>Mary Sue Terry</td>
<td>1986-</td>
</tr>
</tbody>
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3Hon. 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.

4Hon. 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.

5Hon. 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.

6Hon. 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.


8Hon. 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


Alston v. Commw. From Cir. Ct. City of Richmond. Appeal of jury verdict in tort claim case for injuries received when plaintiff allegedly struck on back of head by guard. Dismissed.

Brown v. Cir. Ct. City of Suffolk. Orig. juris. Petition for writ of mandamus to command court to allow petitioner award in motion for judgment because defendant's attorney failed to show cause why hearing should not be held. Dismissed.


Clay v. Real Est. Bd. From Va. Ct. App. Challenge to decision holding that real estate broker dealing on own account was still responsible to Real Estate Board. Aff'd.


Commonwealth v. Eades. Orig. juris. Petition for writ of mandamus to direct clerk to issue subpoenas in accordance with law. Dismissed.

Correll v. Thompson. From Cir. Ct. Franklin Co. Appeal from denial of habeas corpus in capital murder case. Aff'd.


Dixon v. Spain. Orig. juris. Petition for writ of prohibition to have court proceedings stayed and case directed to another judge. Dismissed.

Eaton v. Commw. From Cir. Ct. Fauquier Co. (change of venue from Rockbridge Co.). Appeal of conviction for capital murder of police officer resulting in death sentence. Aff'd.


In re Abramson. Orig. juris. Petition for writ of mandamus to have action returned to court of origin. Dismissed.

In re Gallagher & Hecht. Orig. juris. Petition for writ of prohibition or mandamus against circuit court judge claiming bias against criminal defendants. Dismissed.

In re Gray. Orig. juris. Petition for writ of mandamus to direct judge to use sentencing guidelines in petitioner's case. Dismissed.

In re Huff. Orig. juris. Petition for writ of mandamus to compel trial court to vacate order refusing to appoint petitioner as executor of mother's estate. Dismissed.

In re Jaffe. Orig. juris. Petition for writ of prohibition to bar circuit judge from acting on order and from further action in case. Dismissed.

In re Locklear. Orig. juris. Petition for writ of mandamus to have judge process inmate's motion to proceed in forma pauperis in divorce case. Dismissed.

In re Maryland. Orig. juris. Petition for writ of mandamus to compel judge to appoint counsel for petitioner. Dismissed.

In re Morton. Orig. juris. Appeal of denial of motion to quash State Bar's subpoena duces tecum for bank records. Appeal not perfected.

In re Pouncy. Orig. juris. Petition for writ of mandamus to compel judge to appoint attorney for inmate in civil suit. Dismissed.

In re Reid. Orig. juris. Petition for writ of mandamus to command judge to process petitioner's tort claim. Dismissed.

In re Simms. Orig. juris. Petition for writ of mandamus to compel judge to grant inmate's motion to be transported to court for civil matter unrelated to incarceration. Dismissed.
In re Welsh. Orig. juris. Petition for writ of prohibition or mandamus against circuit court judge, claiming bias against criminal defendant. Dismissed.

In re Wessendorf. Orig. juris. Petition for writ of mandamus to compel hearing on motion, to compel judge to recuse himself, and to stay proceedings in domestic case. Dismissed.


King v. Forst. From Cir. Ct. Fairfax Co. Appeal of tax commissioner's and trial court's denial of credit on individual income tax for business tax paid to District of Columbia. Rev'd.


Morrison v. Oast. Orig. juris. Petition for writ of mandamus to compel trial judge to vacate order appointing special prosecutor. Dismissed.

Mu' Min v. Commw. From Cir. Ct. Prince Wm. Co. Appeal of conviction and death sentence for murder committed while defendant was prisoner in custody of correctional facility employee. Aff'd.

Reed v. Commw. From Cir. Ct. City of Richmond. Appeal of conviction of firearms offense based on claim of inconsistent verdicts. Aff'd.


Savino v. Commw. From Cir. Ct. Bedford Co. Appeal of death penalty conviction on several grounds, including alleged 5th and 6th Amendment violations. Aff'd.


Scorpio v. Cherry. Orig. juris. Petition for writ of mandamus to compel clerk of court to place certain motions on docket. Dismissed.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA


Commonwealth v. Ramirez. From Cir. Ct. City of Va. Beach. Appeal of decision denying Commonwealth's motion to vacate expungement order, in case where court had noted evidence sufficient to establish guilt, then dismissed case after defendant complied with court's conditions.

Corning Glass Works v. Dep't Tax'n. From Cir. Ct. Fairfax Co. Appeal of denial of application for correction of corporate income tax assessment based on unitary business principle.

Dixon v. Snoddy. Orig. juris. Petition for writ of prohibition to compel judge to stay further proceedings in divorce action.

Hackler v. Cir. Ct. Grayson Co. Orig. juris. Petition for writ of prohibition to prevent trial court from denying pro se petitioner's motion for stay based on petitioner's incompetence.


In re Delgaudio. Orig. juris. Petition for writ of certiorari to review dismissal of petition for writ of prohibition to prevent judge from presiding over libel cases in which petitioners are defendants.

In re Richmond Newspapers. Orig. juris. Petitions for writs of mandamus and prohibition to compel judge to rescind blanket directive sealing files of adult criminal defendants whose cases originate in juvenile court.


Martinez v. Commw. From Va. Ct. App. Appeal of conviction based on whether prosecution in criminal case may argue to jury for specific sentence and whether objection to argument properly preserved for appeal.


Stockton v. Commw. From Cir. Ct. City of Newport News (change of venue from Patrick Co.). Appeal of death penalty imposed upon resentencing for capital murder for hire.

Strickler v. Commw. From Cir. Ct. Augusta Co. Appeal of capital conviction and death sentence for murder committed during abduction, rape and/or robbery.


Worrell Enterprises v. Taylor. From Cir. Ct. City of Richmond. Appeal of order granting writ of mandamus to compel production of Governor's telephone bills showing numbers called pursuant to Virginia Freedom of Information Act.

CASES IN THE SUPREME COURT OF THE UNITED STATES


Coleman v. Thompson. From 4th Cir. Ct. App. Appeal questioning whether procedural default may be excused because of error by counsel in collateral proceeding. Pending.


James B. Beam Distilling Co. v. St. of Georgia. From Ga. Sup. Ct. Amicus questioning whether court's decision that state statute unconstitutional applies retroactively so that taxpayers may be granted refunds. Pending.

Maryland v. Warden. From 4th Cir. Ct. App. Petition for certiorari claiming cause for procedural default in habeas corpus due to pro se status of inmate and denial of use of law library. Pending.


Mu'Min v. Commw. From Va. Sup. Ct. Appeal questioning whether Constitution requires that jurors be asked content of publicity they have read or heard about case. Pending.

Norfolk Shipbldg. & Drydock v. Lathey. Orig. juris. Petition for writ of certiorari to have state compensation laws extended to maritime injuries. Denied.


Sullivan v. Stroup. From 4th Cir. Ct. App. Appeal challenging Commonwealth's position that benefits under Title II of Social Security Act are properly considered "child support" for purposes of aid to families with dependent children program. Rev'd.


Inherent authority of Governor to issue executive orders. Governor may not exercise power exceeding authority bestowed upon him by constitution and laws. Executive Order No. 8 (90) prohibiting state agencies, boards and institutions from investing in companies not substantively free of interests in South Africa not unconstitutional on its face. Duty imposed upon trustees of any funds impacted by Order to adhere to fiduciary principles and fiscal responsibility; trustees, whether ordered by Governor to implement Order or whether they voluntarily choose to implement policy, not subject to liability for investment actions.

June 7, 1990

The Honorable Joseph B. Benedetti
The Honorable Robert E. Russell
Members, Senate of Virginia

You ask several questions concerning Executive Order Number Eight (90), issued by the Governor on May 15, 1990. Specifically, you ask "the extent of the authority of the Office of the Governor over matters of investments by agencies and institutions of our Commonwealth including divestiture of such investments." You also ask for my "comment on the fiduciary duties and responsibilities of members of the boards of the agencies and institutions in question and their personal liability for breach of those duties and responsibilities as they may relate to Executive Order Number Eight and its implementation." Finally, you ask whether "the existence of Executive Order Number Eight and its directions insulate members of the boards in question from liability to affected third parties notwithstanding acts that are judged to be ultra vires acts."

I. Executive Order Number Eight (90)

Executive Order Number Eight provides:

The Democracy that is enjoyed by the citizens of the United States, to large extent, was fathered and nurtured by patriot citizens of this Commonwealth to blossom and grow across our great Nation. If we are to recognize and honor our heritage we, through our own concrete actions, must participate in the extension to all people these freedoms and liberties that we hold dear.

Accordingly, to the extent of the authority vested in my by Article V of the Constitution, the Code and the Common Law of Virginia, and subject always to my continuing authority and responsibility to act in such matters, and to reserve powers, I do hereby direct all agencies and institutions of the Commonwealth to implement a policy that:

1. will allow absolutely no further investments in companies that are not substantively free of interests in South Africa, and
2. To immediately take steps to begin the divestment of those interests in companies with such substantive interests that are presently owned by agencies and institutions of the Commonwealth.

This program of investment and divestment is to be carried out with full adherence to fiduciary principles and fiscal responsibility.

This Executive Order is to become effective immediately and will remain in full force and effect until amended or rescinded.

Given under my hand and under the Seal of the Commonwealth of Virginia this 15th day of May, 1990. [Emphasis in original.]

II. Applicable Constitutional and Statutory Provisions

Article V, § 1 of the Constitution of Virginia (1971) provides, in part, that "[t]he chief executive power of the Commonwealth shall be vested in a Governor." Article V, § 7 further provides, in part, that "[t]he Governor shall take care that the laws be faithfully executed." Article X, § 11 also provides that "[t]he General Assembly shall maintain a state employees retirement system to be administered in the best interest of the beneficiaries thereof and subject to such restrictions or conditions as may be prescribed by the General Assembly."

Section 2.1-41.1 of the Code of Virginia provides: "Except as may be otherwise provided by the Constitution or law, the Governor shall have the authority and responsibility for the formulation and administration of the policies of the executive branch, including resolution of policy and administrative conflicts between and among agencies."

Section 2.1-51.33(A)(1) provides, in part, that the state agencies assigned to the Secretary of Finance shall "exercise their respective powers and duties in accordance with the general policy established by the Governor or by the Secretary [of Finance] acting on behalf of the Governor." The Department of Treasury is an agency subject to the direction and supervision of the Secretary of Finance. See § 2.1-51.34.

Section 2.1-185 provides, in part:

The Governor and State Treasurer, acting jointly, are authorized and empowered, whenever in their opinion there are funds in the state treasury in excess of the amount required to meet the current needs and demands of the Commonwealth, to invest such excess funds in securities that are legal investments under the laws of the Commonwealth for public funds.

Chapter 18 of Title 2.1, §§ 2.1-327 through 2.1-329.1, contains the statutory provisions governing legal investments of public funds by the Commonwealth, all public officers, municipal corporations, political subdivisions and all other public bodies of the Commonwealth. Section 2.1-328 provides that

[t]he 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.

Further, § 2.1-329.1 provides that "[w]hen investments are made in accordance with this chapter, no treasurer or public depositor 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."

III. Prior Opinion Discusses Authority of Governor to Issue Executive Orders

A prior Opinion of this Office, discussing possible methods a Governor may use to reorganize the executive branch of the Commonwealth, details several examples of the inherent authority of a Governor to issue executive orders:

Although no provision of the Constitution explicitly authorizes the Governor to issue executive orders and no Virginia statute provides a general grant of authority to issue such orders, Governors of the Commonwealth have historically issued executive orders in the absence of a specific statute expressly or generally conferring the authority. The Governor has the inherent authority to issue executive orders in order to "take care that the laws be faithfully executed." Art. V, § 7. It is recognized that there is a general reservoir of powers granted by the Constitution to the Governor as the Chief Executive of the Commonwealth. See 1945-1946 Report of the Attorney General at 144.

Examples of situations in which executive orders are appropriate are as follows:

(1) Whenever a provision of the Code of Virginia expressly confers that authority upon the Governor. See, e.g., §§ 2.1-51.9, 2.1-51.15, 2.1-51.18, 2.1-51.21, 2.1-51.24 and 2.1-51.27 (permitting the assignment or reassignment of agencies to Cabinet Secretaries by executive order); and § 44.1-146.17(1) (permitting the issuance of executive orders to carry out the purposes of the Emergency Services and Disaster Law). Compare Boyd v. Commonwealth, 216 Va. 16, 215 S.E.2d 915 (1975), with Jackson v. Hodges, 176 Va. 89, 10 S.E.2d 566 (1940); see, also, 1941-1942 Report of the Attorney General at 75;

(2) Whenever there is a genuine emergency which requires the Governor, pursuant to his constitutional responsibility and power, to issue an order, to abate a danger to the public regardless of the absence of explicit authority. See 1945-1946 Report of the Attorney General, supra; and

(3) Whenever the order is administrative in nature, as opposed to legislative. See 1965-1966 Report of the Attorney General at 143.

An executive order may not, however, be employed when a law is required. See 1977-1978 Report of the Attorney General at 5. This is because the legislative power of the Commonwealth is vested in the General Assembly pursuant to Art. IV, § 1, and the Governor may not exercise that power. See Art. III, § 1; accord Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587, 72 S. Ct. 863, 867 (1952).

1983-1984 Att'y Gen. Ann. Rep. 180, 182-83. The determination of when, pursuant to Article V, §§ 1 and 7 and § 2.1-41.1, a Governor properly may issue an executive order or when a Governor assumes the prerogatives constitutionally authorized for other branches of government has been the subject of much debate. See, e.g., Note, Gubernatorial Executive Orders as Devices for Administrative Direction and Control, 50 Iowa L. Rev. 78 (1964). See also 2 A. Howard, Commentaries on the Constitution of Virginia 587-90 (1974). Each case necessarily will be determined by the nature of the authority sought to be exercised. "Under our system of government, the governor has and can rightly exer-
else no power except such as may be bestowed upon him by the constitution and the laws." *Lewis and als. v. Whittle and als.*, 77 Va. 415, 420 (1883).

IV. Executive Order Itself Acknowledges Limits of Governor's Authority

The second paragraph of Executive Order Number Eight (90) specifically provides that the Order was issued "to the extent of the authority vested in [the Governor] by Article V of the Constitution, the Code and the Common Law of Virginia." (Emphasis in original.) It is clear from this language that the Governor recognizes that there are limits to his authority. The fact that some state agencies, boards or institutions over whose investment activity the Governor has no direct control may voluntarily comply with Executive Order Number Eight (90) does not itself render this Order unconstitutional. Executive Order Number Eight (90), on its face, does not attempt to have a mandatory impact on any such state agency, board or institution. Executive Order Number Eight (90) does not create any new law. It has been characterized by the Governor as a "call to arms" and echoes the sentiment that apartheid is repugnant to America's most fundamental notions of human rights and dignity.

V. Executive Order Calls Specifically for Investments by State Agencies, Boards and Institutions with Adherence to Fiduciary Responsibility

You also ask for my comments on the fiduciary duties and responsibilities of members of the boards or agencies in question as they relate to the implementation of Executive Order Number Eight (90). Any potential concerns in this regard are answered by the Order itself: "This program of investment and divestment is to be carried out with full adherence to fiduciary principles and fiscal responsibility." (Emphasis added.) The Executive Order, therefore, not only anticipates that members of state agencies or boards with investment responsibilities will not breach these fiduciary duties and, as a result, subject themselves to the possibility of personal liability, it specifically directs those members to adhere to their "fiduciary principles and fiscal responsibility."

Your question concerning the fiduciary responsibilities of members of state agencies and boards making investment decisions presupposes that decisions based solely upon the ethical and social constraints of a divestment policy, rather than on the risk and return characteristics of a particular investment, will breach this fiduciary duty. Much has been written on the topic of social investing and, in particular, about divestment of stocks of companies doing business in South Africa. No common agreement as to the legal resolution of the issue has been reached. It is my opinion, however, that a constrained approach to social investing, with adherence to basic fiduciary duties, would not subject these fiduciaries to personal liability. In short, the principles detailed by the Governor in Executive Order Number Eight (90) clearly can complement a state agency's, board's or institution's fiduciary responsibility to its contributors and to the Commonwealth's citizenry. Furthermore, Executive Order Number Eight (90) does not call for divestment to be implemented solely on moral or ethical grounds, but, rather, with "full adherence to fiduciary principles and fiscal responsibility." It is my opinion that this constraint is a sufficient standard to ensure that members of state agencies, boards and institutions do not breach their fiduciary duties.

VI. Summary

In summary, it is my opinion that a reservoir of inherent authority is vested in the Governor that may be exercised by him as "chief executive" to ensure that "all laws be faithfully executed." Va. Const. Art. V, §§ 1, 7. As long as that exercise of power does not exceed the authority "bestowed upon him by the constitution and the laws," the Governor has not intruded into the legislative domain of the General Assembly. *Lewis*, 77 Va. at 420. Executive Order Number Eight (90) adheres to these principles and, as a result, is
not unconstitutional on its face. Furthermore, as long as Executive Order Number Eight (90) is implemented in accordance with these principles, the Governor will not have exceeded the authority vested in his Office.

It is also my opinion that Executive Order Number Eight (90) does not alter the fiduciary duty imposed upon the trustees of any funds impacted by this Order. As long as the members of agencies, boards or institutions fully adhere to their fiduciary responsibilities, regardless of whether they have been appropriately ordered by the Governor to implement the Executive Order or they voluntarily choose to implement this policy, they should not be subject to liability for their investment actions.

1 In a letter to the Honorable Hunter B. Andrews, Majority Leader of the Senate of Virginia, dated May 21, 1990, the Governor emphasizes that he "was well aware when [he] executed the Order that certain boards and institutions operate autonomously and, therefore, that they may make independent judgments as to whether they will follow [his] mandate." A copy of this letter was mailed to both of you, as well as to each other member of the Senate, by the Governor.

Your inquiry does not specify which agencies or boards you feel are impacted by the Order. Any exhaustive examination of every potential state agency, board or other entity affected by this Order, however, is premature. In a memorandum to all state agency heads, dated May 15, 1990, the Governor directed a task force, composed of members of the Governor's staff and certain members of his Cabinet, to draft specific instructions for compliance with this Executive Order. In his letter to Senator Andrews, supra note 1, the Governor noted that this task force will contact "appropriate members of the legislature to obtain their ideas." The task force will designate the specific state agencies or boards which the Governor envisions are affected by the Executive Order and the manner in which these agencies or boards are to initiate compliance.

Even with these instructions, certain agencies and boards are not affected directly by Executive Order Number Eight (90). For example, the Virginia Supplemental Retirement System is administered pursuant to § 51-111.17 by a Board of Trustees. Pursuant to Va. Const. Art. X, § 11, quoted in Part II of this Opinion, the retirement system is subject to "such restrictions or conditions as may be prescribed by the General Assembly." The specific authority given to invest, and the scope of permissible investments to be made, by the Board of Trustees has been detailed by the General Assembly in §§ 51-111.24 through 51-111.24:8.

Private foundations established to support the educational activities of state institutions of higher education are a second example. The state policy toward such independent endowments is found in § 23-9.2. Section 2.1-180 provides that donations to these foundations are exempt from any obligation to be deposited in the state treasury. A prior Opinion of this Office concludes that boards of visitors of various state colleges and universities may hold and invest funds independent of the State Treasurer. See 1982-1983 Att'y Gen. Ann. Rep. 89. Another prior Opinion of this Office further concludes that there is no authority for the State directly to supervise decision-making by these private educational foundations. See 1986-1987 Att'y Gen. Ann. Rep. 54, 55.

The authority of the Governor to direct specific investments of funds held by the State Treasurer is less clear. Pursuant to § 2.1-187, the State Treasurer is authorized, in his discretion, "to sell, transfer, and convey any notes, bonds, obligations or certificates of stock held in the general fund" and, pursuant to § 2.1-185, the Governor and the State Treasurer act jointly to invest excess funds. Yet the Governor sets the underlying policy for the investment of these state funds pursuant to §§ 2.1-41.1 and 2.1-51.33.


The fiduciary duty of certain state agencies and boards is detailed specifically in the Code. For example, the standard of judgment and care required in making investments for the Board of Trustees of the Virginia Supplemental Retirement System is contained in § 51-111.24:2. The Uniform Management of Institutional Funds Act, §§ 55-268.1 through
55-268.10, details the general rules governing the investment of institutional endowment funds. Further, investments in accordance with §§ 2.1-327 through 2.1-329.1 protect a treasurer or public depositor from liability in the absence of negligence, malfeasance, misfeasance, or nonfeasance.

I note that Senator Benedetti cosponsored a bill in the 1990 Session of the General Assembly directing the Virginia Supplemental Retirement System to consider the impact of their investment decisions on certain groups within Northern Ireland. See S.B. No. 273 (1990). On February 13, 1990, this bill was carried over for further consideration by the 1991 Session.


Several state institutions voluntarily have supported the principles of Executive Order Number Eight (90). See litt. to Sen. Andrews, supra note 1. See also U. Va. Decides to Divest, Richmond Times-Dispatch, May 26, 1990, at B-2.

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT (STATEMENT OF ECONOMIC INTERESTS).

Reporting of payments by governmental agency for officer's or employee's participation in educational meetings held outside Commonwealth.

February 14, 1990

The Honorable Robert L. Calhoun
Member, Senate of Virginia

You ask whether employees of the City of Alexandria (the "City") who are required to file a financial disclosure form (the Statement of Economic Interests) pursuant to § 2.1-639.14(A) 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"), must report attendance at certain types of meetings held outside the Commonwealth.

I. Facts

During the course of the year, City employees attend a number of educational meetings, conferences, and seminars or training sessions in the District of Columbia or in Maryland. The employees typically use a City motor pool car for transportation to the event, are reimbursed by the City for parking costs, and either receive meals as a part of the program, are reimbursed by the City for meals, or personally bear the cost of meals. In the event the program attended lasts for more than one day, these employees usually return to their homes for the night. The tuition or registration fee is paid by the City directly to the program provider. The total value of any travel or reportable meals generally is less than $200 but, when added to the tuition or registration fee, produces an aggregate payment or reimbursement by the City in excess of $200.
In these circumstances, you ask whether a declarant would be required to report attendance at such a meeting or conference on Schedule D of the Statement of Economic Interests.

II. Applicable Statutes

The complete text of the Statement of Economic Interests is detailed 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 government officers and employees in the performance of their official duties. See 1987-1988 Att'y Gen. Ann. Rep. 23.

Schedule D of the Statement of Economic Interests requires the disclosure of each source from which a declarant received during the reporting period 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 a governmental 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 conducted in Virginia.

III. Declarant Must Report Attendance at Educational Meeting Held Outside Commonwealth When Cost Borne by Payor Governmental Agency Exceeds $200, Including Tuition or Registration Fees Paid Directly to Program Provider

The scope of the reporting requirements of Schedule D is reviewed in two prior Opinions of this Office. These Opinions conclude that the travel reimbursement disclosure requirement of Schedule D does not extend to all travel an officer or employee may undertake on behalf of a governmental agency. The disclosure requirement is directed at formal meetings or conferences. Professional conferences, association meetings and educational gatherings are among those meetings identified as triggering the travel reimbursement disclosure requirement. See Att'y Gen. Ann. Rep.: 1989 at 6, 7-8; 1987-1988 at 23, 27. The latter Opinion also concludes that an officer or employee must report the value of lodging provided in connection with such meetings, even when the governmental agency pays for such lodging by direct payments to the provider. 1987-1988 Att'y Gen. Ann. Rep., supra, at 26.

The primary object of the reporting requirements of Schedule D is the disclosure of an officer's or employee's receipt, from a third party, of anything of value for the officer's or employee's participation in a meeting or the presentation of a talk. If the meeting is held outside the Commonwealth, the officer or employee must report the receipt of things of value, whether the payor is a governmental agency or a nongovernmental entity. In the context of tuition or registration fees paid directly to a program provider, there is no direct "receipt" of money by the meeting participant. The officer or employee, however, does receive the value of the educational program. In addition, the tuition or registration fee reflects the total cost of the officer's or employee's participation in the program that is borne by the payor. If a nongovernmental party paid the cost of an officer's or employee's participation, it certainly would be within the intent of the Schedule D disclosure requirement. In this context, Schedule D does not distinguish between governmental or nongovernmental payors to trigger the reporting requirements. It is my opinion, therefore, that a declarant would be required to report attendance at such educational meetings held outside the Commonwealth when the cost borne by the City as payor exceeds $200, even when the tuition or registration fee for the declarant is paid directly to the program provider by the City.
ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

Meeting between two members of seven-member board of supervisors and two members of seven-member town council to discuss mutual governmental business constitutes "meeting" within Act's definition; compliance with Act's public meeting requirement.

February 21, 1990

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask whether a prearranged meeting between two members of a seven-member board of supervisors and two members of a seven-member town council, scheduled to discuss joint service contracts and other governmental business, constitutes a "meeting" as that term is defined in The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act").

I. Applicable Statutes

The Act, which became effective on July 1, 1968, establishes the public policy of the Commonwealth with regard to access to official records in the custody of state and local public officials and entry to meetings of public bodies. Section 2.1-341 provides, in part, that the term

"meeting" or 'meetings' means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.1-343.1, as a body or entity, or as an informal assemblage of (i) as many as three members, or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of state Institutions of higher education; and other organizations, corporations or agencies in the Commonwealth, supported wholly or principally by public funds.

Section 2.1-341 also provides that

"public body" means any of the groups, agencies or organizations enumerated in the definition of 'meeting' as provided in this section, including any committees or subcommittees of the public body created to perform delegated functions of the public body or to advise the public body.

II. Meeting of Two Members of Seven-Member Board of Supervisors and Two Members of Seven-Member Town Council to Discuss Governmental Business Constitutes "Meeting" Pursuant to Act

The Act requires that, except as otherwise specifically provided by law, all "meetings" of a "public body" must be open to the public. Section 2.1-343. Both a board of supervisors and a town council are "public bodies" within the meaning of the Act. Section 2.1-341. The term "public body" also includes "any committees or subcommittees of the public body created to perform delegated functions of the public body or to advise the public body." Id.
It is my understanding that the two members of each public body in the facts you present were designated or appointed by their respective board or council for the purpose of attending the meeting you describe to discuss joint service agreements and other governmental issues affecting both the county and the town and to report back to their respective public bodies. Since each of these two-member delegations was selected for a specific purpose and was not merely an ad hoc two-member group from each public body, it is my opinion that each of the two-member delegations constitutes a "committee" within the meaning of § 2.1-341 ("public body"), and must, therefore, comply with the requirements of the Act. See Atty Gen. Ann. Rep.: 1987-1988 at 236, 238 (committee meetings of public bodies are subject to the public meeting requirement); 1985-1986 at 332 (committees established by public bodies are subject to the Act and must comply with the Act's open meeting requirement; such committees may also conduct closed meetings if the requirements of § 2.1-344 are met); 1980-1981 at 384 (meetings of a committee of a county governing body are meetings subject to the Act, even though the committee has only two members).

Based on the above, it is further my opinion that the meeting between the two-member committee of a seven-member board of supervisors and the two-member committee of a seven-member town council you describe constitutes a "meeting," as that term is defined in § 2.1-341 of the Act.¹

1 The facts you present provide no indication that this meeting was "held for [the] purpose of negotiating any issues subject to the [Commission on Local Government's] review," Section 15.1-945.7(D). If this were the case, however, the meeting would be exempt from the Act's requirements unless the meeting is specifically required by law. See id.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

CRIMINAL PROCEDURE: CENTRAL CRIMINAL RECORDS EXCHANGE.

Booking photographs or "mug shots" not criminal history record information to be filed with Central Criminal Records Exchange; disclosure not prohibited. Police or sheriff's department required to produce booking photograph or "mug shot" in response to request made under Virginia Freedom of Information Act.

August 30, 1990

The Honorable John A. Rollison III
Member, House of Delegates

You ask whether, and under what circumstances, The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), requires a police or sheriff's department to produce, in response to a request made under the Act, a booking photograph or "mug shot" of an adult who has been arrested.

I. Applicable Statutes

The disclosure of public records is governed by the Act, the express policy of which is to ensure "the people of this Commonwealth ready access to records in the custody of public officials." Section 2.1-340.1. 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 cus-todian 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(B)(1) exempts from the mandatory disclosure provisions of the Act "[m]emoranda, correspondence, evidence and complaints related to criminal investigations." Section 2.1-342(B)(1) also provides, however, that "[i]nformation in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions of [the Act]."

All official records are open for inspection and copying during regular office hours, unless otherwise specifically provided by law. Section 2.1-342(A). The Act does not require requests for official records to be made in writing or to mention the Act. A public body must respond to a request for official records within five work days. Id. One of four responses must be made: (1) the official records must be provided; (2) if an exemption applies to all the records, a written explanation must be given describing why the records will not be produced and citing the applicable statutory exemption; (3) if an exemption applies to some of the official records, the exempted records may be deleted with a written explanation citing the statutory exemption, and the remainder of the records must be provided; or (4) if the custodian of the records determines that it is "practically impossible" to (a) produce the records in five work days or (b) determine whether the records are available within five work days, the requester must be so notified. When the latter response is made, the records custodian has seven additional work days to respond to the request. Id.

Chapter 23 of Title 19.2, §§ 19.2-387 through 19.2-392, establishes the Central Criminal Records Exchange ("CCRE") of the Department of State Police and the procedure for reporting criminal offenses to CCRE. Section 19.2-389 restricts the dissemination of "criminal history record information" to certain individuals and agencies. Section 19.2-390(a) requires law-enforcement officials to make a report to CCRE, "on forms provided by it, of any arrest on a charge of treason or of any felony or of any offense punishable as a misdemeanor under Title 54.1, or Class 1 and 2 misdemeanors under Title 18.2," with certain exceptions provided in that section. Section 19.2-390(a) requires that reports filed with CCRE "be accompanied by fingerprints of the individual arrested." Section 19.2-392(A) provides:

All duly constituted police authorities having the power of arrest may take the fingerprints and photographs of: (i) any person arrested by them and charged with a felony or a misdemeanor an arrest for which is to be reported by them to the Central Criminal Records Exchange, or (ii) any person who pleads guilty or is found guilty after being summoned in accordance with § 19.2-74. Such authorities shall make such records available to the Central Criminal Records Exchange. Such authorities are authorized to provide, on the request of duly appointed law-enforcement officers, copies of any fingerprint records they may have, and to furnish services and technical advice in connection with the taking, classifying and preserving of fingerprints and fingerprint records.
II. Booking Photographs and "Mug Shots" Are "Official Records" Under Act; No Exemption from Production Applies

A police or sheriff's department is a "public body," subject to the Act's disclosure requirements. Section 2.1-341. The definition of "official records" includes photographs. Id. The Act requires that "[a]ny exception or exemption from applicability shall be narrowly construed." Section 2.1-340.1.

Section 19.2-389 prohibits the dissemination of criminal history record information except as specifically provided. Section 19.2-389 does not authorize the release of criminal history record information to the media or the general public. Section 19.2-390(a) requires that fingerprints of the individual be filed with the report to CCRE, but does not mention booking photographs or "mug shots." Section 19.2-392 authorizes "[a]ll duly constituted police authorities having the power of arrest" to take fingerprints and photographs of "(i) any person arrested by them and charged with a felony or a misdemeanor an arrest for which is to be reported by them to the Central Criminal Records Exchange, or (ii) any person who pleads guilty or is found guilty after being summoned in accordance with § 19.2-74." That section, however, provides only that the fingerprints and photographs shall be made available to CCRE, but does not appear to make them part of the CCRE record. Inquiries by members of my staff to the State Police and to several local police and sheriffs' departments reveal that the release of booking photographs or "mug shots" to news media and others is a common practice.


I have reviewed the exemptions from production under the Act and find no express exemption for booking photographs or "mug shots." The Act specifically requires exemptions to be strictly construed. The exemption in § 2.1-342(B)(1) for records "related to criminal investigations" specifically provides that the exemption shall not apply to information "relative to the identity" of persons arrested and charged.¹ In my opinion, the booking photograph or "mug shot" is information "relative to the identity" of the subject within the meaning of that section. Because, as discussed above, booking photographs or "mug shots" are not required to be filed with CCRE, it is my opinion that they are not criminal history record information as contemplated by § 19.2-389, and that § 19.2-389 does not prohibit their disclosure. It is further my opinion, therefore, that a police or sheriff's department is required to produce a booking photograph or "mug shot" in response to a request made under the Act, as provided by § 2.1-342(A).

¹A possible exception could exist in a case where the disclosure of the photograph of the arrested person would jeopardize an ongoing investigation. In my opinion, the exemption in § 2.1-342(B)(1) would permit the police or sheriff's department to refuse to release the booking photograph in such a situation.

ALCOHOLIC BEVERAGES: ALCOHOLIC BEVERAGE CONTROL — MIXED BEVERAGES.

Mixed beverage special events license may not be issued prior to passage of referendum approving sale of mixed alcoholic beverages. Banquet special event license permits
"brown bagging" of lawfully acquired alcoholic beverages; "brown bagging" does not include dispensing mixed drinks to public. Statutory violation determined from facts adduced by Commonwealth's attorney, grand jury or trier of fact.

June 21, 1990

The Honorable John E. Greenbacker Jr.
Commonwealth's Attorney for Halifax County

You ask whether certain facts you describe violate § 4-58 of the Code of Virginia. You also ask that I discuss the term "brown bagging," as it is used with respect to certain activities permitted by § 4-89(j).

I. Facts

Each year the Halifax County Chamber of Commerce (the "County" and the "Chamber") and the Turbeville Cantaloupe Growers Association sponsor a cantaloupe festival in the County. Attendees purchase tickets, each of which contains brief information about the menu and entertainment. You state that there is nothing printed on any of the tickets or on any other festival advertisement to indicate that alcoholic beverages of any type will be provided at the festival. Because wine and beer are served for consumption during the festival, however, a member of the Chamber does obtain a "banquet special event license" from the Virginia Alcoholic Beverage Control Board (the "Board"). Since the County has not passed a referendum approving the sale of mixed alcoholic beverages pursuant to § 4-98.12, the Chamber is precluded from obtaining a "mixed beverage special events license" under § 4-98.2(c).

Although mixed beverages may not be sold at the festival, you state that it has been the practice to establish a roped-off hospitality area on the festival grounds where mixed beverages are offered to adults attending the festival, without additional charge. As an accommodation to the organizations conducting the event, several local banks either supply the alcoholic beverages for the mixed drinks or provide funds to purchase the liquor.

You state that the Chamber takes the position that, since cocktails or mixed beverages are not mentioned on the tickets or on any advertising or promotional materials, they are not included in the ticket purchase price or admission charge and, therefore, are not being sold. The Chamber supports its position by claiming that all alcoholic beverages for mixed drinks are "donated" by third parties—the local banks—and that the mixed drinks are dispensed to persons attending the festival without additional charge.

II. Statutes Prohibit Unlicensed Sale of Alcoholic Beverages, Authorize Certain Limited Licenses

Section 4-58 provides, in part:

If any person who is not licensed under the provisions of [Chapter 1 of Title 4] to sell alcoholic beverages in this Commonwealth shall sell any alcoholic beverages other than permitted by the provisions of this chapter, he shall be guilty of a misdemeanor.

The terms "sale" and "sell," as they are used in The Alcoholic Beverage Control Act, §§ 4-1 through 4-98 (the "Act"), are defined as follows:

'Sale' and 'sell' shall include exchange, barter and traffic, and any delivery made otherwise than gratuitously, by any means whatsoever, of alcoholic
beverages; to solicit or receive an order for alcoholic beverages; to keep, offer or expose the same for sale; to peddle.

Section 4-2 (emphasis added). These statutes, when read together, generally prohibit the sale of alcoholic beverages by any person who is not licensed by the Board. Other statutes in the Act authorize the Board to grant various types of licenses, and several of these licensing statutes must be considered to respond to your question.

Section 4-25(A)(20) authorizes the Board to issue "banquet licenses." There are two types of these banquet licenses that may be issued. The basic "banquet license" is designed for private gatherings, such as an office holiday party. The "banquet special event license" is designed for a special event, like the festival you describe, which is conducted by a nonprofit corporation or association. Regardless of the type of banquet license granted, the licensee may sell or serve wine and beer:

Banquet licenses [may be granted] to persons in charge of banquets or special events which licenses shall authorize the licensees to sell or give wine and beer in rooms or areas approved by the Board for the occasion . . . .

Section 4-25(A)(20). If the voters of a locality have approved the sale of mixed beverages by referendum, the granting of a "mixed beverage special events license" in that locality pursuant to § 4-98.2(c) would be authorized. The qualifications for this license are nearly identical to those of a banquet special event license, but the privileges of the license "authorize the licensee to sell and serve mixed beverages for consumption in areas approved by the Board on the premises ... designated in the license." Id. (emphasis added).

Since the County voters have not approved the sale of mixed beverages by referendum, a mixed beverage special events license may not be issued for the festival you describe. The banquet special event license which the Chamber obtains, however, does operate to permit what commonly is referred to as "brown bagging." This is because § 4-89(j), which is effective when either type of banquet license has been issued, provides that the provisions of the Act shall not be construed to prevent

[t]he keeping and consumption of any alcoholic beverages, lawfully acquired, [1] at a private meeting or private party limited in attendance to members and guests of a particular group, association or organization at a banquet or similar affair, or [2] at a special event, for which [in either case] a banquet license shall have been granted by the Board.

Since food and other refreshments clearly are included in the cost of the ticket, however, they are served for "compensation" at the festival, and § 4-61, therefore, would apply in the absence of a banquet license. This statute provides, in part, that

[n]o alcoholic beverages shall be kept or allowed to be kept upon any premises ... or other place, where food or refreshments of any kind are furnished for compensation, except such alcoholic beverages as such person ... operating such place of business is authorized [by license granted pursuant to the Act] to purchase and to sell at such place of business . . . .

III. Determination of Violation of Statute Based on Particular Facts Adduced by Investigation or Trial

A prior Opinion of this Office concludes that § 4-58 would be violated if an unlicensed person or association conducting a dinner-dance or other event sold admission tickets which, by advertisement, included dinner, wine and cocktails from a bar. See
1985-1986 Att'y Gen. Ann. Rep. 7. This prior Opinion reasons that even though alcoholic beverages are "donated" to a particular event, either in kind or through funding, by a group of "friends," the activity would still constitute a "sale" prohibited by § 4-58 because (1) the definition of the term "sale" in § 4-58 is sufficiently broad to prohibit the activity, (2) a delivery "otherwise than gratuitously" would occur, and (3) it is not relevant how the person conducting the event acquired the donated funds. Id. at 7-8. These principles also would seem to apply, in general, to the festival you describe, regardless of whether the alcoholic beverages were donated indirectly to the event or purchased directly by the person or association conducting it.

The facts you present are distinguishable from those upon which the prior Opinion was based, however, since you note that there is no reference to the serving of alcoholic beverages on admission tickets or on other festival advertising. These facts provide some evidence that alcoholic beverages are not being "sold" within the meaning of the Act. On the other hand, facts concerning the price structure of the ticket, the manner in which ticket sales are conducted, including verbal and other less formal promotional methods, whether the ticket price includes all aspects of the event, or other facts relating to the intent of the sponsors of the festival or the expectations of the ticket purchasers, would be relevant in determining the nature of the express or implied contractual undertaking and whether alcoholic beverages are being served "otherwise than gratuitously." See § 4-2 ("sale," "sell"). Any determination whether particular conduct violates a criminal statute, in this case § 4-58, necessarily is dependent upon a number of factual variables--variables which ultimately will be revealed only upon a thorough investigation or trial. This Office traditionally has declined to render official Opinions under such circumstances, since such factual determinations properly are reserved to you, as Commonwealth's attorney, or to a grand jury or the trier of fact. See 1987-1988 Att'y Gen. Ann. Rep. 69, 72.

IV. "Brown Bagging" Does Not Include Dispensing Mixed Beverages to Public

The term "brown bagging" typically describes "[t]he practice of taking one's own liquor into a public establishment, as a restaurant, where setups are available." The American Heritage Dictionary 212 (2d c. ed. 1985). Customarily, "brown bagged" liquor is carried in a brown paper bag to conceal it from public view. In Virginia, § 4-89(j) permits an individual to "brown bag" lawfully acquired alcoholic beverages (wine, beer or liquor) to a banquet or special event licensed by the Board pursuant to § 4-25(A)(20). It is my opinion that § 4-89(j) limits an individual to keeping and consuming his own alcoholic beverages at such an event, a limitation which reasonably may be extended to include sharing the beverages with family or others in a private group. Section 4-89(j) clearly, however, does not contemplate the dispensing of "brown bagged" mixed drinks to the public or to all those attending the event.

1The term "mixed beverage" or "mixed alcoholic beverage" is defined as "a spirits drink composed in whole or in part of alcoholic beverages having an alcoholic content of more than fourteen per centum by volume and served to an individual in a quantity less than the quantity contained in a closed package for consumption on premises licensed under [Chapter 1.1 of Title 4]." Section 4-98.1.

2For the purposes of this Opinion, I will assume that all such adults are of lawful age.

3"Special event" is defined as "an event sponsored by a duly organized nonprofit corporation or association and conducted for an athletic, charitable, civic, educational, political or religious purpose." Section 4-2 (emphasis added).

4A mixed beverage referendum was defeated in the County on November 2, 1982. No further referendum on this issue has been held.

5The issuance of a banquet license for a special event where food, wine and beer are served or consumed but not sold to the public (e.g., a free admission event where free
food and beer are served or consumed) remains necessary to prevent a violation of laws prohibiting drinking alcoholic beverages in a public place. See § 4-78.

You also ask that I define the term "brown bagging". The term is not defined either in the Code of Virginia or Regulations of the Board.

Paragraphs (A)(11)(g) and (A)(12)(f) of § 4-25, which authorize the Board to grant retail on-premises wine and beer licenses to persons operating coliseums, stadia or similar facilities (such as an automobile racetrack), were amended in 1989 to insert the following provisions authorizing "brown bagging": "Upon authorization of the licensee, nothing herein shall be construed to prohibit any person from keeping and consuming his own lawfully acquired alcoholic beverages on the premises in any areas and locations covered by the license." Ch. 42, 1989 Va. Acts 77, 79-80 (Reg. Sess).

BANKING AND FINANCE: MONEY AND INTEREST.

Statutory provisions do not limit amount of late charge lenders may impose on certain business loans.

November 20, 1990

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

You ask several questions about the application of various provisions of Chapter 7.3 of Title 6.1, §§ 6.1-330.49 through 6.1-330.90 of the Code of Virginia ("Chapter 7.3"), relating to money and interest. First, you ask whether the limitations on late charges imposed by § 6.1-330.80 apply to loans made for business or investment purposes, or are limited only to loans for personal, family or household purposes. You then ask whether the provisions of § 6.1-330.85, which deal with prepayment penalties and the rebate of unearned interest upon prepayment, apply only to the types of subordinate mortgage loans described in § 6.1-330.71. If § 6.1-330.85 is not limited in application only to those loans described in § 6.1-330.71, you ask whether the requirements of § 6.1-330.85 apply to loans made for business or investment purposes.

I. Applicable Statutes

Section 6.1-330.75 provides:

A. No person shall, by way of defense or otherwise, avail himself of the provisions of [Chapter 7.3], or any other section or case law relating to usury or compounding of interest to avoid or defeat the payment of interest, or any other sum, in connection with a loan made to a person or entity for business or investment purposes, provided the initial amount of the loan is $5,000 or more.

B. For the purposes of this section, unless a loan is for family, household, or personal purposes which shall not include a passive or active investment, it shall be deemed to be for business or investment purposes.

Section 6.1-330.80(A) provides, in part:

Any lender or seller may impose a late charge for failure to make timely payment of any installment due on a debt, whether installment or single maturity, provided that such late charge does not exceed five percent of the amount of such installment payment and that the charge is specified in the contract between the lender or seller and the debtor.
Section 6.1-330.85(A) provides:

Any borrower under any loan described in § 6.1-330.71 shall have the right to anticipate payment of his debt in whole or in part at any time without penalty. In cases where interest has been added to the face amount of a note payable in installments, the borrower shall have the right to a rebate of any unearned interest, which rebate shall be computed in accordance with the Rule of 78 as illustrated in § 6.1-330.86.¹

Section 6.1-330.71 imposes limits on interest rates and other charges made in connection with subordinate mortgage loans on certain improved residential property, when such loans are made by lenders other than those exempt from § 6.1-330.71 pursuant to § 6.1-330.73.

Section 6.1-330.73 exempts from the application of §§ 6.1-330.71, 6.1-330.72 and 6.1-330.85 "loans made by any bank, savings institution, industrial loan association, [or] credit union," or by "a seller in a real estate sales transaction who takes a subordinate mortgage on such real estate." For purposes of this Opinion, I assume that the "lender" in question is not exempted by § 6.1-330.73 from the application of §§ 6.1-330.85 and 6.1-330.71.

II. Provisions of § 6.1-330.80 Do Not Limit Amount of Late Charge Lenders May Impose on Certain Business Loans

Section 6.1-330.80(A) authorizes lenders and sellers to impose a late charge upon borrowers for failure to make timely payment of an installment due on a debt, provided the charge imposed does not exceed five percent of the payment due, and provided the charge is specified in the contract of indebtedness. By its plain language, § 6.1-330.80(A) applies broadly to "[a]ny lender or seller." Section 6.1-330.75(A), however, provides that

[n]o person shall, by way of defense or otherwise, avail himself of the provisions of [Chapter 7.3] to avoid or defeat the payment of interest, or any other sum, in connection with a loan made to a person or entity for business or investment purposes, provided the initial amount of the loan is $5,000 or more. [Emphasis added.]


The payment of a late charge has long been held not to constitute the payment of interest. Winslow v. Dawson, 1 Va. (1 Wash.) 118 (1792); see also Homewood Inv. Co., Inc. v. Moses, 96 Nev. 326, 331, 608 P.2d 503, 506 (1980). In my opinion, however, payment of a late charge does constitute the payment of "any other sum" for purposes of § 6.1-330.75(A).

Construing §§ 6.1-330.75(A) and 6.1-330.80(A) together to produce a harmonious result, therefore, I am of the opinion that § 6.1-330.75(A) makes the interest rate and late charge limitations of § 6.1-330.80(A) inapplicable to loans for business or investment purposes, when the initial amount of the loan is $5,000 or more.²

While not restricted by statute, however, the interest rates, late charges and other charges on loans of more than $5,000 for business and investment purposes will still be limited by common law and basic equitable principles. See, e.g., Taylor v. Sanders, 233 Va. 73, 75, 353 S.E.2d 745, 747 (1987) (stipulated damage provision in contract not
enforceable where actual damages ascertainable and stipulated amount grossly excessive); *Winslow v. Dawson*, 1 Va. (1 Wash.) at 119 (late charge penalty relieviable in equity).

III. Provisions of § 6.1-330.85 Only Apply to Types of Subordinate Mortgage Loans Described in § 6.1-330.71

Your second question concerns the scope of § 6.1-330.85. That section gives borrowers the right to prepay without penalty loans described in § 6.1-330.71. As currently in effect, § 6.1-330.85(A) also provides that, for loans to which interest was added to the face amount of the note when the loan was made ("add-on interest"), the borrower has the right at the time of prepayment to a rebate of the unearned interest, computed in accordance with the Rule of 78.

Section 6.1-330.85(A) applies, by its own terms, only to "[a]ny borrower under any loan described in § 6.1-330.71." Section 6.1-330.71(A)(1) imposes limits on loans that are (1) secured, in whole or in part, "by a subordinate mortgage or deed of trust[4] on residential real estate improved by the construction thereon of housing consisting of one to four family dwelling units," and (2) made by a lender other than one of the lenders listed in § 6.1-330.73. The lenders listed in § 6.1-330.73 include banks, savings institutions, industrial loan associations, credit unions and sellers in a real estate transaction that takes a subordinate mortgage on the real estate sold.

I am, therefore, of the opinion that § 6.1-330.85 applies only to any borrower under any loan secured by a subordinate mortgage or deed of trust on residential real estate containing one to four dwelling units, made by a lender other than a bank, savings institution, industrial loan association, credit union or seller in a real estate transaction taking a subordinate mortgage on the property sold.

IV. Loans in Amounts of $5,000 or More and Made for Business or Investment Purposes Not Exempt from Provisions of § 6.1-330.85 in All Instances

Your third question is whether, assuming § 6.1-330.85 does not apply only to the types of real estate loans described in § 6.1-330.71, the provisions of § 6.1-330.85 are applicable to loans for business or investment purposes. As discussed above, I conclude that § 6.1-330.85 does apply only to those loans described in § 6.1-330.71.

Those two sections are not mutually exclusive, however, since some of the loans described in § 6.1-330.71 could be loans in amounts of $5,000 or more for business or investment purposes. As noted above, the loans described in § 6.1-330.71 generally are subordinate mortgage loans on residential real estate containing one to four dwelling units. A loan secured by a mortgage on a single dwelling unit could be for family, household or personal purposes, but a loan secured by a mortgage on land containing two, three or four dwelling units, in most instances, would be for business or investment purposes. It is my opinion, therefore, that not all subordinate mortgage loans for business or investment purposes would be excluded automatically from the requirements of § 6.1-330.85. Whether a particular business or investment subordinate mortgage loan is subject to the provisions of § 6.1-330.85 depends on the terms of the individual loan agreement concerning prepayment penalties and interest rebates, and whether § 6.1-330.75 makes those terms enforceable notwithstanding the provisions of § 6.1-330.85, as discussed in Part II above.

1Section 6.1-330.85 was amended at the 1990 session of the Virginia General Assembly, Ch. 338, 1990 Va. Acts 460, 461 (Reg. Sess.). The amendment, which will become effective on January 1, 1991, provides that, with respect to loans where interest was
added to the face amount of the note, the rebate of unearned interest is to be computed in accordance with the Rule of 78 only on loans having an initial maturity of sixty-one months or less. On loans having a longer initial maturity, the borrower must receive a rebate computed under a method at least as favorable to the borrower as the actuarial method.

2Loans of less than $5,000 for business and investment purposes, conversely, are subject to the limits of §6.1-330.80.

3The amendment discussed in supra note 2 will not be effective until January 1, 1991.

4The term "subordinate mortgage or deed of trust" is defined in §6.1-330.71(A)(1) for purposes of Chapter 7.3 as "one subject to a prior mortgage or deed of trust in existence at the time of the making of the loan secured by such subordinate mortgage or deed of trust."

5Section 6.1-330.73 also expressly makes §6.1-330.85 inapplicable to loans made by those lenders.

BANKING AND FINANCE: VIRGINIA CONSUMER FINANCE ACT.

True contract of hazard lender not required to obtain small loan license; usury laws not applicable. Virginia law places no limitation on principal amount of loan of true contract of hazard lender; limitation on amount taken or received by lender in lieu of interest.

July 27, 1990

The Honorable William S. Moore Jr.
Member, House of Delegates

You state that a constituent would like to make loans to personal injury and other tort plaintiffs and you ask, after outlining additional facts, whether the loans contemplated would be exempt from Virginia's usury laws as "contracts of hazard." If the contemplated loans are exempt, you ask whether the lending business established by your constituent would be required to obtain a small loan license under the Virginia Consumer Finance Act, §§6.1-244 through 6.1-310 of the Code of Virginia. Finally, if the contemplated loans are exempt, you ask whether Virginia law places any limitation on the principal amount of loans that may be made by a contract of hazard lender.

I. Facts

Your constituent plans to engage in the business of making loans to personal injury and other tort plaintiffs. The sole security to be given by the borrowers would be an assignment of any eventual litigation proceeds. Principal and interest on any loan would be due upon receipt by the borrower of sufficient funds from adjudication or settlement of the borrower's tort claim. Repayment of both principal and interest would be contingent upon the borrower's obtaining a recovery on the tort claim, and no payment would be due if the litigation is unsuccessful or if the amount of recovery obtained is insufficient to satisfy any attorney's, physician's or other lien placed against the proceeds.

You do not provide any sample documents that are expected to be used in making these loans. Therefore, I do not know the specific loan repayment terms that will be used, but can only discuss your request with respect to the more general repayment terms detailed in your letter. You also have not indicated the interest rates that are likely to be charged or the principal amounts that are likely to be loaned. Finally, you do not indicate whether the entity that will be making the loans will be a sole proprietorship, a partnership or a corporation.
II. Whether Contract of Hazard Is Attempt to Avoid Usury Statute Is Question of Fact

There is no doubt that, under the facts you describe, repayment of the principal sum loaned will be contingent on future events. As a general rule, when "repayment of the loan depends upon the happening of contingent events . . . so that the lender may receive nothing, or something less than his principal and legal interest may amount to, the contract is not liable to the imputation of usury." *City of Lynchb'g v. Norvell & others*, 61 Va. (20 Gratt.) 601, 609 (1871). See also 47 C.J.S. Interest and Usury § 133 (1982) (where principal sum lent or any part thereof is put in hazard, lender may lawfully require for risk incurred as large a sum as may be agreed upon in good faith); 45 Am. Jur. 2d Interest and Usury § 156 (1969); 14 Williston on Contracts § 1692 (W. Jaeger 3d ed. 1972). The rationale for this general rule is that transactions of this type are not really loans, but a species of wager. The lender charges for the risk, not for the loan. *Norvell*, 61 Va. at 610-11. See also *David v. Johnston*, 479 S.W.2d 525, 527-28 (Ark. 1972) (speculative investment of oil and gas venture drilling costs providing for significant return, but contingent on production of oil and gas, not usurious).

The general rule stated above is, however, subject to an equally well-settled exception that "a merely colorable contingency or hazard will not prevent excessive interest charges from being usurious." *Van Dyke v. Commonwealth*, 178 Va. 418, 425, 17 S.E.2d 386, 389 (1941) (quoting *Doyle v. American Loan Co.*, 185 Ark. 233, 235, 46 S.W.2d 803, 804 (1932)). See also *Norvell*, 61 Va. at 610 (question arises whether hazard encountered is "real, substantial hazard, or . . . merely colorable"); 45 Am. Jur. 2d, supra § 156 (rule not applicable where contingency selected is so improbable as to convince court or jury that there was no real hazard and that repayment of loan was made subject to improbable contingency merely to escape usury statute); *Diversified Enterprises, Inc. v. West*, 141 So. 2d 27, 30 (Fla. Dist. Ct. App. 1962); *Teichner v. Klassman*, 49 Cal. Rptr. 742, 748-49 (Cal. App. 2d 1966). In determining whether usury is present, the courts must probe behind the written instrument and "examine all facts and circumstances which shed light on the true nature of the transaction." *Radford v. Community Mtg. Corp.*, 226 Va. 596, 602, 312 S.E.2d 282, 285 (1984).

In deciding whether a repayment contingency in a loan agreement is substantial, and not merely colorable, the courts will look to the probabilities and not the possibilities. Whether a contingency is probable often will depend upon the intent and understanding of the parties, and is a question of fact for the trier of fact to decide based upon the evidence presented. See *Van Dyke*, 178 Va. at 426, 17 S.E.2d at 370; *State Bank of N. Carolina v. Cowan &c.*, 35 Va. (8 Leigh) 238, 248 (1837).

For example, in *Van Dyke*, the loan agreement relieved the borrower of any obligation to repay upon the occurrence of any of a number of involuntary events, including the borrower's death, liability or loss of employment for 60 days. The lender contended that these risks justified an annual interest rate of 240%. The trial court submitted to a jury the question whether the risk of nonpayment was substantial, and the jury found the lender guilty of usury. Noting that every verdict must rest upon evidence, the Supreme Court of Virginia affirmed the jury's conclusion that the contingencies in the loan agreement "were but plausible devices to cover up the fantastic rate of interest charged." Id. at 426, 17 S.E.2d at 370.

For your constituent's contemplated loans, whether the risk of nonpayment was substantial could only be determined on a case-by-case basis. The degree of risk would depend on, among other factors, the merits of the individual borrower's tort claim, the solvency of the tort defendant and the availability of insurance. Those are determinations ultimately resolvable only by the trier of fact in a judicial proceeding. I am unable, therefore, to say with certainty that all such loans would be true contracts of hazard, exempt from the usury laws, although I readily can imagine that some of them would entail sufficient risk to be so characterized.
III. Virginia Consumer Finance Act Does Not Apply to True Contract of Hazard Lender

Whether your constituent's business entity would be required to obtain a license as a small loan lender under the Virginia Consumer Finance Act (the "Act") is likewise dependent on the factual determination whether the loans in question are true contracts of hazard.

A. Applicable Statutes

Section 6.1-249 of the Act provides, in part:

No person shall engage in the business of lending in amounts of the then established size of loan ceiling or less, and charge, contract for, or receive, directly or indirectly on or in connection with any loan, any interest, charges, compensation, consideration or expense which in the aggregate are greater than the rate otherwise permitted by law except as provided in and authorized by this chapter [Chapter 6 of Title 6.1] and without first having obtained a license from the [State Corporation] Commission.

Section 6.1-250 identifies the entities that are exempt from the provisions of the Act. Those entities include, but are not limited to, banks, savings banks, trust companies, building and loan associations, industrial loan associations, credit unions and bona fide licensed pawnbrokers.

Section 6.1-251 provides that the requirements of § 6.1-249 "shall apply to any person who seeks to evade its application by any device, subterfuge, or pretense whatsoever."

B. True Contract of Hazard Lenders Not Required to Obtain License to Make Loans

Based on the authorities cited above, a true contract of hazard lender is not deemed to be making loans, but is instead making a business wager, or advancing money as a hazardous investment in an enterprise. Lenders who enter into true contracts of hazard also cannot be said to have contracted for, charged or received interest or other charges "which in the aggregate are greater than the rate otherwise permitted by law," since the usury laws do not apply to true contracts of hazard. Section 6.1-249. It is my opinion, therefore, that if your constituent's business is limited to those loans that are, in fact, true contracts of hazard, that business is not required to obtain a license under § 6.1-249.

On the other hand, if your constituent's business makes loans that are not true contracts of hazard, it is my opinion that the business is required to obtain a license if it intends to make loans in amounts below the then applicable small loan ceiling and if, in making those loans, it intends to contract for, charge or receive interest or other charges in excess of the rate otherwise permitted by law. The facts you provide do not indicate that your constituent would be an entity exempt from the Act under § 6.1-250.

Except as otherwise permitted, the maximum contract rate of interest currently allowed is twelve per cent per year. Section 6.1-330.55. Therefore, pursuant to § 6.1-249, if your constituent intends to make loans that are not, in fact, true contracts of hazard, in amounts of less than $3,500, and to charge interest or other sums at any rate in excess of twelve per cent per year, it will be required to obtain a small loan license.
IV. No Limitation in Virginia Law on Amount of Loan Made by True Contract of Hazard Lender

It is my opinion that Virginia law places no specific limitation on the principal amounts of loans made by true contract of hazard lenders. The only limitation placed on true contracts of hazard by any of the authorities cited is that the amounts taken or received in lieu of interest may be only as large a sum as may be agreed upon in good faith. *Diversified Enterprises, Inc.*, 141 So. 2d at 30; 47 C.J.S., supra § 133. This "good-faith" requirement places some outside limit on the amount of interest that may be received by the lender, even in a true contract of hazard situation, but does not limit the principal amount of the loan.

1The term "contract of hazard" applies to loans for which repayment of principal and interest is contingent upon a subsequent event, making the loan "at hazard." See generally 19 M.J. Usury § 8 (Repl. Vol. 1979).

2I do assume, however, that the entity making the loans will not be the attorney who, or the law firm that, represents the tort plaintiff borrower. If this assumption is incorrect, your constituent may want to obtain a legal ethics opinion from the Virginia State Bar regarding whether the activity contemplated would violate the provisions of the Virginia Code of Professional Responsibility. This Office traditionally does not issue Opinions on questions of legal ethics.

3The loan ceiling amount for small loan lenders is reviewed and set from time to time by the State Corporation Commission after a hearing. Section 6.1-271. At present, the established ceiling amount for small loan lenders is $3,500. *Va. Fin. Serv. Ass'n*, State Corp. Comm'n Case No. BFI890186 (Aug. 15, 1989) [hereinafter Fin. Serv. Ass'n].

4The maximum contract rate of interest detailed in § 6.1-330.55 is subject to a variety of exceptions that are applicable to various lenders in making loans for various purposes. For the purposes of this Opinion, I assume that none of those exceptions applies to your constituent.

5Consumer finance licensees currently are able to charge interest at the rate of 33% per year on the first $800 loaned, 24% per year on that part of the unpaid principal balance in excess of $800 but not in excess of $2,000, and 18% per year on that part of the unpaid principal balance in excess of $2,000 and not in excess of $3,500. See Fin. Serv. Ass'n., supra note 3.
I. Deputy Sheriff May Be Entitled to Invoke
Doctrine of Sovereign Immunity in Negligence Action

The Supreme Court of Virginia traditionally has applied the doctrine of sovereign immunity to those employees who work for an immune governmental entity or body. The Court has granted tort immunity under appropriate circumstances to employees of both the Commonwealth and local governments. See, e.g., Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984); Bowers v. Commonwealth, 225 Va. 245, 302 S.E.2d 511 (1983). The Court also has applied the doctrine of sovereign immunity to limit the liability of employees of local school boards in the exercise of discretionary and supervisory functions. See, e.g., Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982).


The Supreme Court of Virginia has held that the doctrine of sovereign immunity serves a multitude of purposes, including protecting the public purse, providing for the smooth operation of government, eliminating the public inconvenience and danger that would result if officials were afraid to act, assuring that citizens will be willing to accept public jobs, and preventing citizens from improperly influencing the conduct of government through vexatious litigation. Messina, 228 Va. at 308, 321 S.E.2d at 660. It is my opinion that these same public policy considerations often cited by the Court in explanation of the general doctrine of the sovereign immunity apply with equal force to sovereign immunity for a sheriff and his deputies.

Although I am unaware of any decision of the Supreme Court of Virginia that addresses this precise issue, several reported and unreported state circuit court decisions have held that the defense of sovereign immunity is available to both sheriffs and deputy sheriffs in tort actions. See, e.g., Ferguson v. Foster, 12 Va. Cir. 130 (Cir. Ct. Roanoke Co. 1988); Small v. Jackson, 4 Va. Cir. 282 (Cir. Ct. City of Richmond 1989); Maksalenko v. Cropper, No. L-39-83 (Cir. Ct. Caroline Co. Jan. 9, 1984). Based on the above, it is my opinion that the defense of sovereign immunity may be available to a deputy sheriff in an appropriate case.

II. Deputy Sheriff Acting Within Scope of Employment May Be Immune from Suit for Negligent Operation of Motor Vehicle

The Supreme Court of Virginia consistently has held that employees of immune governmental bodies are not entitled to sovereign immunity for acts or omissions which constitute intentional, wanton, culpable or grossly negligent conduct or for acts beyond the scope of their employment. James v. Jane, 221 Va. 43, 53, 267 S.E.2d 108, 113 (1980). See also Fox v. Deese, 234 Va. 412, 423-24, 362 S.E.2d 699, 706 (1987). As a result, a deputy sheriff would not be entitled to sovereign immunity defense for such acts or omissions.

A deputy sheriff may be entitled to raise sovereign immunity as a defense, however, in an action for simple negligence resulting from an act within the scope of his
employment. Whether the deputy sheriff actually enjoys such immunity must be determined on a case-by-case basis. The Supreme Court of Virginia has held that several factors should be considered by a court in making this determination:

(1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion.


For purposes of your inquiry, I will treat the sheriff as the "governmental entity" that employs the deputy sheriff. It is certainly possible that, under appropriate factual circumstances, a court applying the Lentz four-factor test discussed above would conclude that a deputy sheriff is immune from suit for the negligent operation of a motor vehicle while carrying out his official functions. For example, if a deputy sheriff had a motor vehicle accident while in pursuit of a person suspected of violating the law, a persuasive argument could be made that the first two factors of the test had been satisfied. If the sheriff exercised a high degree of supervision and control over the deputy, the third factor of the Lentz test also could be satisfied. If the deputy sheriff exercised a significant amount of judgment and discretion in the apprehension of a suspect, a court could conclude that the fourth factor of the test had been satisfied as well.¹

The Supreme Court of Virginia has not had an opportunity to determine whether a deputy sheriff is entitled to sovereign immunity for acts of negligence while operating a motor vehicle in the scope of his employment. Several analogous circuit court opinions, however, have held that city and county police officers may plead sovereign immunity as a defense in tort actions based upon acts of simple negligence committed in the operation of their police vehicles. See, e.g., _Jefferson v. Howard_, 16 Va. Cir. 195 (Cir. Ct. City of Richmond 1989) (city officer operating police vehicle in response to call for assistance from another officer); _Robbins v. Wessel_, 12 Va. Cir. 231 (Cir. Ct. Chesterfield Co. 1988) (county police officer engaged in high speed chase).

Based on the above, it is my opinion that, depending on the facts of the particular case, the doctrine of sovereign immunity may be available to a deputy sheriff as a defense in a negligence action arising out of the operation of his motor vehicle in the course of his employment.

¹The Virginia Tort Claims Act, Va. Code Ann. §§ 8.01-195.1 through 8.01-195.8, while waiving the immunity of the Commonwealth under certain circumstances, preserves the immunity of state employees "to the extent and degree that such persons presently are immunized." Section 8.01-195.3.

²The Court in _First Va. Bank–Colonial_ reversed the decision of the trial court granting the clerk of court sovereign immunity from the ministerial acts of his subordinate. This reversal, however, was based on grounds that the acts complained of were ministerial in nature and, therefore, beyond the scope of sovereign immunity, and that the clerk was liable for those acts under the doctrine of _respondeat superior_. 225 Va. at 78, 80-81, 301 S.E.2d at 11, 13.

³I assume that your inquiry is directed to a deputy sheriff's operation of a motor vehicle that is not merely incidental to the performance of his official duties. In the example cited in Pt. II of this Opinion, the activity of the deputy sheriff is a unique public function. The deputy sheriff is not using the vehicle merely for transportation in the performance of a perfunctory duty. See 1986-1987 Att'y Gen. Ann. Rep. 45.
Monetary sanctions pursuant to statute not available for plaintiff's failure to file court-ordered pleading or to prosecute claim, for filing of motion for nonsuit or successive motions for nonsuit.

March 20, 1990

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

You request my opinion concerning the interaction of § 8.01-380 (pertaining to dismissal of actions by nonsuit) and § 8.01-271.1 of the Code of Virginia (pertaining to sanctions), and Rule 7B:2 of the Rules of the Supreme Court of Virginia (pertaining to pleadings in the general district courts). Specifically, you ask whether, pursuant to § 8.01-271.1, monetary sanctions may be granted to a defendant by a general district court upon a plaintiff's motion for a nonsuit.

I. Applicable Statutes

Section 8.01-380(B) provides:

Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits or counsel may stipulate to additional nonsuits. The court, in the event additional nonsuits are allowed, may assess costs and reasonable attorney's fees against the nonsuiting party.

Section 8.01-271.1 further provides:

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....

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....

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... including a reasonable attorney's fee.

Finally, Rule 7B:2 provides, in part:

The judge of any General District Court may require the plaintiff to file and serve a written bill of particulars and the defendant to file and serve a written grounds of defense within the periods of time specified in the order so
II. Facts

You describe two typical factual situations to illustrate your inquiry. First, the defendant moves for motion for summary judgment in a general district court for the plaintiff's failure, through procrastination or a busy schedule, to prepare and file a court-ordered bill of particulars. Plaintiff makes a contemporaneous motion for nonsuit. Second, plaintiff makes a last minute motion in a general district court for a continuance, then takes a nonsuit when the continuance is not granted.

Under both of these factual scenarios, a motion is made by the defendant pursuant to § 8.01-271.1 asking the court to impose monetary sanctions for plaintiff's failure to file a court-ordered pleading or for failure to prosecute a claim.

III. Monetary Sanctions Under § 8.01-271.1 May Not Be Imposed for Filing Motion for Nonsuit

Section 8.01-271.1 imposes sanctions only for statements affirmatively made—either by signed pleading or oral motion—and not for inaction. It is my opinion, therefore, that no monetary sanction under § 8.01-271.1 would be appropriate for plaintiff's inaction (i.e., plaintiff's failure to file a court-ordered pleading or to prosecute a claim), and that the appropriate sanction under these circumstances would be that provided by Rule 7B:2—the award of summary judgment to the adverse party.

Moreover, a court may not, in my opinion, impose sanctions under § 8.01-271.1 for a motion for nonsuit affirmatively requested by the plaintiff. Section 8.01-380(B) gives the plaintiff an absolute right to take one nonsuit. Nash v. Jewell, 227 Va. 230, 237, 315 S.E.2d 825, 828-29 (1984). Because that right is unconditional, a plaintiff may not be sanctioned for exercising that right.

If a party moves for an additional nonsuit, § 8.01-380(B) provides for the assessment of costs and attorney's fees if the nonsuit is allowed. Because this statute specifically provides for a particular sanction for filing successive nonsuits, it is my opinion that the sanctions under § 8.01-271.1 are not available.

The statute also imposes an identical standard for oral motions made in court.

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY — GARNISHMENT — PROCESS — WHO TO BE SERVED.

State, as opposed to federal, procedure governs for actions in garnishment to recover child support and alimony. Service of process on judgment debtor must comply with Virginia's statutory requirements; federal law requires federal agent to mail copy of garnishment to judgment debtor.

July 3, 1990

The Honorable Warren E. Barry
Clerk, Circuit Court of Fairfax County
You ask whether service of process on a judgment debtor pursuant to 42 U.S.C.A. § 659 (West 1983) is adequate in a Virginia garnishment proceeding to enforce a judgment for child support or alimony payments against funds held by the federal government. If such service is not adequate, you ask how the judgment debtor should be served.

I. Applicable Statutes

Section 8.01-511 of the Code of Virginia details the Virginia requirements for the institution of garnishment proceedings and requires that "[t]he summons and the notice ... shall be served on the garnishee, and shall be served on the judgment debtor promptly after service on the garnishee. Service on the judgment debtor and the garnishee shall be made pursuant to subdivision 1 or 2 of § 8.01-296." (Emphasis added.)

Section 659 authorizes garnishment against the United States for the enforcement of child support and alimony obligations. This federal statute provides, in part, that the federal agent who receives the garnishment shall,

as soon as possible but not later than fifteen days after the date effective service is so made of any such process, send written notice that such process has been so served (together with a copy thereof) to the individual whose moneys are affected thereby at his duty station or last-known home address. Section 659(d).

The relevant difference between the state and federal statutes quoted above is that § 8.01-511 requires the creditor to serve the judgment debtor pursuant to § 8.01-296(1) or (2),¹ while § 659(d) imposes a duty on the federal agent to mail a copy of the process to the debtor.

II. State Procedure Governs State Court Action

The purpose of § 659 is to waive the sovereign immunity of the United States government as a defendant in state court garnishment actions involving an individual's legal obligation "to provide child support or make alimony payments." Section 659(a); Stephens v. United States Dept. of Navy, 589 F.2d 783 (4th Cir. 1979); Diaz v. Diaz, 568 F.2d 1061, 1063 (4th Cir. 1977). This federal statute does not create any new federal cause of action or confer any further jurisdiction upon federal courts. Stephens, 589 F.2d at 783; Diaz, 568 F.2d at 1063. Actions in garnishment to recover child support and alimony that are authorized by § 659 fall squarely within the jurisdiction of state courts. Id. It is my opinion, therefore, that state procedures for service of process should be followed.

III. Service upon Judgment Debtor Must Comply with Virginia's Statutory Requirements

In the facts you present, it is further my opinion that service of process on a judgment debtor pursuant to 42 U.S.C.A. § 659 is not adequate and that the judgment debtor must be served pursuant to Va. Code Ann. §§ 8.01-296 and 8.01-511. Of course, this does not relieve the federal agent of his responsibility also to mail a copy of the garnishment to the judgment debtor, as required by § 659(d).

¹Pursuant to § 8.01-296(1), process is served by personal service, that is, by the delivery of process to an individual in person. Section 8.01-296(2) provides for substituted service of process, which requires either the delivery of a copy of the process at the debtor's usual place of abode to a member of the debtor's family who is at least sixteen years of age or, if the first method of service cannot be affected, the posting of a copy of the process on the front or main door of the debtor's place of abode.
2 Procedural rules, including those involving service of process, are controlled by the law of the forum in which the case is heard. Ches. & Ohio Ry. v. Kelly, 241 U.S. 485, 491 (1916). See also Dickinson v. Stiles, 246 U.S. 631, 633 (1918) (questions of procedure in state courts should be governed by state law).

CIVIL REMEDIES AND PROCEDURE: JUDGMENTS AND DECREES GENERALLY — ACTIONS — EVIDENCE.

No alias, or subsequent, process may issue on void judgment. Authenticated copy of original note previously filed by circuit court clerk may be used to support subsequent confession of judgment. No statutory requirement that clerk record failure of service upon judgment debtor within requisite sixty days. Creditor may confess one judgment against multiple debtors with liabilities of different amounts under single note or contract.

June 29, 1990

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

You ask several questions concerning a confession of judgment by an attorney-in-fact pursuant to § 8.01-432 of the Code of Virginia. First, you ask whether an alias service may be requested if the judgment debtor is not served with a copy of the judgment order within sixty days of the entry of the judgment, as required by § 8.01-438. If a new confession of judgment is required, you ask whether the original note should be transferred to a new file or whether a true copy of the original instrument may be filed in the new proceeding.

You also ask whether the circuit court clerk is required to note on the judgment lien docket the fact that judgment has not been served within sixty days.

Your third question is whether one judgment may be confessed against multiple debtors who have different liabilities under a single note.

I. Applicable Statutes

Section 8.01-432 codifies the common-law practice of judgment by confession:

Any person being indebted to another person, or any attorney-in-fact pursuant to a power of attorney, may at any time confess judgment in the clerk's office of any circuit court in this Commonwealth, whether a suit, motion or action be pending therefor or not, for only such principal and interest as his creditor may be willing to accept a judgment for, which judgment, when so confessed, shall be forthwith entered of record by the clerk in whose office it is confessed, in the proper order book of his court. Such judgment shall be as final and as binding as though confessed in open court or rendered by the court, subject to the control of the court in the clerk's office of which the same shall have been confessed.

Section 8.01-438 details the procedures that must be followed if a judgment is confessed by an attorney-in-fact and provides, in part:

If a judgment is confessed by an attorney-in-fact, it shall be the duty of the clerk within ten days from the entry thereof to cause to be served upon the judgment debtor a certified copy of the order so entered in the common-law
order book, to which order shall be appended a notice setting forth the provisions of § 8.01-433. The officer who serves the order shall make return thereof within ten days after service to the clerk. The clerk shall promptly file the order with the papers in the case. The failure to serve a copy of the order within sixty days from the date of entry thereof shall render the judgment void as to any debtor not so served.

Section 8.01-439 further provides:

Such confession and clerk's certificate, together with the power of attorney if the confession be by an attorney-in-fact, and the note, bond or other obligation, if there be such, on which the judgment is based, shall be securely attached together by the clerk and filed by him among the records in his office.

Finally, § 8.01-30 provides that "[u]pon all contracts ... made by more than one person ... an action may be maintained and judgment rendered against all liable thereon, or any one or any intermediate number ...."  

II. Alias Process May Not Issue on Void Judgment

Alias, or subsequent, process generally may issue until there is a return of "executed." M. Burks, Pleading and Practice § 38 (4th ed. 1952). On the other hand, there can be no alias process to a void summons. Rennolds and Others v. Williams, 147 Va. 196, 136 S.E. 597 (1927).

Pursuant to § 8.01-438, a judgment confessed by an attorney-in-fact is void as to any debtor upon whom the judgment has not been served within sixty days from the date of entry. In such case, the confessed judgment has no further legal existence. It is my opinion, therefore, that no alias, or subsequent, process may issue based upon this void judgment.

III. Copy of Note May Be Filed with Subsequent Judgment

For the purposes of this Opinion, I assume that a second judgment may be confessed on the same note when the first judgment is void.  

As quoted above, § 8.01-439 directs the circuit court clerk to file a confessed judgment, the power of attorney and the note among the records of his office and, as a result, these documents become official records of the court. An authenticated copy of any official court record may be used as prima facie evidence. See § 8.01-389. It is my opinion, therefore, that an authenticated copy of the original note, which is already on file in the prior proceeding, may be used to support a subsequent confession of judgment.

IV. Clerk Is Not Required to Record Failure to Serve Debtor with Process

Prior to the amendments enacted by the 1988 Session of the General Assembly, § 8.01-438 required the clerk to record a note in the judgment lien docket if a judgment debtor was not served within sixty days of the entry of a confessed judgment. The current provisions of § 8.01-438 have no such requirement. Since the prior language, discussed above, was removed, it is my opinion that the clerk no longer is required to note on the judgment lien docket the failure of service within the requisite sixty days.
V. Judgment Creditor May Confess One Judgment Against Debtors with Different Liabilities Under Single Note

Section 8.01-30 provides that "[u]pon all contracts ... made by more than one person ... an action may be maintained and judgment rendered against all liable thereon, or any one or any intermediate number ...." Although no adjudication is required in entering a judgment by confession, such a judgment has all the qualities, incidents and attributes of any other judgment. Beazley's Adm'r v. Sims' Adm'r, 81 Va. 644, 647-48 (1886); 11A M.J. Judgments and Decrees § 176 (1978). Based on the above, it is my opinion that, when there are multiple debtors under a single note or contract, the creditor may confess a single judgment against each person liable under that note or contract. The fact that the debtors' liabilities are for different amounts does not affect this conclusion.

1 An "alias process" is a further or second process used when the first has failed to accomplish its purpose. Black's Law Dictionary 66 (5th ed. 1979).

2 Section 8.01-433 provides for the setting aside or modification of a confessed judgment under certain circumstances, none of which is pertinent to the questions you ask.

3 It generally is agreed that the entry of a judgment confession exhausts the power given and precludes the entry of subsequent judgments. Some courts have held, however, that the power of attorney is not exhausted if the first judgment subsequently is vacated. Annotation, Successive Judgments by Confession on Cognovit Note or Similar Instrument, 80 A.L.R.2d 1380 (1961).


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

WILLS AND DECEDEDS' ESTATES: ADMINISTRATION OF ESTATES - SETTLEMENT OF ACCOUNTS AND DISTRIBUTION.

Elements necessary for inclusion in order of publication published in newspaper for purposes of public notification; omission of contents not necessary reasonably to apprise interested parties of nature and object of underlying judicial proceeding.

January 24, 1990

The Honorable Clifford R. Weckstein
Judge, Circuit Court for the City of Roanoke

You ask what information from an order of publication is required to be published in a newspaper publication of that order. Specifically, you ask whether the date of entry of the order of publication, the judge's name, the endorsement of requesting counsel and a clerk's certificate of authenticity must be published in the newspaper. You further ask whether it is necessary to publish any information other than that specifically required by § 8.01-317 of the Code of Virginia, which generally governs the contents of orders of publication.1

You state that your inquiry is prompted, in part, by a question raised by the local media and members of the bar in your circuit concerning the extent to which information contained in a show cause order against distribution of a decedent's estate pursuant to § 64.1-179 must be published in a newspaper.

I. Applicable Statutes

Section 8.01-317 provides, in part:
Except in condemnation actions, every order of publication shall give the abbreviated style of the suit, state briefly its object, and require the defendants, or unknown parties, against whom it is entered to appear and protect their interests on or before the date stated in the order which shall be no sooner than fifty days after entry of the order of publication.

The Code of Virginia does not provide a particular form of notice for such publication.

Section 64.1-179, governing publication of a show cause order against distribution of a decedent's estate, requires newspaper publication of the order, but does not specify the contents of that order. Section 64.1-180, however, provides a model form for notices published pursuant to § 64.1-179. That form includes the name of the court entering the show cause order against distribution, identifies the affected estate and describes the date and place of the hearing noticed by the show cause order. The model form in § 64.1-180 also includes an attestation on the order by the clerk of the circuit court.

II. Published Orders Must Provide Meaningful Notice of Object and Nature of Proceedings to Affected Parties

An order of publication issued pursuant to § 8.01-317 is a substitute for personal service of process; its purpose is to "apprise the defendant of the nature and object of the proceeding against him and to notify him that his rights may be affected in the litigation." Robertson v. Stone, 199 Va. 41, 43, 97 S.E.2d 739, 741 (1957). Similarly, the publication of a show cause order against distribution of a decedent's estate pursuant to § 64.1-179 is designed to protect the interests of parties having claims against the estate and, further, to protect the personal representative of the estate from unknown or contested claimants. Carter v. Skillman, 108 Va. 204, 60 S.E. 775 (1908). The object of providing meaningful notice to affected parties is an important consideration in determining which provisions of an order of publication must be published.

The statutory form of notice to show cause against distribution of a decedent's estate in § 64.1-180, although not mandatory, does provide a guideline for the contents of published notices. While the model notice in this statute includes the date of entry of the show cause order, as well as the identity of the circuit court entering the order, it omits language that is not necessary for purposes of public notification, such as the name of the circuit court judge entering the show cause order.

The Office of the Executive Secretary of the Supreme Court of Virginia has developed a form order of publication, entitled "Order of Publication, Commonwealth of Virginia" for use by general district courts to comply with § 8.01-317. The form order is separated into three sections, only one of which is designated for publication by a newspaper. The section of this form order designated "for publication" identifies the issuing district court, describes the object, time and location of the proceeding, and includes the date of the order. The publication of these elements satisfies the statutory purpose of apprising interested parties, who typically are unknown, of the nature and object of the particular proceeding. The fact that these elements appear in the model statutory notice of § 64.1-180 for the distribution of an estate supports this interpretation.

III. Published Publication Order Should Include Date of Order, Identity of Court and Description of Proceeding

Based on the above, it is my opinion that the contents of published portions of orders of publication must be selected reasonably to apprise interested parties of the nature and object of the underlying judicial proceeding. While the endorsement of counsel and prefatory language found in orders of publication entered by a court need not be published in a newspaper, it is further my opinion that the publication should include the
date of entry of the order, the identity of the court entering the order, and an adequate
description of the time, place and purpose of the proceeding. The use of the model forms
described in this Opinion would satisfy statutory requirements and avoid any misunder-
standing concerning what portions of an order of publication must be published.

1Although your inquiries do not address the constitutional adequacy of published
notices permitted by state law, I note that, if an interested party's name and address are
"reasonably ascertainable," notice by publication may not satisfy due process require-
ments under the Fourteenth Amendment of the Constitution of the United States. Men-

See Form DC-436 6/88 (114:9-015 9/89). See also § 16.1-69.51 (authorizing the Com-
mittee on District Courts, after consultation with the Executive Secretary of the
Supreme Court, to determine the form of district court records).

CIVIL REMEDIES AND PROCEDURE: RECEIVERS, GENERAL AND SPECIAL.

Circuit court clerk may receive compensation for services in amount court deems rea-
sonable for cash bonds of $2,500 or more; compensation not to exceed amounts specified
by statute. Civil or criminal cash bonds of $2,500 or more must be included in report
clerk files with Department of General Services' Division of Risk Management.

October 1, 1990

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

You ask whether § 8.01-600 of the Code of Virginia authorizes a circuit court clerk
to be paid the fees specified in § 8.01-589 for cash bonds of $2,500 or more received by
the clerk in criminal and civil cases. You also ask whether criminal and civil cash bonds
of $2,500 or more must be included in the report that § 8.01-600.1 requires the clerk to
file with the Division of Risk Management (the "Division") of the Department of General
Services.

I. Applicable Statutes

Chapter 22 of Title 8.01, §§ 8.01-582 through 8.01-606, contains provisions relating
to general and special receivers. Section 8.01-589(A) provides:

A general receiver may receive as compensation for his services such
amount as the court deems reasonable, but not exceeding:

1. Ten dollars at receipt of the originating court order to receive funds,
deposit funds, and establish files and accounting records with respect to
those funds;

2. Ten dollars when all funds held for a beneficiary or beneficiaries are
disbursed;

3. Ten dollars per draft or check for periodic and final disbursements;

4. Five percent of the interest income earned; and

5. Ten dollars for remitting funds to the State Treasurer and up to ten dol-
sars per draft for remitting those funds.
Section 8.01-600 describes how funds under the control of the court shall be deposited, what records shall be kept, and the liability of the clerk for such funds. Section 8.01-600 also states, in part:

This section shall not apply to money or cash in an amount less than $2,500 received in lieu of surety on any bond in criminal or civil cases appealed to the circuit court, or on criminal or civil cases appealed from the circuit court to the Court of Appeals or the Supreme Court of Virginia.

... When the clerk receives funds under this section, he shall be entitled to receive fees in accordance with § 14.1-143.2 in the amounts as specified for general receivers in § 8.01-589.

Section 8.01-600.1 describes the clerk’s own surety bond and annual reporting requirements:

The clerk shall annually obtain bond through the Department of General Services’ Division of Risk Management in an amount sufficient to cover the funds anticipated to be received pursuant to § 8.01-600 during the next year. No later than October 1 of each year, he shall report to the Division the amount of money under his control pursuant to § 8.01-600 as of June 30 of the current year and shall report the amount he expects to come under his control for the year ending on June 30 of the following year. He shall also report any other information reasonably required by the Division concerning bond coverage of money under his control. The cost of the bond shall be apportioned among the funds under his control as of the billing date based on the amount of each owner’s or beneficiary’s money.

II. Section 8.01-600 Authorizes Clerk to Receive Compensation for Services in Amount Court Deems Reasonable for Handling Cash Bonds of $2,500 or More; Fees May Not Exceed Sums Specified in § 8.01-589

You first ask whether § 8.01-600 authorizes the clerk to be paid fees as set forth in § 8.01-589 for handling cash bonds of $2,500 or more in criminal or civil cases. Section 8.01-589 authorizes a general receiver to receive as compensation for his or her services an amount deemed reasonable by the court, but not to exceed the amounts set forth in this section. Section 8.01-600 states that its requirements will not apply to cash bonds in amounts of less than $2,500. By specifying that its provisions do not apply to cash bonds in amounts of less than $2,500, § 8.01-600 clearly makes its provisions applicable to cash bonds of that amount or greater. The mention of one thing in a statute implies the exclusion of another. 1989 Att’y Gen. Ann. Rep. 40, 42. "[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).

Section 8.01-600 further provides that "[w]hen the clerk receives funds under this section, he shall be entitled to receive fees in accordance with . . . § 8.01-589." Because the terms of § 8.01-600 apply to cash bonds in amounts of $2,500 or more, it is my opinion that § 8.01-600 authorizes the clerk to receive compensation for his or her services in such an amount as the court deems reasonable when the clerk accepts cash bonds in the amount of $2,500 or more, but such compensation may not exceed the amounts specified in § 8.01-589.
You also ask whether criminal or civil cash bonds of $2,500 or more must be included in the report that § 8.01-600.1 requires the clerk to file with the Division. Section 8.01-600.1 requires each clerk to obtain a fidelity bond annually through the Division in an amount sufficient to cover the funds anticipated to be received by the clerk pursuant to § 8.01-600 during the next year. The clerk must report to the Division the amount of money under his or her control as of June 30 of the current year, and the amount anticipated to be received by the clerk for the year ending on June 30 of the following year. Section 8.01-600.1.

Because § 8.01-600 applies to cash bonds in the amount of $2,500 or more, and § 8.01-600.1 applies to funds received or anticipated to be received pursuant to § 8.01-600, it is my opinion that cash bonds of $2,500 or more must be included in the report that § 8.01-600.1 requires the clerk to file with the Division.

CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.

Chesapeake Bay Preservation Area regulations not self-executing; reserve sewage drainfield and full buffer area criteria only affect landowner after adoption of local ordinance. Lots recorded prior to effective date of regulations have limited vested rights. Vested rights determined as of date of adoption of local ordinance imposing Act's requirements; vested rights subject to new regulations to greatest extent possible.

August 10, 1990

Ms. Sharon E. Pandak
County Attorney for Prince William County

You ask certain questions requiring an interpretation of §§ 4.2(7)(b) and 4.3(B)(2) of Part IV of the Chesapeake Bay Preservation Area Designation and Management Regulations, VR 173-02-01 (the "Regulations"). 6:1 Va. Regs. Reg. 11, 16, 17-18 (1989) [hereinafter 6:1 Va. Regs.].

I. Applicable Statute and Regulations

Section 10.1-2115 of the Code of Virginia, a portion of the Chesapeake Bay Preservation Act, §§ 10.1-2100 through 10.1-2115, provides that the Act "shall not affect vested rights of any landowner under existing law."

The Chesapeake Bay Local Assistance Board has promulgated the Regulations pursuant to § 10.1-2107(A) to "establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or to use and develop land in" Chesapeake Bay Preservation Areas designated by the locality.

Section 4.1(A) of the Regulations provides that the land use and development performance criteria "become mandatory upon the local program adoption date." 6:1 Va. Regs., supra, at 15-16. The local program adoption date is the date a local government meets the requirements of having (1) a map delineating Chesapeake Bay Preservation Areas in the locality, and (2) performance criteria applying in Chesapeake Bay Preservation Areas in that locality that employ the requirements of Part IV of the Regulations. See 6:1 Va. Regs., supra Pt. I, § 1.4, at 12; see id. Pt. II, § 2.2(A)-(B), at 14.

Section 4.2(7)(b) of the Regulations requires that any new construction must
provide a reserve sewage disposal site with a capacity at least equal to that of the primary sewage disposal site. This reserve sewage disposal site requirement shall not apply to any lot or parcel recorded prior to the effective date of these regulations, and which lot or parcel is not sufficient in capacity to accommodate a reserve sewage disposal site, as determined by the local health department.


Section 4.3(B)(2) of the Regulations provides that when the application of the required buffer area in a Resource Protection Area would result in the loss of a buildable area on a lot or parcel recorded prior to the effective date of these regulations, modifications to the width of the buffer may be allowed in accordance with the following criteria:

a. Modifications to the buffer area shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities.

b. Where possible, an area equal to the area encroaching the buffer area shall be established elsewhere on the lot or parcel in a way to maximize water quality protection.

c. In no case shall the reduced portion of the buffer area be less than 50 feet in width.


Section 6.5 sets October 1, 1989, as the effective date of the Regulations. 6:1 Va. Regs., supra Pt. VI, at 24.

II. Adoption of Local Ordinance Triggers Drainfield and Buffer Requirements

Your first question is whether the reserve sewage drainfield and full buffer area criteria should be applied to lots that were recorded after October 1, 1989, but before the adoption of an ordinance implementing the requirements of the Regulations.

Until a locality adopts an implementing ordinance, there are no Chesapeake Bay Preservation Area criteria to apply to lots in that locality. The Regulations are not self-executing on landowners. Section 4.1(A) provides that the "criteria become mandatory upon the local program adoption date." 6:1 Va. Regs., supra, at 15-16. It is my opinion, therefore, that the criteria only affect a landowner after they are adopted by local ordinance.

Upon adoption of an ordinance, reserve drainfield and full buffer area requirements apply to all lots except lots recorded prior to the effective date of the Regulations that either (1) already are vested under a traditional vesting analysis, or (2) fall within the exception in § 4.2(7)(b) or § 4.3(B)(2), quoted above.

Upon a traditional vesting analysis, vesting occurs when a building permit has been issued, or if no building permit has been issued, when an owner has incurred substantial good-faith expenditures based on local approval of his plans for development. See Fairfax County v. Medical Structures, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972) (where special use permit was granted under existing zoning, bona fide site plan was filed and diligently pursued, and substantial expense was incurred in good faith before change in zoning
requirements, permittee had vested right to land use described in use permit). See also 1989 Att'y Gen. Ann. Rep. 32. A vested project may be completed as permitted, even though it cannot comply with current requirements.

III. Lots Recorded Prior to October 1, 1989, Have Limited Vested Rights

Your second question is whether a landowner's rights to use of a lot have vested with respect to the reserve drainfield and buffer requirements where (1) the lot was subdivided before the effective date of the Regulations, but (2) the lot was not developed before the adoption of the local ordinance, and (3) no plans for development of the lot had been submitted to the locality for approval prior to the time of local ordinance adoption.

As provided in §§ 4.2(7)(b) and 4.3(B)(2), a lot that was recorded prior to October 1, 1989, but was not developed before adoption of the local ordinance, and cannot meet the reserve drainfield and full buffer requirements of the local ordinance and still retain a usable building site, does not have to meet those requirements, or in other words, is vested as to those requirements. If the lot can be built upon and still meet the reserve drainfield and full buffer requirements, however, the exceptions and modifications in §§ 4.2(7)(b) and 4.3(B)(2) do not apply. 61 Va. Regs., supra, at 16, 18.

You also ask whether an owner who, before October 1, 1989, recorded a lot on which it is feasible to establish a reserve drainfield and buffer, and who has submitted plans for development of the lot that have advanced far enough in the development process to be vested under a traditional vesting analysis, is required to comply with the Regulations. A prior Opinion of this Office concludes:

[T]he 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 conformity.' 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.

1989 Att'y Gen. Ann. Rep., supra, at 36 (citations omitted). Based on similar reasoning, I am of the opinion that an owner must comply with the reserve drainfield and buffer requirements on lots on which it is feasible to meet those requirements, even if the owner's rights to use of the property might otherwise be vested under a traditional vesting analysis.

IV. Date of Common Law Vesting Is Date of Local Ordinance Adoption

Your final question is what date the locality should use to determine vesting issues. Because, as discussed in Part I above, the Regulations take effect only upon the adoption of a local ordinance, it is my opinion that the date of adoption of the local ordinance is the determinative date for analyzing a particular owner's common law vested rights. October 1, 1989, is the relevant date only for determining whether lots that were recorded before that date, but that cannot meet the reserve drainfield and full buffer requirements, are eligible for the exceptions and modifications discussed in Part III above.

1Buffer requirements provide that a 100 foot buffer area "shall be retained if present and established where it does not exist." However, "a combination of a buffer area not
less than 50 feet in width and appropriate best management practices [to achieve the purposes of the Resource Protection Areas] at least the equivalent of the 100 foot buffer area may be employed in lieu of the 100 foot buffer." 6:1 Va. Regs., supra § 4.3(B), at 18.

"Note that § 4.3(B)(2) authorizes a reduced buffer area, not the elimination of all buffer area. See supra note 1.

CONSERVATION: VIRGINIA RECREATIONAL FACILITIES AUTHORITY ACT.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

ADMINISTRATION OF GOVERNMENT GENERALLY: TREASURY, STATE TREASURER AND COMPTROLLER.

Authority required to use appropriation solely for purposes of land acquisition; required to deposit appropriation with bank or trust company; may use interest earned on appropriation for any statutorily authorized purposes. Authority's own contracts for goods and services subject to requirements of Procurement Act; payments for materials and services procured by nongovernmental entity for which entity entitled to reimbursement need not be competitively bid.

July 25, 1990

The Honorable G. Steven Agee
Member, House of Delegates

You ask several questions concerning the expenditure of funds by the Virginia Recreational Facilities Authority (the "Authority"). You first ask whether the Authority may lawfully use interest earned on a $6 million land acquisition appropriation by the General Assembly for purposes not directly related to land acquisition, such as buying and moving old buildings and maintaining, repairing and providing security on Authority property. You also ask whether the Virginia Public Procurement Act applies to the procurement of the described services or to the purchase of two storage buildings.

I. Facts

"EXPLORE" is a cooperative venture between the Authority and the Roanoke River Foundation ("River Foundation") to develop a family oriented tourist attraction along the Roanoke River. See 1986-1987 Att'y Gen. Ann. Rep. 62, 63 n.1. The River Foundation is a private, nonprofit organization established in 1985 with contributions from business and civic leaders to promote economic development in the western region of the Commonwealth through such a tourist attraction.

The information you provided includes a memorandum prepared by the Roanoke Times & World-News, an Agreement dated January 6, 1989, between the Authority and the River Foundation (the "1989 Agreement"), and a private legal opinion the Authority obtained concluding that the interest earned on the appropriation could be used "for any of the Authority's lawful purposes." Letter from Roger C. Wiley to Ms. Joyce Waugh (Feb. 13, 1989). These documents reflect that the Authority contracted with the River Foundation in January 1989 to operate the EXPLORE project through the planning and development phases. The 1989 Agreement states that the Authority solicited proposals for the operation of the project "[p]ursuant to its statutory power and the Virginia Public Procurement Act." Id. § 1.
The 1989 Agreement provides in § IV that the River Foundation shall provide services "without charge to the Authority," except that (1) the Authority "shall ... reimburse [the River] Foundation for its payroll and related costs for staff time, and overhead expenses, to the extent the same are directly attributable to land acquisition efforts, and for legal, appraisal, engineering and other expenses customarily incurred in acquiring real property," and that (2) the River Foundation reserves the right to reimbursement for costs associated with other EXPLORE project activities "[as] funds become available to [the] Authority, through [the River] Foundation's fund-raising efforts or from other sources." The terms of such reimbursement are to be approved by the Authority by amendments to the 1989 Agreement.

Since 1988, the Authority's sole source of funds, with the exception of a small amount of rent, has been interest earned on the unexpended portion of the $6 million appropriation from the 1988-1990 Appropriations Act which the Authority deposited in interest-bearing accounts. Interest on these funds through March 1990 totaled $237,741.10.

In March 1989, the Authority obtained a line of credit secured by interest earned on the appropriated funds. The line of credit and accrued interest have been used to acquire and move old buildings to be used as part of the EXPLORE project, to maintain, repair and provide security on Authority property, and to purchase two storage buildings. In making these expenditures, the Authority has reimbursed the River Foundation for subcontractors and has made payments directly to vendors, principally Renovation Specialists, a firm that has a contract with the River Foundation. The Authority has no contract with Renovation Specialists. Between April 1989 and May 1990, the Authority made payments directly to Renovation Specialists totaling $196,535.79, primarily for moving old buildings and maintaining Authority property. Part of the Authority's payments to Renovation Specialists included $16,225.00 expended in 1989 to purchase two storage buildings. The Authority did not solicit bids for the work performed by Renovation Specialists. The storage building purchases also were not competitively bid.

II. Statutes and Appropriations Act Provisions

The 1986 Session of the General Assembly approved the River Foundation's proposal to develop the EXPLORE project and authorized the Division of Parks and Recreation of the Department of Conservation and Historic Resources to acquire property that the Authority determined was necessary to develop the EXPLORE project, including a 700-acre site for a state park. Ch. 354, 1986 Va. Acts 586 (Reg. Sess.). Chapter 354 also authorized the Department of Highways and Transportation to acquire land for a scenic parkway. Id. at 587.

The 1986 Session of the General Assembly also enacted Chapter 13.1 of Title 10, §§ 10-158.1 through 10-158.20, of the Code of Virginia, establishing the Authority as a political subdivision of the Commonwealth to perform an essential governmental function in promoting and providing the EXPLORE project. Ch. 360, 1986 Va. Acts 596 (Reg. Sess.). Two years later, the General Assembly recodified Chapter 13.1 of Title 10 as Chapter 16 of Title 10.1, §§ 10.1-1600 through 10.1-1622 ("Chapter 16"). Ch. 891, 1988 Va. Acts 1874, 1998-2003. Section 10.1-1601 provides:

In order to (i) provide a high quality recreational attraction in the western part of the Commonwealth; (ii) expand the historical knowledge of adults and children; (iii) promote tourism and economic development in the Commonwealth; (iv) set aside and conserve scenic and natural areas along the Roanoake River and preserve open-space lands; and (v) enhance and expand research and educational programs, there is created a political subdivision of the Commonwealth to be known as "the Virginia Recreational Facilities
Authority.' The Authority's exercise of the powers conferred by this chapter shall be deemed to be the performance of an essential governmental function.

The 1988-1990 Appropriations Act made a $6 million general fund appropriation to the Authority as a "Non-State Agency" under Item 334 of § 1-76. Ch. 800, 1988 Va. Acts 1280, 1412. Section 1-76 of the 1988-1990 Appropriations Act specifies the purpose of this appropriation:

This appropriation shall be provided solely for the purpose of land acquisition. Federal funds provided to the state for extension of the Blue Ridge Parkway in conjunction with Authority projects shall be applied toward the match requirements of § 4-5.07 of this Act.

Section 4-5.07 provides special requirements for appropriations to nonstate agencies, including requirements that nonstate agencies maintain segregated accounts in compliance with regulations prescribed by the State Comptroller and submit timely biennial budget requests certifying the availability of matching funds from other public and private sources. 1988 Va. Acts, supra, at 1591.

Chapter 16 details rules for the governance and conduct of the Authority. Sections 10.1-1602 and 10.1-1603(7) authorize the Authority to retain and compensate an executive director, consultants, investment bankers, financial experts, architects, engineers and other enumerated professionals with funds made available to the Authority. Section 10.1-1617 requires that all moneys of the Authority must be deposited with banks or trust companies in special accounts:

All moneys of the Authority, from whatever source derived, shall be paid to the treasurer of the Authority. Such moneys shall be deposited by the treasurer in one or more banks or trust companies, in one or more special accounts. All banks and trust companies are authorized to give security for such deposits, if required by the Authority. The moneys in the accounts shall be paid out on the warrant or other order of the treasurer of the Authority or any person authorized by the Authority to execute such warrants or orders.

Section 10.1-1611 provides that all moneys received pursuant to Chapter 16 are deemed to be trust funds which may be used for the general purposes authorized in that chapter. Under § 10.1-1615, the Authority is authorized to accept and expend state moneys subject to the conditions prescribed by the Commonwealth.

Section 11-41(A) of the Virginia Public Procurement Act, §§ 11-35 through 11-80 (the "Procurement Act"), provides that "[a]ll public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law."

III. Authority Required to Deposit Funds with Bank or Trust Company and May Use Interest for Any Purpose Authorized in Chapter 16

Neither the 1988-1990 Appropriations Act nor the statutes creating the Authority as a political subdivision of the Commonwealth contain language that would prohibit deposit of the $6 million land acquisition appropriation with a bank or trust company and use of the interest income to finance the Authority's general operations. Section 10.1-1617 requires the Authority to deposit all funds, including appropriated funds, with a bank or trust company until the principal is expended for an authorized purpose. There is
Section 1-76 of the 1988-1990 Appropriations Act contains a clear statement of intent to limit use of the $6 million appropriation to the Authority to land acquisition. 1988 Va. Acts, supra, at 1412. Section 10.1-1615 further requires that all state moneys received by the Authority must be expended on the terms and conditions prescribed by the Commonwealth. There is, however, no reference to interest income earned on the money appropriated.

Section 10.1-1611 specifies that all moneys received by the Authority pursuant to Chapter 16 are "trust funds to be held and applied solely as provided in this chapter." The General Assembly is explicit when it intends to prohibit use of accrued interest for otherwise authorized purposes such as operation and maintenance. See, e.g., 1975-1976 Att'y Gen. Ann. Rep. 206, 207 (limitation on appropriation specified in Chapter 421, 1962 Va. Acts 681) that interest and other income "shall be used for the purposes of the [State Education Assistance] Authority other than maintenance and operation"). See also 1986-1987 Att'y Gen. Ann. Rep. 62 (when Authority has general statutory power under $10-158.5(3) (now §10.1-1603(1)) to acquire land without acreage limitation, such restrictions on acquisitions by the State Division of Parks and Recreation for Authority purposes under Chapter §3, 1986 Va. Acts, supra, at 587, do not apply to the Authority's power). Neither the 1988-1990 Appropriations Act nor Chapter 16 contains such a prohibition regarding the use of accrued interest on the $6 million appropriation to the Authority.

Virginia has by statute altered the general common law rule that interest on a fund becomes a part of the principal that may be expended only for the purposes for which expenditure of the principal is authorized. See Queen v. Moore, 340 S.E.2d 838, 841 (W. Va. 1986) (holding that, in absence of lawful separation, general rule is that interest on fund becomes part of principal). When interest is to become a part of the particular principal fund generating it, the General Assembly explicitly so provides. See, e.g., § 52-4.3 (Drug Investigation Special Trust Account); § 54.1-2113 (Virginia Real Estate Transaction Recovery Fund); § 54.1-1119 (Contractor Transaction Recovery Fund); § 3.1-22.12 (Chippokes Plantation Farm Foundation Fund). See also § 58.1-3142 (Interest on funds of state or political subdivision received by city or county treasurer belongs to fund); Att'y Gen. Ann. Rep.: 1983-1984 at 366; 1977-1978 at 350, 351; 1974-1975 at 213; 1973-1974 at 44, 46; 1972-1973 at 340, 341 (construing predecessor § 58-930). But see 1974-1975 Att'y Gen. Ann. Rep. 71 (applying general principle that interest on fund belongs to such fund in case of general district court funds not belonging to state or political subdivision and not governed by any specific statute). Neither the 1988-1990 Appropriations Act nor Chapter 16 provides that interest earned on the $6 million appropriation to the Authority becomes part of the principal.

The General Assembly could, of course, provide that interest on the Authority's appropriation becomes part of the principal, or prohibit the use of that interest for other than land acquisition purposes. Consistent with §§ 2.1-180 and 2.1-185, the general statutory provisions concerning the deposit of state funds by state agencies and the investment of surplus state funds by the Governor and State Treasurer, the Commonwealth's long-standing policy has been to credit interest on all public funds to the general fund unless specifically stated otherwise in the Code of Virginia or the relevant Appropriations Act.

Section 1-76 of the 1988-1990 Appropriations Act does not establish any time limitation within which the appropriation must be expended to acquire land for the EXPLORE project.
Based on the above, it is my opinion that the Authority is required to use the $6 million appropriation in the 1988-1990 Appropriations Act solely for purposes of land acquisition. It is further my opinion that the Authority is required to deposit this appropriation with a bank or trust company until the appropriation is expended for land acquisition but that, in the absence of a statute providing that the interest earned on the appropriation to the Authority becomes part of the principal, or prohibiting the use of interest for other than land acquisition purposes, the Authority may use interest earned on the appropriation for any of the purposes authorized in Chapter 16.

IV. Authority's Contracts for Goods and Services Subject to Procurement Act

In the facts you present, the Authority has made payments directly to vendors, primarily Renovation Specialists, for moving old buildings, for maintenance, repair and security on Authority property, and for the purchase of two storage buildings, none of which was competitively bid. The Authority's 1989 Agreement provides for reimbursement of River Foundation expenditures not directly relating to land acquisition from nonappropriated funds by amendments to the Agreement. The Authority has no contract with the primary vendor, Renovation Specialists.

As an independent political subdivision created by the General Assembly pursuant to § 10.1-1601, the Authority would be considered a "public body" for purposes of the Procurement Act. See 1987-1988 Att'y Gen. Ann. Rep. 84, 87 (independent political subdivisions are public bodies within meaning of § 11-37 of the Procurement Act and its predecessors). An independent grant of procurement authority—such as that provided to the Authority in §§ 10.1-1602 and 10.1-1603(7)—to retain and compensate an executive director, consultants and certain experts—will not, by itself, remove a procurement from the scope of the Procurement Act. See 1982-1983 Att'y Gen. Ann. Rep. 635, 636 (treasurer's selection of depository for public funds subject to Procurement Act).

Section 11-41(A) specifies that the Procurement Act applies to "[a]ll public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction." Contracts for the acquisition of real property fall outside the scope of the Procurement Act. See 1983-1984 Att'y Gen. Ann. Rep. 290 (substance of lease must be examined to determine whether, in actuality, it is one for the purchase of goods and services for purposes of the Procurement Act). Similarly, contracts entered into by a private developer entitled to reimbursement by a public body are not subject to the Procurement Act where the construction and materials contracts are not contracts of the public body itself. See 1985-1986 Att'y Gen. Ann. Rep. 47, 49.

Based on the foregoing, it is my opinion that, in the circumstances presented, the Authority's payments directly to Renovation Specialists for moving old buildings, for providing maintenance, repair and security services on Authority property, and for the purchase of two storage buildings were not in violation of the Procurement Act to the extent that the payments were for materials and services which the River Foundation procured and for which it is entitled to receive reimbursement under the 1989 Agreement. That Agreement was entered into pursuant to the Procurement Act. The Authority itself has no contract with Renovation Specialists and there is no requirement that subcontracts between nongovernmental entities be competitively bid. To the extent that the Authority itself enters into contracts with Renovation Specialists or other vendors for the described services, storage buildings, or similar construction materials and services, however, it is my opinion that such contracts would be subject to the requirements of the Procurement Act.

V. Summary

In summary, based on the facts presented, I conclude that:
1. Neither the terms of the 1988 land acquisition appropriation nor the statutes establishing the Authority prohibit the use of interest earned on the appropriated funds for the purposes authorized in Chapter 16.

2. The Authority's own contracts for goods and services are subject to the provisions of the Procurement Act, but payments made for materials and services which were procured by the River Foundation and for which the River Foundation was entitled to receive reimbursement under the 1989 Agreement are not governed by the Procurement Act.

1Section 4-1.02 of the 1988-1990 Appropriations Act authorizes the Governor to direct the State Comptroller to withhold further disbursements to a "state or other agency" when the Governor determines that an appropriation is not being used for the purpose authorized or exceeds the amount needed to accomplish that objective. Ch. 800, 1988 Va. Acts 1280, 1574. Here, however, the documents you provide reflect that the entire $6 million appropriation already has been disbursed to the Authority.

2Compare § 51.1-116 (procurement of investment-related services by the Board of Trustees of the Virginia Retirement System "shall not be subject to the provisions of the Virginia Public Procurement Act").

Storage buildings of the type you describe presumably are not permanently affixed to land when purchased and, therefore, would be considered goods for purposes of § 11-41(A) of the Procurement Act. See Black's Law Dictionary 1137 (5th ed. 1979) (real estate includes buildings permanently affixed to land). As noted, contracts for the acquisition of real property fall outside the scope of the Procurement Act.

CONSTITUTION OF VIRGINIA: FUTURE CHANGES — EDUCATION — SCHOOL BOARDS.

GENERAL ASSEMBLY: GENERAL ASSEMBLY AND OFFICERS THEREOF.

Strict compliance with amendatory requirements of Constitution necessary; identical resolutions must be adopted by separate legislative sessions. Printing error in enrolled bill does not affect validity of amendment process.

February 1, 1990

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

You ask whether a printing error in the enrolled version of House Joint Resolution No. 178 ("H.J. Res. No. 178"), adopted by the 1989 Session of the General Assembly, constitutes a change that would affect the scheduling of the appearance of this proposed constitutional amendment on the ballot in 1990, assuming that the proposed amendment is approved by the 1990 Session of the General Assembly.

I. Facts

H.J. Res. No. 178 proposes an amendment to Article VIII, § 7 of the Constitution of Virginia (1971). The resolution was introduced in 1988 and carried over to the 1989 Session. As introduced, H.J. Res. No. 178 would have added the following sentence to Article VIII, § 7: "The General Assembly may adopt a grievance procedure for school board employees where final decision-making authority is vested in a person or body other than the school board." The House of Delegates adopted H.J. Res. No. 178, as proposed, on

In the enrolled version of H.J. Res. No. 178, the word "than" in the proposed amendatory language was misprinted as "then." This printing error was corrected by hand by the legislative staff to read "than" on the original enrolled bill.

The General Assembly presently is considering House Joint Resolution No. 21 (1990 Sess.) and House Bill No. 165 (1990 Sess.) to continue the process of amending the Constitution of Virginia and providing for a referendum on the proposed constitutional amendment.

II. Applicable Constitutional and Statutory Provisions

Article XII, § 1 provides for the procedure by which the Constitution of Virginia may be amended. This procedure requires that a proposed amendment must be agreed to by both houses of the General Assembly in two sessions with a House of Delegates election occurring between the two sessions considering the proposed amendment. A proposed amendment then must be approved by the voters before becoming a part of the Constitution. Section 30-19 of the Code of Virginia further provides for the amendment of the Constitution and codifies the requirements of Article XII, § 1. See generally 1983-1984 Att'y Gen. Ann. Rep. 59; id. at 173.

Section 30-14 provides that the Clerk of the House of Delegates shall be the Keeper of the Rolls of the State with specific duties concerning the enrollment and printing of legislation enacted by the General Assembly. Section 30-14.3 provides:

The Keeper of the Rolls of the State is authorized to correct typographical errors in bills in the form that they are offered, printed, engrossed, enrolled, or printed after passage; and for the sake of uniformity to change from upper to lower case or vice versa, take out or put in hyphens, change from one word form to two word form or vice versa, to the end that it will not be necessary to encumber the journal with amendments for such purposes.

III. Printing Error in Enrolled Bill Duly Corrected Pursuant to Statutory Authority Does Not Affect Validity of Resolution Adopted by General Assembly

In Coleman v. Pross, 219 Va. 143, 246 S.E.2d 613 (1978), the Supreme Court of Virginia held that the General Assembly had not complied with the procedural requirements of Article XII, § 1 with respect to several proposed constitutional amendments because the resolution adopted in the second year deleted one of the amendments proposed in the resolution adopted in the first year. The Court noted that the process to amend the Constitution is deliberately lengthy, precise and balanced. Id. at 153, 246 S.E.2d at 619. "We hold that strict compliance with these mandatory provisions [of Article XII, § 1] is required in order that all proposed constitutional amendments shall receive the deliberate consideration and careful scrutiny they deserve." Id. at 154, 264 S.E.2d at 620. To satisfy these procedural requirements, the Court held that the proposed constitutional amendments approved by the two legislative sessions must use precisely the same language. Id. See also 1979-1980 Att'y Gen. Ann. Rep. 102.
In this instance, the enrolled version of H.J. Res. No. 178 included a printing error that was corrected by hand by the legislative staff. In most cases, the enrolled bill is considered the best evidence of the legislative intent concerning the language of an act. See Johnson v. Barham, 99 Va. 305, 308, 38 S.E. 136, 137 (1901). In other contexts, however, a legislative journal will be accorded "absolute verity" concerning legislative proceedings. Wise v. Bigger, Clerk & als., 79 Va. 269, 281 (1884). See also Henrico v. City of Richmond, 177 Va. 754, 773, 15 S.E.2d 309, 314 (1941). Variations or errors in enrolled bills, legislative journals or published session laws generally do not affect the validity of legislative acts. See 1 N. Singer, Sutherland Stat. Const. §§ 15.17, 15.18 (4th ed. 1985); 1975-1976 Att'y Gen. Ann. Rep. 6.

The entire legislative record of H.J. Res. No. 178, other than the enrolled bill with the initial printing error, demonstrates that the proper word used in the resolution to amend the Constitution is "than" rather than "then." The printing error in the enrolled bill was corrected by the legislative staff pursuant to § 30-14.3. It is my opinion, therefore, that the printing error in the enrolled version of H.J. Res. No. 178 will not affect the validity of the constitutional amendment process to date or the scheduling of the appearance of the proposed amendment on the ballot for 1990, if that amendment is approved by the 1990 Session of the General Assembly.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

COUNTIES, CITIES AND TOWNS: PUBLIC UTILITIES; FRANCHISES; ETC.

City's gas pipeline easement may not be granted in perpetuity; granting of easement limited to constitutional and statutory proscription of forty years' duration. Statutory procedures for advertising and publicly receiving bids must be followed before proceeding to grant easement.

August 23, 1990

The Honorable R. Edward Houck
Member, Senate of Virginia

You state that a public service corporation has asked the City of Fredericksburg (the "City") to grant the corporation a perpetual easement for installation of a natural gas pipeline across vacant property owned by the City in fee simple. You then ask whether, and under what substantive and procedural limitations, the City may grant such an easement.

I. Applicable Constitutional and Statutory Provisions

Article VII, § 9 of the Constitution of Virginia (1971) provides, in part:

No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three fourths of all members elected to the governing body.

No franchise, lease, or right of any kind to use any such public property or any other public property or easement of any description in a manner not permitted to the general public shall be granted for a longer period than forty years, except for air rights together with easements for columns of
support, which may be granted for a period not exceeding sixty years. Before granting any such franchise or privilege for a term in excess of five years, except for a trunk railway, the city or town shall, after due advertisement, publicly receive bids therefor.

Section 15.1-307 of the Code of Virginia contains restrictions identical to those in Article VII, § 9 of the Constitution. Sections 15.1-308 through 15.1-313 detail the procedures for advertising and receiving the bids required by § 15.1-307.

II. City's Grant of Gas Pipeline Easement Limited to Forty Years' Duration; Advertisement and Bid Procedures Must Be Followed

As discussed above, Article VII, § 9 of the Constitution and § 15.1-307 of the Code of Virginia both impose two distinct restrictions on cities and towns. First, property of certain enumerated classes that has been dedicated to public use may not be sold without a three-fourths vote of all members elected to the municipal council. Second, the grant of any franchise, lease or right to use any of the enumerated classes of public property "or any other public property or easement of any description in any manner not permitted to the general public" is limited to forty years in duration. Art. VII, § 9; § 15.1-307; see also Stendig Development Corp. v. Danville, 214 Va. 548, 202 S.E.2d 871 (1974); 1989 Att'y Gen. Ann. Rep. 125 (constitutional limits applicable to city's lease of property to state agency).

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). In the facts you present, the proposed gas pipeline easement is clearly an "easement of any description" to use City property "in a manner not permitted to the general public." Art. VII, § 9. I am of the opinion, therefore, that the easement may not be granted in perpetuity, but must be limited to a term of not more than forty years.

As noted above, Article VII, § 9 and § 15.1-307 further provide that when proposing to grant "any such franchise or privilege" for longer than five years, the city or town must advertise and "publicly receive bids" for the proposed grant. This requirement, which originated in § 125 of the 1902 Constitution of Virginia (the predecessor to Article VII, § 9), was intended "to prevent both hasty and clandestine moves on the part of the council." 2 A. Howard, Commentaries on the Constitution of Virginia 855 (1974). As with the forty-year limitation, the plain language of the advertising and bid requirement encompasses the "privilege" to be granted in the gas pipeline easement. In my opinion, therefore, the City must advertise and publicly receive bids for the easement before proceeding to grant it, in the manner detailed in §§ 15.1-308 through 15.1-313.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - COUNTY AND CITY OFFICERS.

COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY - GOVERNMENT OF CITIES AND TOWNS - TRANSITION OF TOWNS TO CITIES - TRANSITION OF SECOND-CLASS TO FIRST-CLASS CITIES.

COURTS OF RECORD: CIRCUIT COURTS.

ELECTIONS: COMMONWEALTH AND LOCAL OFFICERS - CITY, COUNTY AND DISTRICT OFFICERS.
Cities of second class independent units of government sharing certain constitutional offices with county; do not have court of record. Upon transition to first-class status, city may continue to share constitutional officers with county; General Assembly may provide for creation of separate court of record for city, may amend city charter to provide for separate offices of sheriff and Commonwealth's attorney.

January 5, 1990

The Honorable Kevin G. Miller
Member, Senate of Virginia

You ask several questions concerning the status of the constitutional officers currently serving the City of Harrisonburg (the "City") and Rockingham County (the "County") if the City becomes a city of the first class. The City is currently a city of the second class, but you state that the City Council has taken action to change the City's status to a city of the first class. As a city of the second class, the City currently shares three constitutional officers—a Commonwealth's attorney, sheriff and clerk of the circuit court—with the County.

You ask whether the City and the County may continue to share the services of these three constitutional officers if the City becomes a city of the first class. You also ask what the immediate effect on the status of these shared constitutional officers will be when the City becomes a city of the first class.

I. Applicable Constitutional and Statutory Provisions

A. Current Law

Article VII, § 4 of the Constitution of Virginia (1971) provides:

There shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue. . . .

* * *

. . . 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.

Section 15.1-40.1 of the Code of Virginia implements Article VII, § 4, and includes a "savings clause" providing that any county or city not required to have or to elect constitutional officers prior to July 1, 1971, shall not be required to do so by § 15.1-40.1.

The Charter for the City (the "Charter") was enacted by the 1952 Session of the General Assembly, and has been amended several times since that date. Section 50 of the Charter provides for the election of

those officers who under the general law are elected jointly by the voters of Rockingham County and the City of Harrisonburg . . . .

* * *

Nothing contained herein shall be construed or taken to change the existing law whereby the Commonwealth's Attorney, the Clerk of the Circuit Court
and the Sheriff, together with members of the General Assembly, are jointly elected by the voters of Rockingham County and the City of Harrisonburg, to serve both said county and city, and all applicable laws with respect thereto are hereby continued in full force and effect.


Section 15.1-796 provides that every city shall elect a sheriff "unless otherwise provided in § 15.1-40.1," which is described above. Section 15.1-820 provides that every city "which has a court in whose office deeds are admitted to record" shall elect a clerk of such court. See also § 24.1-87. Section 15.1-821 provides for the election of Commonwealth's attorneys in cities, but further provides that any city not required to have or to elect a Commonwealth's attorney prior to July 1, 1971, shall not be required to do so.

Chapter 22 of Title 15.1, §§ 15.1-982.1 through 15.1-1010 ("Chapter 22"), provides for the transition of towns to city status. Section 15.1-1009 provides that Chapter 22 shall not affect cities existing prior to January 1, 1976, and, further, that "as to such cities the statutes under which they were organized as cities shall continue in force." Former § 15.1-994, repealed in 1979 in Chapter 85, 1979 Va. Acts 93, provided for the sharing of certain constitutional officers (Commonwealth's attorney, sheriff and clerk of the circuit court) upon the transition of a town to city status. See Ch. 623, 1962 Va. Acts 960, 1169 (text of repealed § 15.1-994). Compare § 15.1-994.1 (current provision in Chapter 22 for sharing of constitutional offices).

Chapter 23 of Title 15.1, §§ 15.1-1011 through 15.1-1025 ("Chapter 23"), provides for the transition of cities of the second class to city of the first-class status. Section 15.1-1024 provides for the election of new officers made elective by reason of the transition. No provision of Chapter 23, however, directly addresses your inquiry.

Section 17-116.1(a) establishes the circuit courts for counties and 28 named cities. Section 17-117 further provides for the circuit courts of counties and 23 named cities, all of which also are named in § 17-116.1(a). Section 17-118 provides for the continued concurrent jurisdiction of the circuit courts of counties within which a city of the second class has become a city of the first class.

B. Provisions of Former Law and Interaction with Current Statutes

Former Article VI, Sec. 98 of the Constitution of Virginia (1902) distinguished between cities of the first class (cities with a population exceeding 10,000) and cities of the second class (cities with a population less than 10,000). Cities of the first class were required to have a "corporation court" in addition to the circuit court. By operation of Article VIII, Secs. 118 and 119, cities of the first class (with a corporation court) were required to have a clerk of court and a Commonwealth's attorney. See also Art. VIII, Sec. 120 (election of a city sergeant in cities). This constitutional distinction between cities of the first and second classes was not continued in the 1971 Constitution. See 2 A. Howard, Commentaries on the Constitution of Virginia 797 (1974); 1974-1975 Att'y Gen. Ann. Rep. 168, 169.

Chapter 22, providing for the transition of a town to city status, was amended extensively in 1979 in Chapter 85, 1979 Va. Acts, supra, at 103-06. These amendments included the deletion of nearly all express references to cities of the second class. As a result of these 1979 amendments, there is no existing procedure for a town to become a city of the second class. If a town becomes a city pursuant to current law, the new city would have the attributes of a city of the first class, except the creation of a separate court of record would require action by the General Assembly and, pursuant to
$15.1-1005, the costs and expenses of the county's circuit court, the clerk of the circuit court, the Commonwealth's attorney and sheriff would be apportioned between the county and the new independent city. In addition, $15.1-997 provides that, upon the transition to city status, the jurisdiction of the circuit court of the county over the territory in the new independent city is unchanged. Finally, there is no provision for the automatic establishment of the constitutional offices of clerk of the circuit court, Commonwealth's attorney or sheriff. See §§ 15.1-991, 15.1-998.


II. City May Continue to Share Constitutional Officers upon Transition to First-Class Status

As the above review of current and former constitutional and statutory provisions demonstrates, the legal structure affecting cities of the second class, their courts and their constitutional officers has evolved over the years. The existing statutes in Titles 15.1 and 17 reflect this evolution in different and sometimes inconsistent ways. Although cities of the second class are independent units of government, they share certain constitutional officers with a county and do not have a court of record (a circuit court). See 2 A. Howard, supra 797 n.13; C. Bain, "A Body Incorporate," The Evolution of City-County Separation in Virginia 20-21, 58-65 (1967); Att'y Gen. Ann. Rep.: 1977-1978 at 144; 1974-1975 at 61, 62-63; id. at 413. Pursuant to prior law, upon the transition of a city of the second class to a city of the first class, the creation of a court of record was required by Article VI, Sec. 98 of the 1902 Constitution and repealed §§ 15.1-1014 and 15.1-1015. Pursuant to current law, however, no circuit court is required upon the transition of a city to first-class status. In addition, Article VII, § 4 of the 1971 Constitution and § 15.1-40.1 provide that a city that was not required to have or to elect constitutional officers prior to July 1, 1971, shall not be required to do so. See also § 15.1-796 (election of city sheriff; savings clause of § 15.1-40.1 incorporated by reference); § 15.1-821 (election of Commonwealth's attorneys for cities; savings clause). See generally 2 A. Howard, supra 831-32 (discussion of savings clause in Art. VII, § 4). Finally, a city is not required to elect a clerk of court unless a separate circuit court has been established as a court of record for the city. See §§ 15.1-820, 24.1-87.

In this instance, the Charter provides that the City and the County shall be served by a jointly elected Commonwealth's attorney, sheriff and clerk of the circuit court. No provision of Chapter 23 (providing for the transition of cities of the second class to city of the first-class-status) or Title 17 provides for the automatic establishment of a circuit court in a newly declared city of the first class. The requirement that a city elect a clerk of the circuit court is not triggered unless a circuit court has been established for the city. See §§ 15.1-820, 24.1-87. Similarly, §§ 15.1-796 and 15.1-821, providing for the election of sheriffs and Commonwealth's attorneys for cities, provide that cities which did not elect constitutional officers prior to 1971 are not required to do so. As a result, the general law of the Commonwealth currently does not provide for the creation of separate constitutional offices to replace shared constitutional offices upon the transition of a city of the second class to first-class status. Upon such a transition, the General Assembly could, of course, provide for the creation of a separate court of record in the city (see, e.g., §§ 17-116.1(a), 17-117) or could amend the city's charter to provide for the separate offices of sheriff and Commonwealth's attorney.
Based on the above, it is my opinion that the City and the County may continue to share the services of the Commonwealth’s attorney, sheriff and clerk of the circuit court if the City becomes a city of the first class. It is further my opinion that, upon the City’s transition, there would be no immediate effect on the status of these shared constitutional offices unless the General Assembly acts to establish a separate court of record for the City or amends the Charter or general law to provide for the establishment of separate constitutional offices upon the transition of a city of the second class to first-class status.

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CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - DEBT.

COUNTIES, CITIES AND TOWNS: VOLUNTARY SETTLEMENT OF ANNEXATION, TRANSITION OR IMMUNITY ISSUES.

Contractual obligation of county to transfer specific tax revenues to city pursuant to revenue sharing agreement establishes debt subject to constitutional limitations on county debt; obligation unenforceable absent approval of county voters in referendum.

February 21, 1990

Mr. W. Wayne Heslep
County Attorney for Alleghany County

You ask whether a "revenue sharing" agreement ("Agreement") between the City of Clifton Forge (the "City") and Alleghany County (the "County") is enforceable.

I. Facts

On August 24, 1984, the City and the County executed an Agreement for the sharing of certain tax revenues. The terms of the Agreement include:

(1) the transfer to the County of certain real property owned by the City and located in the County;
(2) the subsequent sale of the property by the County to a private industry;

(3) the establishment and operation by the County of a joint development investment fund from the proceeds of the sale of the property;

(4) the perpetual equal sharing of tax revenues generated from the property and paid to the taxing jurisdiction. The tax revenues subject to revenue sharing include gross receipts taxes, real property taxes, personal property taxes, and machinery and tool taxes. The revenue sharing provision continues in effect even if the governmental jurisdiction of the property changes;

(5) the deposit of tax revenues generated from the property in a separate tax revenue sharing account by the County and the subsequent disbursement to the City of the appropriate share of the tax revenues; and

(6) an express disclaimer of any modification or waiver of any rights provided for the benefit of the County or the City by § 15.1-1167.1 of the Code of Virginia.

The Agreement has the effect of requiring the perpetual equal sharing of the designated tax revenues between the City and the County. Because the real property in question is located in the County, the Agreement operates to obligate the County to transfer to the City one-half of the tax revenues generated from the property.

II. Constitution of Virginia Limits Permissible Debts of Counties; § 15.1-1167.1 Authorizes Voluntary Revenue Sharing Agreements

The ability of a county to contract debt and otherwise incur financial obligations is limited by Article VII, § 10(b) of the Constitution of Virginia (1971). Subject to certain exceptions, Article VII, § 10(b) prohibits counties from contracting debt or establishing a fixed contractual obligation to make payments in future years unless the proposed debt is authorized by general law and approved by the qualified voters of the county in a duly authorized referendum. The limitation imposed upon county debt by Article VII, § 10(b) has been applied to unconditional long-term obligations requiring the payment of money. See Fairfax-Falls Church v. Herren, 230 Va. 390, 394, 337 S.E.2d 741, 743-44 (1985); Fairfax County v. County Executive, 210 Va. 253, 259, 169 S.E.2d 556, 560 (1969); Button v. Day, 205 Va. 629, 642, 139 S.E.2d 91, 100 (1964).

Section 15.1-1167.1 authorizes the settlement of potential annexation and other disputes involving counties, cities and towns by voluntary agreements. Section 15.1-1167.1(2) authorizes such a voluntary agreement to include provisions for revenue sharing and the dedication of tax revenues to an economic growth sharing account. Voluntary agreements entered into pursuant to § 15.1-1167.1 are subject to review by the Commission on Local Government and judicial approval. See § 15.1-1167.1(3)-(5). These agreements are binding on future local governing bodies. See § 15.1-1167.1(6).

Section 15.1-1167.2, enacted in 1985, now requires the conduct of a referendum to approve any debt contracted by a county under the terms of a revenue sharing agreement entered into pursuant to § 15.1-1167.1.

III. Contractual Obligation to Transfer Tax Revenues to City Constitutes Debt Subject to Limitations Imposed by Article VII, § 10(b); Obligation to Transfer Tax Revenues Unenforceable

The necessity for voter approval of the obligation of a county to share tax revenues pursuant to a revenue sharing agreement is well recognized under Virginia law. A prior Opinion of this Office concludes that an agreement providing for, among other things,
county payments of tax revenues from a limited geographical area to a city was of
outright validity absent the approval of the voters of the county in a duly authorized ref-
the tax revenue sharing obligation of the county would constitute a debt within the
meaning of Article VII, § 10, and that the "special fund doctrine" and the "service con-
tract" exceptions to the constitutional limitations on local debt do not apply to exempt
the obligation to transfer tax revenues from the limitation. Id. at 98.2 Other Opinions
reach a similar conclusion concerning the necessity of obtaining voter approval of con-
tractional obligations of a county to share tax revenues with other localities. See Att'y
authorizes a county referendum to approve such obligations, was enacted in 1985, follow-
ing the 1984 Agreement between the City and County, in recognition of this principle. See infra note 1.

In the facts you present, the Agreement obligates the County to transfer to the
City a portion of specific tax revenues generated by the real property in question. In my
opinion, this obligation constitutes a long-term debt subject to the limitation imposed by
Article VII, § 10(b). The obligation created by operation of the Agreement was not
approved by the voters of the County. It also is my opinion that the source of the pay-
ments--specific tax revenues from specific parcels of real property--does not constitute
a special fund that excepts the obligation from the application of the constitutional limi-
tation on local debt. It is my opinion, therefore, that the County's obligation to transfer
annually to the City a portion of specific tax revenues from the real property in question
is unenforceable. See Herren, 230 Va. at 395, 337 S.E.2d at 744 (multiyear employment
contract by county agency held to be unenforceable); American-LaFrance v. Arlington
County, 164 Va. 1, 178 S.E. 783 (1935) (multiyear contract for purchase of fire-fighting
equipment held to be unenforceable). See also 15 E. McQuillin, The Law of Municipal
Corporations §§ 41.41, 41.44 (3d ed. 1985). If the County refuses to make payment to the
City, as provided in the Agreement, any remedy ordered by a court will be based upon its
consideration of the equities of the parties, as well as public policy considerations that
balance these equities against the debt limitations in Article VII, § 10(b). See American-

1Section 15.1-1167.1 was enacted in Ch. 523, 1983 Va. Acts 696, 697-98. Prior to the
enactment of § 15.1-1167.1, §§ 15.1-1166 and 15.1-1167 authorized similar voluntary fis-
cal agreements. Sections 15.1-1166 and 15.1-1167 were repealed by Ch. 523, 1983 Va.
Acts 696. Section 15.1-1167.2, requiring the conduct of a county referendum to approve
obligations assumed as part of a voluntary agreement, was not enacted until 1985. See
Ch. 66, 1985 Va. Acts 77, 77-78. The enactment of § 15.1-1167.2 was motivated, at least
in part, by widespread recognition that the obligations of counties under voluntary reve-
nue sharing agreements establish debt subject to constitutional limitations. See
1984-1985 Att'y Gen. Ann. Rep. 96, 102. In this instance, the Agreement between the
City and the County was executed prior to the enactment of § 15.1-1167.2.

2In Terry v. Mazur, 234 Va. 442, 362 S.E.2d 904 (1987), the Supreme Court of Virginia
held that the special fund doctrine did not except from constitutional limitations on state
debt an obligation to set aside specific and limited tax revenues to satisfy a debt. In
reaching its conclusion, the Court noted the application of the special fund doctrine to
special funds comprised of project-derived revenues and payments from a general fund
upon the moral obligation of the legislative body. The Court declined, however, to extend
the doctrine to include a special fund consisting of tax revenues that the legislative body
is obligated to impose and appropriate. Id. at 455, 362 S.E.2d at 911. See also 1986-1987
conclusion that the designation of specific tax revenues from a limited geographical area
does not constitute a special fund to except the obligation to impose the taxes and
appropriate the revenues from the limitations on local debt imposed by Art. VII, § 10.
CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - DEBT - TAXATION AND FINANCE - LENDING OF CREDIT, STOCK SUBSCRIPTIONS, AND WORKS OF INTERNAL IMPROVEMENT.

COUNTIES, CITIES AND TOWNS: GENERAL - INDUSTRIAL DEVELOPMENT AND BONDS.

Virginia Shell Building Initiative meets public purpose requirement of Constitution's "credit clause"; use of deed of trust to secure repayment of note and interest violative of "debt clause." Local government authorized to transfer fee simple interest and improvements required for shell building to industrial development authority; notes and interest thereon not debt of Commonwealth or of any political subdivision other than authority.

January 5, 1990

Mr. Glen D. Pond
Director, Virginia Supplemental Retirement System

You ask several questions concerning the proposed financial arrangements for the Virginia Shell Building Initiative (the "Initiative"), a program established by the 1989 Session of the General Assembly. See Va. Code Ann. § 15.1-18.4. You state that the Virginia Supplemental Retirement System ("VSRS") has been asked to make loans to local governments ("Participants") to finance the construction of industrial shell buildings pursuant to the Initiative.

I. Applicable Constitutional and Statutory Provisions

Prior to discussing the particular issues you raise in a specific factual context, it is important to detail the constitutional and statutory provisions pertaining to these questions. As discussed above, § 15.1-18.4 of the Code of Virginia establishes the Initiative and provides, in part:

Any county, city, town or any other political subdivision may participate in a program known as the 'Virginia Shell Building Initiative.' This program, administered by the Virginia Department of Economic Development ... makes available moneys to any county, city, town or any other political subdivision for the express purpose of constructing industrial shell buildings to be sold or leased at public or private sale to any person, firm or corporation that will locate thereon any manufacturing, processing or similar establishment.

Your questions concern Article X, § 10 (the "credit clause") and Article VII, § 10(b) (the "debt clause") of the Constitution of Virginia (1971). The "credit clause" of Article X, § 10 provides, in part: "Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation ...."

The "debt clause" of Article VII, § 10(b) provides, in part, as follows:

No debt shall be contracted by or on behalf of any county ... 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) ... unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county ... 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.

II. Facts

You state that VSRS will provide financing to Participants to construct industrial shell buildings. The shell buildings ultimately will be sold, at public or private sale, or leased to private individuals or businesses for commercial or industrial use.

The Initiative is administered by the Department of Economic Development (the "Department") pursuant to a Memorandum of Agreement and Understanding with each Participant, dated November 1989 ("Memorandum"). The Department will make subsidized interest payments on loans used to construct shell buildings. See Mem. Pt. II.

You further state that any Participant to which VSRS makes a loan will be obligated to repay the amount borrowed in accordance with the terms of a promissory note or other evidence of indebtedness executed by a Participant, the term of which will be five years. Interest on the unpaid principal balance of this note will be payable by the Department at an annual interest rate determined by VSRS. It is anticipated that the proceeds of the sale or lease of the shell building will be sufficient to repay the VSRS loan. As discussed below, however, a Participant will be responsible for the repayment of the VSRS loan regardless of any deficiency from the sale or lease of the shell building.

The issues you raise concern county Participants. The obligation of county Participants will be subject to future appropriations by the boards of supervisors. It is not anticipated that these county obligations will be submitted to the voters in a referendum.

The note also will be secured by a letter of credit, in a form and from a financial institution (the "Issuer"), that is acceptable to VSRS. The Participant's liability on the note to the issuer will be identical to its liability to VSRS. The Issuer also may require a deed of trust from the Participant, however, granting a lien on the shell building and the real estate underlying the shell building. If the Participant defaults on the note, the Issuer would be entitled to foreclose on, and acquire title to, the shell building and real estate on which the building is located.

The Participant will be responsible for all land acquisition costs and the expense of installing infrastructure improvements, such as sewer lines, water lines and roads. Pursuant to its agreement with the Department, the Participant will be responsible for all costs associated with construction of the shell building in excess of the VSRS loan proceeds. These excess expenses would be obligations of the Participant and payable from current funds. See Mem. Pt. IV(D). It is contemplated, however, that the VSRS loan will cover most of the construction costs. The loan will not cover the costs of land acquisition or any infrastructure improvements.

You first ask whether the Initiative, financed and implemented as described above, violates the "credit clause" in Article X, § 10, which prohibits localities from granting credit to private persons or entities.

You also ask whether the obligations of a county Participant to pay VSRS amounts due under the note, and to reimburse the Issuer for amounts drawn under the letter of credit, would violate the constitutional restrictions on local debt in Article VII, § 10. In particular, you are concerned that the potential surrender of the Participant's shell build-
The underlying constitutional premise concerning the "credit clause" is that public funds only may be expended for a public purpose. Expenditures directly or indirectly benefiting private parties are prohibited. See Button v. Day, 208 Va. 494, 503, 158 S.E.2d 735, 741 (1968). The mere fact that an incidental benefit might flow to a private entity, however, is insufficient to deprive a transaction of an otherwise valid public purpose. See Development Authority v. Coyner, 207 Va. 351, 357, 150 S.E.2d 87, 93 (1966); Almond v. Day, 197 Va. 782, 91 S.E.2d 660 (1956).

Efforts promoting the economic development of the Commonwealth fulfill a permissible public purpose. Even the decision of the Supreme Court of Virginia in Button, which found unconstitutional the Virginia Industrial Building Authority Act, holds that efforts to promote the economic growth of the Commonwealth meet a public purpose. "It cannot be gainsaid that stimulation of the development of industry is a public purpose warranting governmental participation to achieve the desired objective of creating additional employment for the citizens of the State." 208 Va. at 503, 158 S.E.2d at 741. The constitutional infirmity found by the Button Court was not that the particular activity failed to serve a public purpose, but that the mechanism used was "stamped indelibly with the purpose of granting credit in aid of private interests upon the faith of State funds." Id.

As described in Coyner,

it would indeed be an anomaly for us to say that an authority created for the purpose of stimulating and promoting industrial development, which would contribute to the economy of the State and create jobs for its people, was not for a public purpose and thus not a proper function of government.

207 Va. at 358, 150 S.E.2d at 93. The Supreme Court in Coyner held that the Act in question, "authorizing the Authority to undertake the financing and construction of facilities to be leased by it to private industry in order to stimulate industrial development within the area for which it was created, serves primarily a public purpose and thus constitutes a proper function of government." 207 Va. at 358, 150 S.E.2d at 94. See also Mayor v. Industrial Dev. Auth., 221 Va. 865, 275 S.E.2d 888 (1981); 1986-1987 Att'y Gen. Ann. Rep., supra, at 108.

In City of Charlottesville v. DeHaan, 228 Va. 578, 585, 323 S.E.2d 131, 134 (1984), the Supreme Court confirmed that transactions are to be analyzed according to their "dominant or animating purpose," when subject to "credit clause" scrutiny. The DeHaan Court reviewed the history of a particular redevelopment project in Charlottesville and found that the city's "animating" purpose was "to promote its interests and the interests of its citizens rather than to help a private developer make money." 228 Va. at 588, 323 S.E.2d at 135.

In adopting the Initiative, the General Assembly was informed of the substantial work invested in designing the Initiative by the Governor, the Diamonstein Commission and a statewide advisory committee. See Virginia Shell Building Initiative Report to Virginia Senate Finance Committee and Virginia House Appropriations Committee, at 1-3 (Oct. 26, 1988) (the "Report").
As described in the Report, about 70% of business prospects begin the location process requesting to see existing buildings. Then, the Report concludes that it is in the Commonwealth's best interest to establish an initiative which enhances the inventory of marketable shell buildings. Rep. Pt. III. The animating purpose for the creation of the Initiative, therefore, was the need to have an inventory of shell buildings to attract potential businesses into Virginia.

An additional factor demonstrating the General Assembly's commitment to the Initiative is the support provided to the Department for interest subsidies to be paid on the VSRS loans. See Mem. Pt. II; Ch. 800, Item 92, 1988 Va. Acts 1280, 1330.

The underlying premises of the Initiative contrast favorably with the facts in DeHaan. The trial court in DeHaan found that the city's effort to provide funds to a private developer violated the public purpose provision of the "credit clause." The city's money would be invested in privately owned facilities. The funds would be provided to a private developer who could not have secured credit without the city's indirect assistance. 228 Va. at 582-83, 323 S.E.2d at 132.

The facts you present vary from DeHaan in each particular cited by the trial court. The most important distinction is that no private developer or party will have a legal interest in the shell building until it is disposed of by sale or lease. The county will not be loaning money or property to any private party. The shell building ultimately will be sold or leased at its fair market value to a private party. Part V(A) of the Memorandum requires that full repayment of the note and interest subsidies is due upon a sale or lease of the shell building. There is no presumption that the ultimate purchaser of the shell building will require the credit of the county to secure financing for its purchase or lease of the building. Any purchaser or lessee, therefore, will have to be creditworthy to effect the purchase or lease. Until the sale or lease at fair market value occurs, the property and improvements will be owned by the county, not by a private entity.

The county's involvement, therefore, is neither as a conduit for financing a credit-poor private user, nor as the guarantor of an indirect extension of credit. By the time title to the property vests in any private party, any use of the county's credit will have been repaid in accordance with the Memorandum and the loan documents with VSRS and the Issuer.

The Supreme Court's decision in DeHaan provides additional guidance. First, the "best indications of public policy are to be found in the enactments of the Legislature." 228 Va. at 583, 323 S.E.2d at 133 (quoting Mumpower v. Housing Authority, 176 Va. 426, 444, 11 S.E.2d 733, 739 (1940), quoting Danville v. Hatcher, 101 Va. 523, 532, 44 S.E. 723, 726 (1903)). The General Assembly has authorized local government participation in the Initiative. See § 15.1-18.4. In addition, the Supreme Court also recognized the importance of the local government "promot[ing] its interests and the interests of its citizens rather than [helping] a private developer make money." 228 Va. at 588, 323 S.E.2d at 135. As discussed above, this will occur in the facts you present. Finally, "[a]ny benefit to the developer was incidental — not insignificant or inconsequential — but incidental." 228 Va. at 588, 323 S.E.2d at 136. This also is true in the facts you present.

Based on the above, it is my opinion that the Initiative, operating as you describe, meets the public purpose requirement of the "credit clause" of Article X, § 10, as construed by the Supreme Court of Virginia in City of Charlottesville v. DeHaan. See Att'y Gen. Ann. Rep.: 1987-1988 at 546, 549; 1986-1987 at 106.

IV. Promise to Pay Under Note or Letter of Credit Does Not Create County Debt

In the facts you describe, the obligation of the county's board of supervisors will be subject to future appropriations. As a result, there is "no fixed obligation of the county,

V. Surrender of Fee Simple Interest to Real Estate in Foreclosure Violates "Debt Clause"

The granting of a deed of trust on the shell building, as well as the underlying fee simple interest in the real estate on which the shell building is located, however, puts the general resources of the county at risk. As the Heartwell Opinion notes, the Participant "would be obligated to resolve a potentially difficult dilemma: to appropriate funds to pay [the note] or to surrender valuable improvements in which the county has made a significant investment." 1986-1987 Att'y Gen. Ann. Rep., supra. The Heartwell Opinion analyzed the then-new legislation permitting a county to "mortgage, pledge [or] subordinate" its interest in real property. Id. (citing § 15.1-262). This Opinion concludes that

[the express statutory authority of a county to mortgage or subordinate its interest in its real property, however, does not exclude such transactions from the constitutional limitations on local debt. Article VII, § 10 restricts the power of the General Assembly to delegate to localities the power to incur debts or obligations contrary to the constitutional limitations.]

Id.

If the Initiative operates in the manner you describe, the county would own the underlying fee simple interest in the real estate on which the shell building would be constructed with loan proceeds. Foreclosure on the deed of trust necessarily would require surrender of the underlying fee simple interest, as well as the improvements made by the county to the property. This fact makes the process you describe indistinguishable from the conclusion reached in the Heartwell Opinion. It is my opinion, therefore, that the use of a deed of trust to secure full repayment of the note and interest "does not remove the obligation from the constitutional limitations because the [Participant's] resources, be they public funds or real property with valuable improvements, remain at risk." 1986-1987 Att'y Gen. Ann. Rep., supra.

VI. Loans May Be Made to Authorities to Avoid Constitutional Problems in Foreclosure

Your final question, posed only if constitutional problems exist in the provision of loans to county Participants, is whether those problems could be avoided if the loans are made to Authorities established under the Industrial Development and Revenue Bond Act.

The Supreme Court of Virginia has held that an Authority is a political subdivision that may exercise its powers "only if a public purpose is promoted." L.D.A. v. La France Cleaners, 216 Va. 277, 280, 217 S.E.2d 879, 882 (1975). As discussed in Part III above, the Initiative serves a permissible public purpose. Authorities are "separate and distinct legal entity[es] established to perform the public purposes designated by the legislature." Mayor v. Industrial Dev. Auth., 221 Va. at 868, 275 S.E.2d at 889 (citing Chesapeake Devel. Authority v. Suthers, 208 Va. 51, 155 S.E.2d 326 (1967)). In establishing the Initiative, the General Assembly authorized participation by any "political subdivision." Section 15.1-18.4.
Section 15.1-1388 authorizes a county to acquire facility sites and transfer the sites to an Authority by sale, lease or gift. See 1973-1974 Att'y Gen. Ann. Rep. 31, 32. Similarly, § 15.1-511.1 authorizes a board of supervisors to appropriate funds and transfer property to an Authority. See 1983-1984 Att'y Gen. Ann. Rep. 103, 106. Section 15.1-1378(d), (e) and (f) authorizes an Authority to improve facility sites and to dispose of the sites and improvements by sale or lease. These statutory provisions authorize a county Participant to transfer the underlying fee simple interest and any improvements required for the shell building to the Authority.

 Authorities are empowered to issue bonds to pay for Authority facilities and to grant mortgages to secure these bonds. See § 15.1-1378(g)-(h). Notes, such as those contemplated by VSRS, are the equivalent of bonds. See § 15.1-1374(f). It is my opinion, therefore, that Authorities have the power to receive property, to give security for loans to construct shell buildings and, subsequently, to sell or lease the shell buildings to commercial enterprises. See 1987-1988 Att'y Gen. Ann. Rep. 192, 195.

 I note, however, that the notes are "payable solely from the revenues and receipts derived from the leasing or sale by the authority of its facilities or any part thereof." Section 15.1-1379(a). Further, the notes and the interest on the notes "shall not be deemed to constitute a debt or a pledge of the faith and credit of the Commonwealth, or any political subdivision thereof." Section 15.1-1380(a). See also Farquhar v. Board of Supervisors, 196 Va. 54, 82 S.E.2d 577 (1954).

1As it must under the debt clause of Art. X, § 9, the obligation of the Department to make interest subsidy payments in future years is predicated on the availability of appropriations from the General Assembly. See Mem. Pt. II.

2One potential method that may avoid the creation of a constitutionally restricted debt would be to limit the grant of the deed of trust by the county Participant to the shell building only and to exclude the underlying real property and improvements. A prior Opinion of this Office recognizes the power of a county to enter into a "ground lease," both as a lessor holding fee title to the property, and as a lessee, utilizing the space pursuant to annual appropriations. 1985-1986 Att'y Gen. Ann. Rep. 70, 71. The deed of trust to be given to the Issuer, therefore, would be enforceable only against the shell building itself. The county's financial stake in the underlying fee and infrastructure improvements would not then be subject to foreclosure, and the dilemma posed by the Heartwell Opinion may be resolved. The permissibility of this type of arrangement pursuant to Art. VII, § 10(b) would depend on the precise terms of the agreements and the real economic consequences of the arrangement on the county should there be a default. Such an arrangement would diminish the security available to the Issuer. But, if in fact such an arrangement does not threaten the credit or fiscal integrity of the county, the arrangement could well avoid the constitutional limitations imposed by Art. VII, § 10(b).

3The Heartwell Opinion also discusses the applicability of the "special fund doctrine," first articulated by the Supreme Court of Virginia in Almond v. Gilmer, 188 Va. 822, 51 S.E.2d 272 (1949). See 1986-1987 Att'y Gen. Ann. Rep. 106, 109-11. The reasoning in that Opinion, concluding that the special fund doctrine did not apply to the facts presented, clearly compels the same response to your questions. Notably, the county Participant already will own the underlying fee simple interest in real estate, and will have made the infrastructure improvements from its own funds, prior to the time the loan is made by VSRS. It cannot be found that the VSRS lien against the property underlying the shell building arise "as a result of the transaction creating the lien." Id. at 110. The special fund doctrine, therefore, in my opinion, is not available to bring the transaction within the local debt provisions of Art. VII, § 10(b).
CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - MULTIPLE OFFICES.

Town charter provides that council member chosen as mayor may not retain seat on council. Mayor effectively resigned from council upon qualification of position; vacancy created on council. Upon resignation, mayor may not reclaim council seat; person appointed to council vacancy serves remainder of unexpired term. Former council member who resigned ineligible for reappointment during remainder of term to fill new vacancy.

December 12, 1990

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

You ask several questions concerning the resignation of the mayor of the Town of Fries. You first ask whether an elected member of the Town Council in effect resigned from his position on the Town Council by accepting appointment as mayor. You next ask whether, if this individual now resigns from the office of mayor, he may reclaim his seat on the Town Council for the remainder of the term for which he was originally elected. If the answer to your second question is no, you also ask whether the Town Council may appoint this individual, after he resigns as mayor, to a new vacancy on the Town Council.

I. Facts

In July 1990, the Town Council of the Town of Fries (the "Council" and the "Town") appointed one of its elected members (the "Mayor") to serve as mayor of the Town. The appointee immediately took the oath of office. At the same meeting, another citizen ("Citizen A") was then appointed to fill the Council seat left vacant by the mayoral appointment. The Mayor voiced no objection to this appointment. In August 1990, the Mayor stated his intention to resign from that office with the intent of reassuming his position on the Council. He has ceased to serve as mayor, but the Council has not yet appointed anyone to complete his unexpired term as mayor. A third Council member is serving as acting mayor, pending the issuance of this Opinion.

II. Applicable Constitutional and Statutory Provisions

Article VII, § 6 of the Constitution of Virginia (1971) provides that

unless two or more units exercise functions jointly as authorized in §§ 3 and 4, no person shall at the same time hold more than one office mentioned in this Article. No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law and except that a member of a governing body may be elected or appointed to fill a vacancy in the office of mayor or board chairman if permitted by general law or special act.

Pertinent parts of the Charter for the Town provide:

§ 3. The municipal authorities of the Town shall consist of a mayor, seven councilmen, who shall compose the council of the said town, a treasurer, a clerk, a sergeant, and such number of policemen as may from time to time, be determined on by the council of the said town, or as is herein otherwise provided, and such other offices as may, from time to time, be created, and officers as may be provided for by the council aforesaid.
§ 4. The seven councilmen, as provided for in section three, shall be elected for a term of two years, and each shall serve until his successor shall have qualified. They shall be elected on the first Tuesday in May of every even-numbered year and shall enter upon their duties on the first day of July next succeeding their election, qualifying by taking and subscribing to the usual oath, as prescribed by the general law, before a person duly authorized to administer oaths.

§ 5. There shall annually, at such time in the month of July as the Council may designate, be selected by ballot by the Council of the town, a mayor, who shall, on or before the first day of September of each year, qualify in the manner prescribed by law, and he shall hold his office for a term of one year from the first day of September next succeeding his appointment, and until his successor shall have been duly elected and qualified.

The mayor shall be the presiding officer of the council, but he shall not, except as hereinafter provided, vote upon any question raised before it, except in a case of a tie. He shall be entitled to such compensation as may, from time to time, be determined by the council. He shall be executive head of the town government, and shall have the power, and it shall be his duty to see to the enforcement of all ordinances which are not specifically confined to some other officer.

If any person appointed as mayor shall fail to qualify, or a vacancy in such office occur from any other cause, then the members of council shall, by a majority vote, fill such vacancy for the unexpired term.

§ 6. If any person elected as councilman shall fail to qualify, or a vacancy in said council occur from any other cause, then the remaining members shall, by a majority vote, fill such vacancy for the unexpired term. Any person qualified to vote in the Town shall be eligible to the office of mayor or councilman.


III. Town Charter Does Not Contemplate Person Serving as Both Mayor and Council Member; Council Member Effectively Resigned from Council upon Qualifying as Mayor

The Town Charter makes it clear that the mayor, while he or she is the presiding officer of the Council, is not a member of the Council. Section 3 of the Charter provides that "seven councilmen . . . shall compose the council of the . . . town," 1962 Va. Acts, supra, at 463. Section 5 of the Charter provides that the mayor has no vote on questions before the Council, except in the case of a tie. 1980 Va. Acts, supra, at 72. Section 6 provides that the Council is not limited to its own membership in choosing a mayor, but may select any qualified voter of the Town. 1982 Va. Acts, supra, at 464. In my opinion, therefore, the Charter does not contemplate that a Council member chosen as mayor may serve in that capacity and still retain his or her seat on Council. It is my further opinion, therefore, that when the Mayor was chosen as mayor, he effectively resigned from his Council seat. The Council correctly recognized that a vacancy then existed on the Council, and took action to fill it by appointing Citizen A.
IV. Town Council Member Who Resigns to Become Mayor Has No Right to Resume Council Seat to Which Elected upon Resigning as Mayor

The Supreme Court of Virginia has held that an officeholder who becomes incapable of holding his office by virtue of acting in an incompatible office thereafter ceases to hold the first office, and that a subsequent resignation from the second incompatible office does not restore him to the first office. Dean v. Paolicelli, 194 Va. 219, 236, 72 S.E.2d 506, 516-17 (1952). See also Shell, Judge, v. Cousins, and al., 77 Va. 328, 330-31 (1883); Bunting v. Willis, J., 68 Va. (27 Gratt.) 144, 161-62 (1876). The Court also has held that a county officer who moves to another state intending to establish residence in that state, thereby effectively resigning from his county office, but who changes his mind and returns to the county where he held office, has no right to resume that office. Poulson v. Justices of Accomac, 29 Va. (2 Leigh) 804 (1830) (citing Chew v. Justices of Spottsylvania, 4 Va. (2 Va. Cas.) 208, 209 (1820)).

Based on the above, it is my opinion that the Mayor does not have the right, upon resigning as mayor, to reclaim the Council seat that he gave up to accept appointment as mayor, and that Citizen A, having been duly appointed and qualified, may continue to serve in that seat for the remainder of the unexpired term.

V. Former Council Member Ineligible During Term for Reappointment to Fill New Vacancy on Town Council

Your final question is whether, following his resignation as mayor, the Mayor is eligible for appointment during the remainder of the term for which he was elected to Council to fill another vacancy on the Council for the unexpired term of that vacancy.

As discussed above, Article VII, § 6 of the Constitution provides that a member of a local governing body is ineligible, with certain exceptions, to be elected or appointed to any office filled by the governing body during the term for which he or she was elected to the governing body. One of the stated exceptions is for an appointment to be mayor, if that is permitted by general law or special act. Under this exception, because the Town Charter (a special act) so provides, the Mayor was appointed mayor by his fellow Council members. The other exception in Article VII, § 6 is that a member of a local governing body may be appointed to "such other boards, commissions, and bodies as may be permitted by general law." (Emphasis added.) There is no exception made in Article VII, § 6 for reappointing a member who has resigned to the governing body itself, and I am aware of no provision of general law that specifically addresses such a situation. It is my opinion, therefore, that the Mayor is ineligible for appointment to the Council during the remainder of the term for which he originally was elected to the Council.

1Citizen A was the candidate who had received the number of votes next highest to those elected in the Town election held in May 1990.

2Such a vacancy could occur because Council appoints another of its members to fill the Mayor's unexpired term as mayor, or because of the death of a member or a resignation for other reasons.

3A prior Opinion of this Office concludes that Art. VII, § 6 prohibits a town council member from becoming mayor during the term for which he is elected to the council. 1976-1977 Att'y Gen. Ann. Rep. 159. That Opinion, however, predates the 1984 amendment to Art. VII, § 6 that provided the exception allowing members of governing bodies to be appointed as mayor or county board chairman. Ch. 708, 1984 Va. Acts 1565, 1566; Ch. 766, id. at 2072.
January 30, 1990

The Honorable Harry J. Parrish
Member, House of Delegates

You ask whether the Mayor of the City of Manassas Park (the "Mayor" and the "City") may cast a tie-breaking vote to approve the City's participation in a multijurisdictional commuter rail project.

I. Facts

The Council of the City (the "Council") considered the City's participation in the "Virginia Railway Express" commuter rail project at its November 21, 1989, meeting. After debate, three Council members voted to approve, and three members voted to disapprove the City's participation in the project subject to certain conditions. Casting the tie-breaking vote, the Mayor approved the City's participation, and the motion passed.

You have provided a draft of the Master Agreement for the establishment of the Virginia Railway Express (rev. Oct. 3, 1989) (the "Agreement"). Upon proper execution of the Agreement, each participating jurisdiction will be obligated to make certain appropriations to cover the current year's operating costs for the project. See Agt. Pt. III(B)(1). Obligations for future years are conditioned on annual appropriations by each participating jurisdiction. See id. Pt. III(E). See also 1986-1987 Att'y Gen. Ann. Rep. 141 (prior Opinion addressing certain legal aspects of commuter rail project).

II. Applicable Constitutional and Statutory Provisions

Article VII, § 5 of the Constitution of Virginia (1971) provides for the election of the governing bodies of counties, cities and towns. Article VII, § 7 provides, in part: "No ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body." Section 15.1-819 of the Code of Virginia implements the provisions of Article VII, § 7 with respect to municipal councils.

The Charter for the City originally was enacted by the 1976 Session of the General Assembly, and has been amended several times since its enactment. Section 3.1 of the Charter vests the government of the City in the Council. Section 3.2 provides: "The council shall be composed of six members." Chapter 425, 1977 Va. Acts 624, 626. Section 3.3 establishes the office of mayor and provides, in part, that "[t]he mayor shall have no right to vote in the council except that in every case of a tie vote of the council, the mayor shall vote to break the tie." Id. at 627. Chapter 4 of the Charter provides for the election of the council and the mayor. See 1976 Va. Acts, infra note 1, at 1133-34. If a council member desires to seek election as mayor, § 4.2(A) of the Charter requires the member's resignation as a member of council. See 1977 Va. Acts, supra, at 628-29. See
also 1986-1987 Att'y Gen. Ann. Rep. 36 (prior Opinion addressing constitutionality of similar "resign to run" provision). Pursuant to the City's original Charter, the Mayor was a member of the Council. See 1976 Va. Acts, infra note 1, at 1132. In 1977, however, the General Assembly amended the Charter to provide that the Council shall be comprised of six members. See 1977 Va. Acts, supra, at 526. See also 1980-1981 Att'y Gen. Ann. Rep. at 126, 128 (Opinion concluding that the Mayor is not a member of the Council pursuant to the Charter for the purposes of § 15.1-800, which provides that council members are ineligible to hold certain offices).

III. Council Action Obligating Council to Make Future Appropriations Subject to Absolute Majority Vote Requirement of Article VII, § 7

The first question presented by your inquiry is whether the Council's action of November 21, 1989, was an ordinance or resolution subject to the absolute majority vote requirement of Article VII, § 7.


In the facts you present, the eventual execution of the Agreement will obligate the City to appropriate certain funds to provide for the first year's operations of the project. For the purposes of this Opinion, I assume that the amount of this obligation will exceed five hundred dollars. Although the minutes of the November 21, 1989, meeting are unclear, it appears that the Council authorized the City to participate in the project and, subject to certain conditions, authorized city officials to execute the necessary documents, including the Agreement. The apparent practical effect of the Council's action, therefore, was to authorize the execution of the Agreement, thereby binding the City to make certain appropriations in 1990 to fund the first year's operation of the project. Based on the above, it is my opinion that the Council's action had a sufficiently direct effect on the City's financial condition to trigger the procedural requirements of Article VII, § 7.

IV. Mayor May Cast Tie-Breaking Vote to Approve City's Participation in Project; Mayor's Vote Sufficient to Satisfy Absolute Majority Vote Requirement

The next question presented is whether the Mayor may cast the tie-breaking vote to approve the City's participation in the project.

As reviewed above, Article VII, § 7 requires an absolute majority vote of all members elected to a local governing body to approve ordinances and resolutions appropriat-

In an analogous context, prior Opinions also conclude that an elected or appointed tie breaker, who is considered a member of a county board of supervisors for the purpose of constituting a quorum pursuant to § 15.1-540, is deemed to be an elected member of the governing body and may vote on matters requiring a majority vote under Article VII, § 7. See Att'y Gen. Ann. Rep.: 1982-1983 45; 1974-1975 at 35. On the other hand, significant authority indicates that the tie-breaking vote of a municipal mayor may not be counted to satisfy an absolute majority vote requirement. See 4 E. McQuillin, supra § 13.31(b); Hammer v. Commonwealth, 169 Va. 355, 363-65, 193 S.E. 496, 499-500 (1937) (appointment of justice of peace pursuant to specific statutory provision required absolute majority vote of council; mayor may not break tie; five votes of nine member council required); Smiley v. Commonwealth, 116 Va. 979, 83 S.E. 406 (1914) (appointment of road superintendent pursuant to specific statutory provision required absolute majority vote of board of supervisors; tie-breaker could not cast deciding vote).

In the facts you present, the Mayor, like the remaining six council members, is elected by the City's voters on an at-large basis. See § 4.1 of the Charter, 1976 Va. Acts, infra note 1, at 1134. The Mayor presides over the Council's meetings. See § 3.3 of the Charter, 1977 Va. Acts, supra, at 627. With respect to the Mayor's power to vote, the Charter provides: "The mayor shall have no right to vote in the council except that in every case of a tie vote of the council, the mayor shall vote to break the tie." Id. (emphasis added).

Article VII, § 7 is intended to operate as a fiscal safeguard by establishing the more stringent absolute majority vote requirement for certain types of financial decisions affecting a locality. Compare 1987-1988 Att'y Gen. Ann. Rep. 223, 226 (discussion of general quorum and voting requirements applicable to municipal councils). Whether a mayor is a member of a municipal council for purposes of Article VII, § 7 is determined solely by the charter. Section 3.3 of the Charter provides that the Mayor shall vote to break a tie in every case of a tie vote of the council. See 1977 Va. Acts, supra. This provision unmistakably demonstrates a legislative intent that the Mayor's tie-breaking authority is to apply in every instance of a tie vote. To conclude that the Mayor is not a member of the Council for purposes of Article VII, § 7 and, therefore, could not break tie votes in matters involving appropriations, taxes or borrowing would restrict the Mayor's powers to nonfinancial matters only. It is my opinion that such a conclusion would be inconsistent with the express language of § 3.3 of the Charter. It is further my opinion, therefore, that the Mayor is a member of the Council for the purposes of establishing an absolute majority vote required by Article VII, § 7 in those instances when the Mayor is required to cast a tie-breaking vote. As a result, the Mayor's vote to approve the City's participation in the multijurisdictional commuter rail project was sufficient, in my opinion, to satisfy the absolute majority vote requirement of Article VII, § 7.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

Localities may provide for services of construction manager obtained through separate procurement process to act as its representative on construction project, provided actual construction services procured in compliance with competitive sealed bidding procedures.

March 5, 1990

The Honorable Whittington W. Clement
Member, House of Delegates

You ask whether a Virginia locality, while using the required competitive sealed bid procedures to secure a general contractor for construction, may provide in the bid documents for a project construction manager obtained through a separate procurement process. A sample contract has been furnished to illustrate your question.

I. Applicable Statutes

The procurement of construction services by public bodies is governed by the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act"). Section 11-41(C)(2) requires that, with certain exceptions, all construction be procured utilizing the competitive bidding procedures detailed in §§ 11-37.

Section 11-41(C)(2)(i)-(iv) sets forth the exceptions to that requirement. The exception applicable to localities in § 11-41(C)(2)(iv) references § 11-41.2:1, which authorizes specific local governments to enter into construction contracts for specified projects on a construction management basis. The Act contains no general authorization or prohibition, however, for a locality to enter into a construction management contract that does not provide for construction services.

Section 11-37 defines a "construction management contract" as "a contract in which a party is retained by the owner to coordinate and administer construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner." "Construction" is defined as "building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property." Id. Section 11-37 also defines the terms "competitive sealed bidding" and "competitive negotiation," which are the basic methods for the procurement of goods, services, construction and insurance pursuant to the Act.

II. Construction Management Contract in Facts Presented Does Not Violate Act

The Act contains no provisions that prohibit any locality from entering into a construction management contract that does not provide for actual construction work on a project. Such a construction management contract would not violate the requirement in § 11-41(C)(2) that the actual construction be procured by competitive sealed bidding because the construction management contract in the facts you present does not provide for actual construction work on the project.

The contract you describe provides for a construction manager, who is not a party to the primary construction contract, merely to act as the owner's representative. This construction manager was procured by a separate, competitive negotiation procedure. The portion of the contract you provide that references a construction manager simply puts the general contractor on notice of the identity of the owner's representative for the particular project.
The Act does not regulate the content of a locality's contracts; it only addresses the method by which services or goods are procured.

[It is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, and that the rules governing contract awards be made clear in advance of the competition....

Section 11-35(G) (emphasis added). Both the intent expressed in § 11-35(G) and the specific requirements for competitive sealed bidding have been satisfied in the facts you present. The competitive bidding procedures described in § 11-37 were used to procure this construction contract, as required by § 11-41(C)(2), and competitive negotiation was used to select the construction manager.

Based on the above, it is my opinion, in the facts you present, that a locality may provide for the services of a construction manager obtained through a separate procurement process to act as its representative on a construction project, provided the actual construction services for this project are procured in compliance with the competitive sealed bidding procedures in § 11-37.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

Political subdivisions may not enter into design-build or construction management contracts except in those specific instances authorized by General Assembly.

November 30, 1990

The Honorable Whittington W. Clement
Member, House of Delegates

You ask whether political subdivisions of the Commonwealth are precluded from entering into construction management contracts, except as specifically authorized by § 11-41.2:1 of the Code of Virginia.

I. Applicable Statutes

The procurement of goods and services, including construction, by public bodies in Virginia is governed by the Virginia Public Procurement Act, §§ 11-35 through 11-80 (the "Act").

Section 11-37 of the Act defines "design-build contract" and "construction management contract." Section 11-41.2 specifically authorizes the Commonwealth to enter into construction management and fixed price design-build contracts. Section 11-41.2:1 authorizes individually named political subdivisions to use design-build contracts and construction management contracts to construct six specified local projects.

II. Political Subdivisions of Commonwealth May Not Use Design-Build and Construction Management Contracts in Absence of Specific Legislative Authority

Before the adoption of the Act, an Opinion of this Office concluded that neither the Commonwealth or its agencies, nor counties, cities or towns were authorized to enter into "fixed price design/build contracts" because such contracts were inconsistent with the competitive bidding requirements then in effect in §§ 11-17 through 11-23. 1977-1978 Att'y Gen. Ann. Rep. 91.
In 1980, the General Assembly enacted § 11-17.1, authorizing the use of design-build contracts by the Commonwealth until July 1, 1983. Ch. 95, 1980 Va. Acts 120, 121. After the Act was enacted in 1982, § 11-17.1 was allowed to expire, but its substance was included in the Act, as § 11-41.2, to be effective until July 1, 1988. Ch. 615, 1983 Va. Acts 839. That expiration date was removed in 1988. Ch. 829, 1988 Va. Acts 1654. While § 11-41.2 now authorizes use of design-build and construction management contracts by the Commonwealth, it does not mention political subdivisions.


In this instance, that conclusion is further confirmed by the enactment of § 11-41.2:1. First enacted in 1987 to give the City of Richmond specific authority to use a design-build or construction management contract in construction of a visitors' center, § 11-41.2:1 has now been amended several times to permit such contracts for the construction of five other specific facilities in other jurisdictions.

It is another accepted 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. Att'y Gen. Ann. Rep.: 1989 at 252, 253; 1985-1986 at 19, 20. The specific grants of authority in § 11-41.2:1, therefore, dictate the conclusion that political subdivisions not mentioned in that section do not share in the authority it confers.

Based on the above, it is my opinion that political subdivisions of the Commonwealth may not enter into design-build or construction management contracts, as defined in § 11-37, except in those specific instances authorized by the General Assembly.


In my prior Opinion to you dated March 5, 1990, I concluded that a locality could enter into the contract with the construction manager described in your opinion request, because that contract did not require the construction manager actually to undertake the construction in question. That Opinion also observed that the described contract was not actually a construction management contract, as that term is defined in § 11-37. Rather, it was a contract for a "construction manager" to act as an "owner's representative" in dealing with a single general contractor with whom the locality had entered into a construction contract. It was specifically noted that the "construction manager" was not a party to that primary construction contract. By contrast, the definition of "construction management" found in § 11-37 encompasses the supervision of multiple construction contracts.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

FIRE PROTECTION: FIRE DEPARTMENTS AND FIRE COMPANIES.

COUNTIES, CITIES AND TOWNS: GENERAL.
Volunteer fire departments and rescue squads not "public bodies" within definition of Virginia Public Procurement Act. Act applicable only to certain state-funded construction activities of not-for-profit organizations; other procurement activities not subject to Act.

November 5, 1990

The Honorable John C. Buchanan
Member, Senate of Virginia

You ask two questions concerning the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia (the "Act").

You first ask whether the term "public body," as it is defined in § 11-37 of the Act, includes not-for-profit volunteer fire departments and volunteer rescue squads. You also ask whether the procurement activities of such organizations are subject to any provisions of the Act, except those expressly detailed in § 11-35.

I. Applicable Statutes

Section 11-37 of the Act defines a "public body" as "any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in [Chapter 7 of Title 11]."

Section 11-35(I) provides that the terms of the Act apply to the "procurement of any construction . . . by a Virginia not-for-profit corporation or organization not otherwise specifically exempted when the planning, design or construction is funded by state appropriations greater than $10,000," except where federal regulatory or statutory requirements apply.

II. Volunteer Fire Departments and Rescue Squads Are Not "Public Bodies" Within Meaning of Act

Under the definition in § 11-37, a "public body" must be a part of either the legislative, executive or judicial branch of government and must be a body created by law rather than by the private, voluntary actions of its organizers. See 1982-1983 Att'y Gen. Ann. Rep. 739, 740 (police and firefighter associations not public bodies within definition in Act). Volunteer fire departments and volunteer rescue squads are created by the voluntary action of their members, even though government approval may be required before they may undertake their intended functions. See § 27-8.1 (volunteer "fire company" defined). Compare § 15.1-25 with § 15.1-26.01 (volunteer rescue squads).

It is my opinion, therefore, that neither a volunteer fire department nor a volunteer rescue squad constitutes a "public body" within the meaning of § 11-37.

III. Act Applies Only to State Construction Activities of Not-for-Profit Organizations; Other Procurement Activities by Such Organizations Not Subject to Act

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 should not be done otherwise. Att'y Gen. Ann. Rep.: 1989 at 40, 42; 1985-1986 at 19, 20; 1976-1977 at 199, 201. The provision in § 11-35(I) making the Act specifically applicable to certain state-funded construction contracts of not-for-profit organizations, in my opinion, implies that the General Assembly did not intend the Act to apply to other types of procurement activities by such organizations.
I note, however, that a locality that provides funding to a not-for-profit organization, such as a volunteer fire department or volunteer rescue squad, may set the terms and conditions of that funding, which may include a requirement that the not-for-profit organization adopt procurement guidelines reflecting the policies and procedures contained in the Act. If this occurs, however, the requirements imposed by the locality would arise from the parties' agreement rather than from the Act itself.

CORPORATIONS: PROFESSIONAL CORPORATIONS.

BANKING AND FINANCE: BANKING ACT.

Professional law corporation may act as executor, trustee or administrator of estate, or in any other fiduciary capacity; neither pre-existing attorney-client relationship nor other precondition required to exercise such authority.

May 9, 1990

The Honorable Whittington W. Clement
Member, House of Delegates

You ask whether § 13.1-546.1 of the Code of Virginia, which authorizes a professional law corporation to act as an executor, trustee or other fiduciary, is valid in light of the prohibition in § 6.1-5 against a corporation, other than an authorized bank or trust business, acting in such capacity. If I conclude that the authorization in § 13.1-546.1 for a professional law corporation to act as a fiduciary is permissible, you also ask whether a pre-existing attorney-client relationship or any other prerequisite is required to exercise such authority.

I. Applicable Statutes

Section 6.1-5 provides that "[n]o person, copartnership or corporation, except corporations . . . conducting the banking business or trust business in this Commonwealth under authority of the laws of this Commonwealth or the United States . . . shall engage in the banking business or trust business in this Commonwealth . . ." An exception from this general prohibition is contained in § 6.1-5(1), which permits a natural person to qualify as a trustee, personal representative or other fiduciary.

Section 13.1-546.1, enacted by the 1989 Session of the General Assembly, provides:

A professional corporation engaged in the practice of law, as a part of the practice of law, may act as an executor, trustee or administrator of an estate, or guardian for an infant, or in any other fiduciary capacity. Any officer, employee or agent of a professional corporation engaged in the practice of law who is duly licensed as an attorney in the Commonwealth may perform necessary fiduciary responsibilities on behalf of the corporation.

II. Section 13.1-546.1 Is Valid Authorization for Professional Law Corporation to Act in Fiduciary Capacity

Section 13.1-546.1 expressly authorizes a professional corporation engaged in the practice of law to act as an executor, trustee or administrator of an estate, or other fiduciary. This statute, in effect, provides an exception to the general prohibition in § 6.1-5 against a corporation, other than a bank or trust business, providing these ser-

Based on the above, it is my opinion that § 13.1-546.1 is a valid enactment that authorizes a professional law corporation to act as an executor, trustee or administrator, or in any other fiduciary capacity.

III. No Pre-Existing Attorney-Client Relationship or Other Condition Required for Professional Law Corporation to Act as Fiduciary

You also ask if the phrase in § 13.1-546.1 "as a part of the practice of law" imposes the requirement of an attorney-client relationship or other precondition upon a professional law corporation's authority to act as a fiduciary. Relying upon § 13.1-542, a prior Opinion of this Office considered the question whether a "professional corporation engaged in the practice of law as a part of the practice of law" may act in a fiduciary capacity and concludes that a professional law corporation, as well as an individual attorney, may serve as a fiduciary. See 1974-1975 Att'y Gen. Ann. Rep. 323, 323-24.

I am aware of no express or implied limitation on the authority granted in § 13.1-546.1 based upon an attorney-client relationship, or any other condition. It is my opinion, therefore, that a professional law corporation is not subject to any such limitations in acting as a fiduciary pursuant to § 13.1-546.1.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES.

CRIMINAL PROCEDURE: COMPENSATING VICTIMS OF CRIME — DISABILITY OF JUDGE OR ATTORNEY FOR COMMONWEALTH; COURT-APPOINTED COUNSEL, ETC.

RULES OF VIRGINIA SUPREME COURT: CRIMINAL PRACTICE AND PROCEDURE.

Clerk's fees assessed on per indictment basis, unless offenses properly includable in single indictment. Multiple court-appointed counsel fees assessable only for charges resulting in conviction. Criminal injuries compensation fund fees assessable for each conviction. No imposition of fees payable to district court clerks in felony cases certified to circuit court.

August 30, 1990

The Honorable Michael M. Foreman
Clerk, Circuit Court of the City of Winchester
You ask whether various court costs assessable by law against one individual in a criminal case are assessable on a per case, per indictment or per count basis. You also pose two hypothetical situations and ask (1) whether ten separate controlled substance charges arising over six months would constitute a "common occurrence," and (2) if ten indictments, each charging one count of breaking and entering and one count of grand larceny, result in convictions, how many district court clerk's fees must be assessed.

I. Applicable Statutes

Section 14.1-92 of the Code of Virginia provides, in part:

Whenever more than one indictment shall be made against the same person or persons, at any term of a court for offenses growing out of the same transaction, when all of such offenses could have been properly included in a single indictment, no payment shall be made out of the state treasury to the clerk for services rendered in connection with the trial on, or other disposition of, any of such indictments in excess of one.

Section 14.1-112 provides for the fees to be paid to a circuit court clerk. Section 14.1-112(15) provides that, "[u]pon conviction in felony cases the clerk shall charge the defendant thirty-two dollars in each case."

Section 14.1-115 provides that, for each felony case tried, the circuit court clerk shall be entitled to two dollars and fifty cents, "to be charged only once."

Section 14.1-121 provides for the fees to be assessed for Commonwealth's attorneys:

The fees of attorneys for the Commonwealth in all felony and misdemeanor cases and the fees of city attorneys in all misdemeanor cases in which there is a conviction and sentence not set aside on appeal or a judgment for costs against the prosecutor, and for expenditures made in the discharge of his duties shall be as follows:

For each trial of a felony case in his circuit court, in which only one person is tried at a time, if the punishment prescribed may be death, twenty dollars; if the punishment prescribed is less than death, ten dollars; but where two or more persons are jointly indicted and jointly tried for a felony, in addition to the fees above provided, ten dollars for each person more than one so jointly tried. For each person prosecuted by him at a preliminary hearing upon a charge of felony before any court or judge of his county or city, five dollars.

For each person tried for a misdemeanor in his circuit court, five dollars, and for each person prosecuted by him before such court of his county or city for a misdemeanor, which he is required by law to prosecute, or upon an indictment found by a grand jury, five dollars, and in every misdemeanor case so prosecuted the court or judge shall tax in the costs and enter judgment for such misdemeanor fee.

No attorney for the Commonwealth or city attorney shall receive a fee for appearing in misdemeanor cases before a district court notwithstanding any provision of law to the contrary.

Section 14.1-123 provides for fees to be paid to district court clerks in misdemeanor or traffic violation cases.
Section 14.1-133.2 provides for the imposition by local option of an additional fee to fund courthouse construction, but only through June 30, 1991:

Any county, city, or town may, through its governing body, assess, as part of the fees taxed as costs in each criminal or traffic case in a district or circuit court, a sum not in excess of two dollars.

Payments to court-appointed counsel are governed by § 19.2-163, which provides, in part:

The circuit or district court shall direct the payment of such reasonable expenses incurred by such court-appointed attorney as it deems appropriate under the circumstances of the case. Counsel appointed by the court to represent an indigent charged with repeated violations of the same section of the Code of Virginia, with each of such violations arising out of the same incident, occurrence, or transaction, shall be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such offenses are tried as part of the same judicial proceeding. The trial judge shall consider any guidelines established by the Supreme Court but shall have the sole discretion to fix the amount of compensation to be paid counsel appointed by the court to defend a felony charge that may be punishable by death.

Section 19.2-368.18(B) provides for additional costs to be charged for certain convictions and to be paid to the Criminal Injuries Compensation Fund:

Where any person is convicted, after July 1, 1976, by a court with criminal jurisdiction of (i) treason or any other felony or (ii) any offense punishable as a Class 1 or Class 2 misdemeanor under Title 18.2, with the exception of a public drunkenness or disorderly conduct violation, a cost shall be imposed in addition to any other costs required to be imposed by law. This additional cost shall be thirty dollars in any case under item (i) and twenty dollars in any case under item (ii) of this subsection. Such additional sum shall be paid over to the Comptroller to be deposited into the Criminal Injuries Compensation Fund. Under no condition shall a political subdivision be held liable for the payment of this sum.

II. Assessment of Clerk's Fees Based on Whether Offenses Properly Includable in Single Indictment; Trial Judge Makes Determination in Cases of Doubt

A prior Opinion of this Office concludes that, as a general rule, clerk's fees shall be assessed on a "per indictment" basis. 1982-1983 Att'y Gen. Ann. Rep. 251. Section 14.1-92, however, specifies one instance in which multiple fees are not authorized, that is, when more than one indictment is presented against the same person or persons, at any term of a court, for offenses growing out of the same transaction, if all of such offenses could have been properly included in a single indictment. Rule 3A:6(b) of the Rules of the Supreme Court of Virginia provides that offenses may be joined as separate counts of an indictment if they are "based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan." See Foster v. Commonwealth, 6 Va. App. 313, 322-24, 369 S.E.2d 688, 693-95 (1988). Thus, when either of the situations contemplated by Rule 3A:6(b) exists, only one fee should be paid for all the related indictments. If the clerk has any doubt about whether this situation exists, the determination should be made by the trial judge.

The general rule and exception discussed in the preceding paragraph apply to four of the fees about which you inquire: fees under § 14.1-112(15) (circuit court clerk's
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fees); § 14.1-121 (Commonwealth's attorney's fees); § 14.1-123 (district court clerk's fees); and § 14.1-133.2 (courthouse construction fees). The number of fees is based on whether the offenses may be included in a single indictment, without regard to the number of fines imposed.

III. Court-Appointed Counsel Fees Assessed to Defendant

Court-appointed counsel fees are prescribed by § 19.2-163. Under the provisions of § 19.2-163(2), if repeated violations of the same Code section arising out of the same incident, occurrence or transaction are tried as part of the same circuit court proceeding, only one fee shall be paid to the court-appointed counsel. Section 19.2-163(2) further provides clearly that court-appointed counsel are entitled to separate fees for charges arising out of the same incident, occurrence, or transaction: (1) if they allege violations of the same Code section, but are tried in separate trials; or (2) if they are tried together, but allege violations of different Code sections.

Regardless of how many separate fees are allowed to a defendant's court-appointed counsel, however, the plain language of § 19.2-163(2) provides that the defendant shall be taxed with costs only if he or she is "convicted." If the language of a statute is clear and unambiguous, its plain meaning and intent govern without resort to statutory construction. See Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982); 1987-1988 Att'y Gen. Ann. Rep. 125, 126. I am of the opinion, therefore, that in a situation in which multiple counsel fees would otherwise be imposed on the defendant (if all charges resulted in conviction), but several acquittals are returned or some charges are "nolle prossed," counsel fees for the "acquitted" or "nolle prossed" charges should not be added to the counsel fees allowed for the convictions.

IV. Section 19.2-368.18 Costs Assessable for Each Conviction

Costs payable to the Criminal Injuries Compensation Fund ("CICF") under § 19.2-368.18 are a further exception to the general rules discussed in Part II above. That section imposes, upon conviction for certain offenses, "a cost ... in addition to any other costs required to be imposed by law." A clerk collecting the cost imposed by § 19.2-368.18 must pay it over to the Comptroller for deposit in the CICF. In my opinion, this cost is not a "clerk's fee" and is not, therefore, subject to the § 14.1-92 limitation on fees for offenses that could properly have been included in a single indictment. The § 19.2-368.18 cost should, therefore, be assessed for each covered offense on which a defendant is convicted, regardless of whether the offenses are related.

V. Series of Similar Offenses Not Necessarily Part of Common Scheme

Your first hypothetical question relates to the fees assessable for ten drug offenses committed by a single individual over a period of six months. The Court of Appeals of Virginia has held that similar offenses committed over a period of time may not be included in the same indictment, under Rule 3A:6(b), unless the evidence demonstrates that they were connected by a common scheme or plan. Foster, 6 Va. App. at 322, 369 S.E.2d at 693 (1988). The answer to your question, therefore, would depend on additional facts not included in your hypothetical situation.

VI. District Court Fees Not Allowable in Certified Felony Cases

The answer to your second hypothetical question is governed by § 14.1-123. That section provides for fees for services performed by district court judges and clerks to be charged in misdemeanor and traffic violation cases. Before 1975, § 14.1-123(4) included a provision for imposition of a fee of two dollars "[f]or examining a charge of felony,
including swearing witnesses and taxing costs"; however, an amendment adopted in that year repealed that provision. Ch. 591, 1975 Va. Acts 1235, 1237. In my opinion, therefore, the facts presented in your second hypothetical question would not result in the imposition of any fees payable to district court clerks in felony cases certified to the circuit court.

The phrase "to be charged only once" in § 14.1-115 is not, in my opinion, an exception to the general rule stated above, but simply means that the fee of two dollars and fifty cents should not be reassessed upon retrial (after either a mistrial or retrial upon reversal and remand).

In the case of a certified felony warrant, the courthouse construction fee should be assessed only by the circuit court.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES.

CRIMINAL PROCEDURE: TAXATION AND ALLOWANCE OF COSTS.

CRIMES AND OFFENSES GENERALLY: IN GENERAL.

MOTOR VEHICLES: GENERAL PROVISIONS.

New legislation authorizing assessment for courthouse construction, renovation or maintenance as part of fees incident to criminal or traffic cases applicable to cases alleging either local ordinance, or state statute, violations; assessment may be imposed in both criminal and traffic, or in either criminal or traffic, cases. Dispositive date in determining application of costs statutes is date of conviction. Two localities with combined court facility may enact separate assessments for same cases; collection and distribution of fees to respective treasurers. Each jurisdiction may adopt assessment for particular cases and collect assessment in either locality.

June 6, 1990

The Honorable J.R. Zepkin  
Judge, General District Court, Ninth Judicial District

You ask several questions concerning new § 14.1-133.2 of the Code of Virginia, which was enacted by the 1990 Session of the General Assembly and authorizes an assessment for courthouse construction, renovation or maintenance as part of fees incident to criminal or traffic cases.

I. Applicable Statute

Section 14.1-133.2, which will become effective July 1, 1990, and expire July 1, 1991, unless reenacted by the General Assembly, provides:

Any county, city, or town may, through its governing body, assess, as part of the fees taxed as costs in each criminal or traffic case in a district or circuit court, a sum not in excess of two dollars.

The imposition of such assessment shall be by ordinance of the governing body, which ordinance may provide for different sums in circuit courts and district courts, and the assessment shall be collected by the clerk of the court in which the action is filed, and remitted to the treasurer of such
county, city, or town and held by such treasurer subject to disbursements by the governing body for the construction, renovation or maintenance of courthouse or jail and court-related facilities and to defray increases in the cost of heating, cooling, electricity, and ordinary maintenance.

The assessment provided for herein shall be in addition to any other fees prescribed by law.

II. Statutes Prescribing Costs Are Remedial and Must Be Liberally Construed


Statutes prescribing costs "are to be construed as remedial statutes and liberally and beneficially expounded for the sake of the remedy which they administer." Anglea, &c., 51 Va. (10 Gratt.) at 701. Accord Wicks, 215 Va. at 279, 208 S.E.2d at 756; McCue, 109 Va. at 304, 63 S.E. at 1067; 1977-1978 Att'y Gen. Ann. Rep. 95, 96. "The right to enforce payment of [costs] is a mere incident to the conviction, and thereby vested in the [C]ommonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it." Anglea, &c., 51 Va. (10 Gratt.) at 701. Accord Wicks, 215 Va. at 278-79, 208 S.E.2d at 756; McCue, 109 Va. at 304, 63 S.E. at 1067; Williams, 5 Va. App. at 521, 365 S.E.2d at 344.

"[T]he General Assembly has the authority to provide for the assessment of costs." Carter v. City of Norfolk, 206 Va. 872, 874, 147 S.E.2d 139, 141 (1966). The only constitutional limitation on this doctrine is that costs must bear a true relationship to the Commonwealth's expenses. Id. at 879, 147 S.E.2d at 144; 1984-1985 Att'y Gen. Ann. Rep., supra.

III. Purpose of § 14.1-133.2 Is to Generate Funds for Court Facility Construction and Maintenance

By its very terms, the legislative purpose in the enactment of new § 14.1-133.2 is to generate funds for the "construction, renovation or maintenance of courthouse or jail and court-related facilities and to defray increases in the cost of heating, cooling, electricity, and ordinary maintenance." 1990 Va. Acts, infra note 1. Consistent with the principles enunciated in Anglea and its progeny, § 14.1-133.2 must be construed "liberally and beneficially" to promote the statute's explicit purpose.

IV. Assessments Authorized for Violations of State Statutes and Local Ordinances

You first ask whether the assessments authorized by § 14.1-133.2 are restricted to cases brought pursuant to local ordinances, or whether the assessments may be made in cases involving violations of state statutes as well as local ordinances.

Section 14.1-133.2 authorizes any local governing body to impose an assessment in "each criminal or traffic case in a district or circuit court." (Emphasis added.) The statute is devoid of any suggestion that the authorization was intended to exclude prosecutions under state law. Even though this statute defines its application as to types of cases
(criminal or traffic) and courts (district or circuit), it makes no distinction between prosecutions instituted pursuant to local ordinance or state law. Construing § 14.1-133.2 in a manner consistent with its purpose, it is my opinion that, if a local governing body enacts an ordinance assessing fees, the assessment must apply to cases alleging either local ordinance violations or state statute violations.

V. Assessments Authorized in Both Criminal and Traffic Cases, or in Either Criminal or Traffic Cases

Your next inquiry refers to the terminology in the first paragraph of § 14.1-133.2, which authorizes an assessment in "each criminal or traffic case." (Emphasis added.) You ask whether this statutory language empowers a locality to assess the fee in both criminal and traffic cases, or whether the locality must elect between assessment in either criminal or traffic cases.

Construing § 14.1-133.2 "liberally and beneficially" in the context of its stated purpose, it is my opinion that the language you question authorizes a locality to impose an assessment both in criminal and traffic cases, or in either criminal or traffic cases.

VI. Costs Taxable on Date of Conviction in Criminal and Traffic Cases

Your next questions concern the retrospective and prospective application of local ordinances which impose assessments pursuant to § 14.1-133.2. You ask whether such an ordinance would apply to cases pending prior to the adoption date, but concluded by conviction after the adoption date. You also ask whether such an ordinance would apply to cases initiated prior to, but concluded by conviction after, July 1, 1991, assuming new § 14.1-133.2 is not reenacted by the General Assembly.

The generally accepted rule in similar cases is that, "if [costs] statutes are in force at the time of rendition of [a criminal] judgment, costs in such prosecution are regulated thereby, although enacted subsequently to the commencement of the prosecution." 20 C.J.S. Costs § 436, at 677 (1940).


Not all traffic infractions are criminal in nature. See, e.g., §§ 18.2-8, 46.2-100, 46.2-113 (distinguishing noncriminal traffic "infractions" from criminal traffic "offenses"). There are no statutes, however, that suggest that costs imposed in noncriminal traffic infraction cases are to take effect in a manner different than costs in traffic offense cases that are criminal in nature. See § 14.1-122.1.

Applying the foregoing principles, it is my opinion that the dispositive date in determining the application of costs statutes in criminal and traffic cases is the date of conviction. It is my opinion, therefore, that an ordinance adopted pursuant to § 14.1-133.2 would apply to cases pending before the adoption date of the ordinance, but concluded by conviction after this adoption date. It is also my opinion that such an ordinance would not apply to cases initiated prior to, but concluded by conviction after, July 1, 1991, assuming § 14.1-133.2 is not reenacted by the General Assembly.
Your final questions concern the application of § 14.1-133.2 in the Williamsburg area, where the district and circuit courts of the City of Williamsburg and James City County are combined and operate from one courthouse facility. Specifically, you ask whether two separate fees are to be collected if both localities adopt an assessment ordinance. You next ask how the fees are to be distributed between the localities if the localities adopt different assessments.

Construed "liberally and beneficially" to promote the statute's purpose, it is my opinion that the phrase "[a]ny county, city, or town" (emphasis added) authorizes the governing bodies of both the City of Williamsburg and James City County to enact separate assessments for the same cases. If the two localities enact different fees for the same cases, it is my opinion that these fees should be collected and distributed to the respective treasurers as they have been enacted.

You also ask, if either the City of Williamsburg or James City County, but not both jurisdictions, adopts an assessment for particular cases, whether these fees should be restricted to such cases originating in that locality, or whether the fee should be assessed on all such cases originating in either locality.

Again, the statute's purpose to generate funds for the construction and maintenance of court facilities is determinative. Criminal and traffic cases with venue in either the City of Williamsburg or James City County are tried and processed in a combined physical facility. Construed "liberally and beneficially," it is my opinion that, in localities in which court facilities are combined as they are in the Williamsburg area, § 14.1-133.2 authorizes a single local governing body to adopt an assessment for particular cases, and to collect that assessment on all such cases originating in either locality.

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

Circuit court clerk may charge three dollar fee when writing bail bond for criminal defendant; fee assessed as costs against defendant upon conviction. Clerk not authorized to collect statutorily designated ten dollar fee for issuance of capias in pending criminal proceeding when party requesting capias is Commonwealth.

January 11, 1990

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

You ask two questions concerning whether certain fees may be charged by circuit court clerks in different factual situations. You first ask whether the clerk may charge a three dollar fee pursuant to § 14.1-112(7) of the Code of Virginia when writing a bail bond for a criminal defendant and assess this fee as costs against the defendant upon conviction. You also ask whether a ten dollar fee may be charged by the circuit court clerk pursuant to § 14.1-112(23) for the issuance of a capias and then assessed against a defendant as costs.
1. Three Dollar Fee May Be Charged by Clerk for Bail Bond

Section 14.1-112(7) authorizes a circuit court clerk to charge a fee of three dollars "for making out any bond, other than those under §14.1-90 or subdivision (5) of [§14.1-112]." Neither §14.1-90 nor §14.1-112(5) applies to writing a bail bond for a criminal defendant. As a result, §14.1-112(7) clearly authorizes the clerk to charge a three dollar fee for writing "any bond."


"We have many times said that where the language of a statute is free from ambiguity, its plain meaning is to be accepted without resort to the rules of interpretation. In that situation, we take the words as written and a resort to the extrinsic facts to determine their meaning is not permitted."

Id. at 368, 330 S.E.2d at 92 (quoting Portsmouth v. Chesapeake, 205 Va. 259, 269, 136 S.E.2d 817, 825 (1964) (emphasis omitted)).

This conclusion is supported by the legislative history of former statutes that dealt directly with a clerk's authority in this area. Former §19.1-109.9 provided that "the fee of any ... clerk for admitting a person to bail shall be three dollars." When Title 19.1 was recodified as Title 19.2 by the 1975 Session of the General Assembly, former §19.1-109.9 was repealed. See Ch. 495, 1975 Va. Acts 846. The same Session of the General Assembly enacted §14.1-128.1 with substantively identical provisions. See Ch. 591, 1975 Va. Acts 1235, 1238. Section 14.1-128.1 was repealed in 1982. See Ch. 568, 1982 Va. Acts 975 (Reg. Sess.).

Throughout this codification and repeal of former §§14.1-128.1 and 19.1-109.9, §14.1-112(7) existed in its present form, except that the amount to be charged by the clerk has increased. Compare Ch. 386, 1964 Va. Acts 592, 621 (Reg. Sess.), with present §14.1-112(7). It can be assumed, therefore, that §§14.1-128.1 and 19.1-109.9 ultimately were repealed by the General Assembly as unnecessary, and that there was no intention to change the law. See 1 H. & S. Docs., Revision of Title 19.1 of the Code of Virginia, H. Doc. No. 20, at 6 (1975 Sess.). 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. Based on the above, it is my opinion that §14.1-112(7) authorizes a circuit court clerk to charge a three dollar fee when writing a bail bond for a criminal defendant and to assess this fee as costs against the defendant upon conviction.

II. Fee Not Authorized by §14.1-112(23) for Issuance of Capias in Pending Proceeding; Fee Authorized by §14.1-112(10) for Issuance of Capias Against Principal at Request of Surety

Section 14.1-112(23) authorizes a circuit court clerk to charge a ten dollar fee "for all services rendered by the clerk in any court proceeding for which no specific fee is provided by law ... to be paid by the party filing said papers at the time of filing."

A prior Opinion of this Office concludes that a circuit court clerk may not charge a fee pursuant to §14.1-112(23) for the preparation and issuance of a show cause order when a previously convicted felon is brought before a court for violation of the terms of probation. See 1979-1980 Att'y Gen. Ann. Rep. 81, 82. This Opinion reasons that §14.1-112(23) contemplates that the fee being charged by the clerk is to be paid by the "party filing" the initial court papers, and notes that §14.1-87 prohibits the imposition of any fee against the Commonwealth unless such fee is expressly authorized by statute. The
prior Opinion also notes that the use of the word "filing" in § 14.1-112(23) contemplates the institution of some type of court proceeding, rather than the extension of a proceeding for which fees already have been paid, which is the case when the convicted felon is returned to court for a show cause hearing for violation of the terms of probation. Id. I am in agreement with this prior Opinion, the rationale of which applies equally to the question you ask. It is my opinion, therefore, that a circuit court clerk is not authorized to collect a ten dollar fee pursuant to § 14.1-112(23) for the issuance of a capias in a pending criminal proceeding when the party requesting the capias is the Commonwealth.

Another prior Opinion of this Office concludes that a circuit court clerk may charge a surety a fee pursuant to § 14.1-112(10) for the issuance of a capias, at the request of the surety, for the arrest of a principal. See 1973-1974 Att'y Gen. Ann. Rep. 116, 117. When a capias is issued by the circuit court clerk in this factual context, therefore, it is my opinion that the clerk may charge the fee described in § 14.1-112(10) for the issuance of the capias.

COUNTIES, CITIES AND TOWNS: BOUNDARY CHANGES OF TOWNS AND CITIES.

PROPERTY AND CONVEYANCES: FORM AND EFFECT OF DEEDS AND COVENANTS — FRAUDULENT AND VOLUNTARY CONVEYANCES; ETC.

Recordation of certificate of satisfaction showing payment or satisfaction of lien on property in clerk's office of county where underlying encumbrance recorded prior to annexation meets statutory recordation requirement; not necessary that certificate also be recorded in clerk's office of annexing city.

February 20, 1990

The Honorable Whittington W. Clement
Member, House of Delegates

You ask where a certificate of satisfaction showing the partial or complete payment or satisfaction of a recorded lien should be recorded when the real property that is the subject of the recorded lien is within an area annexed by a city since the recordation of the lien. Specifically, you ask whether the certificate of satisfaction should be recorded only in the clerk's office of the county where the lien is recorded or whether the certificate also must be recorded in the clerk's office of the annexing city.

I. Applicable Statutes

Section 15.1-1051 of the Code of Virginia provides that, upon the issuance of an annexation order, the order and a full description of the territory annexed is to be recorded in the clerk's offices of both the annexing city and the county. The clerk of the circuit court of the county is required to certify to the city's commissioner of the revenue a list of all real estate within the annexed territory. See § 15.1-1052.

Section 55-96 provides for the recordation of certain documents, including deeds of trust and mortgages, in the county or city where the property is located. Section 55-97 provides that a deed releasing a lien of a deed of trust may be recorded in the county or city where the property securing the lien is located or in the county or city in which the property was situated at the time the deed of trust was recorded.

Section 55-66.3(A)(1) requires that a lien creditor, upon the payment or satisfaction of a debt secured by a mortgage, deed of trust or other lien, must deliver a deed of
release, record a certificate of satisfaction in the clerk's office, or have a margin entry made on the book where the encumbrance is recorded, showing the payment or satisfaction.

II. Recordation of Certificate of Satisfaction In Clerk's Office of County Where Underlying Encumbrance Is Recorded Satisfies Requirement of § 55-66.3(A)(1)

A lien creditor must record his deed of trust or mortgage to establish constructive notice of the lien to potential purchasers. See § 55-96. Section 55-66.3(A)(1) obligates the lien creditor to record a certificate of satisfaction or a margin entry showing payment or satisfaction of the debt secured by the lien. Potential purchasers of the formerly encumbered property, therefore, are able to determine that the debt secured by the lien has been paid, satisfied or released.

In the circumstances you present, the real estate securing the debt was located in the county prior to annexation by the city and the writing establishing the lien was recorded in the clerk's office of the county's circuit court. After the recordation of the lien, the real estate was annexed by the adjoining city. Pursuant to § 55-97, a deed releasing the lien of a deed of trust may be recorded either in the city where the property is located or in the county where the land was situated at the time the deed of trust was recorded. If the payment or satisfaction of the debt is recorded by margin entry on the page of the book where the encumbrance is recorded, such a margin entry manifestly must be recorded in the clerk's office of the county where the deed of trust or other writing is recorded. See § 55-66.3(A)(1).

With respect to the recordation of a certificate of satisfaction, § 55-66.3 repeatedly refers to the clerk of the court where the underlying encumbrance is recorded. Based on this language appearing in § 55-66.3, therefore, it is my opinion that the recordation requirement of § 55-66.3(A)(1) is met by the recordation of a certificate of satisfaction in the clerk's office of the county where the encumbrance is recorded. It is further my opinion that § 55-66.3(A)(1) does not require that the certificate of satisfaction also be recorded in the city that has annexed the real estate that is subject to the recorded lien.

COUNTIES, CITIES AND TOWNS: COUNTIES GENERALLY — GOVERNING BODIES OF COUNTIES, CITIES AND TOWNS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT — COUNTY, CITY, AND TOWN GOVERNING BODIES.

ELECTIONS: REQUIREMENTS FOR ELECTION DISTRICTS, PRECINCTS — APPORTIONMENT OF REPRESENTATIVES — COMMONWEALTH AND LOCAL OFFICERS.

County may not reinstate redistricting process after adoption of ordinance absent objections by U.S. Department of Justice pursuant to § 5 of federal Voting Rights Act of 1965, as amended. Establishment of new district without incumbent supervisor does not create vacancy; vacancies occurring after redistricting becomes effective filled from newly established districts.

January 12, 1990

Mr. W. Carrington Thompson
County Attorney for Pittsylvania County
You ask several questions concerning the redistricting of Pittsylvania County (the "County") required by the recent annexation of territory by the City of Danville (the "City").

I. Facts

Effective January 1, 1988, the City annexed approximately 27 square miles and 11,000 residents from the County. Acting pursuant to § 15.1-571.1 of the Code of Virginia, the County's Board of Supervisors (the "Board") proceeded to redistrict the magisterial districts because of the disparities created by the annexation. By ordinance adopted March 16, 1989, the Board completed the redistricting process and submitted the plan adopted to the United States Department of Justice for preclearance, as required by § 5 of the federal Voting Rights Act of 1965. See 42 U.S.C.A. § 1973(c) (West 1981).

Prior to the annexation, the Board consisted of seven members elected every four years from single-member election districts. Pursuant to the March 16, 1989, redistricting plan, the seven Board members will continue to be elected from single-member districts. The March 16, 1989, plan created seven new districts, however, with a significant realignment of district boundaries compared to the former election districts.

You state that the new District 1 has no incumbent supervisor residing within its boundaries. Two incumbent supervisors reside in the new District 2. An incumbent supervisor resides in the new District 3, which was realigned, but the redistricting did not affect the residence of this incumbent supervisor.

The Board now is considering additional changes to the redistricting ordinance adopted March 16, 1989, and thereafter submitted to the United States Department of Justice.

II. Applicable Constitutional and Statutory Provisions

Article VII, § 5 of the Constitution of Virginia (1971) requires that local governing bodies reapportion the representation in the governing body whenever the boundaries of the districts from which its members are elected are changed.

Section 15.1-571.1(A) implements the requirements of Article VII, § 5. Section 15.1-571.1(B) provides:

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

Section 15.1-37.5 prohibits local governing bodies from reapportioning the representation in the governing body except for the decennial reapportionment process. Section 15.1-37.5, however, further provides that this prohibition against interim reapportionment does not apply to reapportionment required by law upon a change in the boundaries of the locality. Any interim redistricting is effective December 31 of the year in which it occurs. See § 15.1-37.3:1. A reapportionment ordinance is subject to the formal recordation requirements in § 15.1-37.7.

Chapter 4.2 of Title 24.1, §§ 24.1-40.7 through 24.1-40.11, imposes certain requirements and restrictions on local governments with respect to the redistricting process. Section 24.1-40.9 provides, in part:
No election district or precinct shall be created, divided, abolished, consolidated, or the boundaries otherwise changed from July 1, 1988, through March 31, 1991, unless ordered by a court of competent jurisdiction, or required as a result of an order entered by a court of competent jurisdiction in an annexation suit, or required to meet objections to such election district or precinct by the United States Attorney General pursuant to the federal Voting Rights Act of 1965 and any amendments thereto.

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 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.

Section 5 of the federal Voting Rights Act, 42 U.S.C.A. § 1973(c), requires that Virginia localities submit changes to voting procedures, including redistricting ordinances, to the United States Department of Justice for preclearance to ensure that such changes do not have the effect of denying or abridging the right to vote on account of race or color. See also 28 C.F.R. pt. 51 (1989).

III. County May Not Reinitiate Redistricting Process After Adoption of Ordinance Absent Objections Pursuant to § 5 of the Voting Rights Act

You first ask whether the Board may now adopt a new redistricting ordinance altering the plan adopted March 16, 1989.

The statutory scheme governing the redistricting process for local governments prohibits interim redistricting, except in specific circumstances, including an annexation. See §§ 15.1-37.5, 24.1-40.9; 1986-1987 Att'y Gen. Ann. Rep. 118, 120. Section 15.1-571.1(B) requires that the Board redistrict the County following the 1988 annexation and that the redistricting process be completed within twelve months of the annexation's effective date. See 1986-1987 Att'y Gen. Ann. Rep. 70. The manifest intent of this requirement is to compel the Board to undertake and complete the mandatory redistricting process in an expeditious manner. The process is complete pursuant to Virginia law upon the recordation of the reapportionment ordinance as required by § 15.1-37.7. Upon its effective date (December 31 of the year it occurs pursuant to § 15.1-37.5:1), the redistricting ordinance governs if a vacancy on the governing body occurs. See § 24.1-17.

Due to the application of § 5 of the federal Voting Rights Act, however, changes to the March 16, 1989, redistricting ordinance would be required if the United States Department of Justice refuses to preclear the redistricting ordinance as adopted. As a general rule, the Department of Justice is required to act on a submission within sixty days of its receipt, although that time may be extended if additional information is required. See 28 C.F.R. §§ 51.9, 51.37, 51.39.

In this instance, the Board adopted the required redistricting ordinance on March 16, 1989. Upon the recordation of the ordinance as required by § 15.1-37.7, therefore, the redistricting process required as a result of the annexation was complete for the purposes of Virginia law. To permit the Board to initiate a new redistricting process at this time would entail the publication of the newly proposed redistricting ordinance...
and the submission of the newly adopted ordinance to the Department of Justice, thereby delaying the completion of the redistricting process for an indefinite period. It is my opinion, therefore, that the reinitiation of the redistricting process at this time would be inconsistent with the requirement of § 15.1-571.1 that the Board initiate and complete the redistricting required as a result of the annexation in an expeditious manner. It is further my opinion that the redistricting required by the City's annexation was complete, for purposes of Virginia law, upon the adoption and recordation of the March 16, 1989, ordinance and that §§ 15.1-37.5 and 24.1-40.9 prohibit the County from reinitiating the redistricting process at this time. Absent changes to the March 16, 1989, plan required by the United States Department of Justice pursuant to § 5 of the Voting Rights Act, therefore, it is my opinion that the Board may not now reinitiate the redistricting process.

IV. Establishment of District Without Incumbent Does Not Create Vacancy

You next ask whether the establishment of District 1, without an incumbent supervisor, will create a vacancy to be filled before the general election in November 1991.

Section 24.1-17, quoted above, provides that elections for county supervisors following 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 county's governing body who hold office at the time of the redistricting. Section 24.1-88(a) provides for the quadrennial election of supervisors.

A prior Opinion of this Office addresses the redistricting process of the County required as a result of the City's annexation and concludes that the November 1987 elections for the County's supervisors were to be conducted from the election districts in effect without respect to the annexation to become effective January 1, 1988. See 1986-1987 Att'y Gen. Ann. Rep., supra, at 72. A subsequent Opinion of this Office, addressed to you, concludes that the redistricting of the County required as a result of the City's annexation would have no effect on the terms of the supervisors elected in November 1987. See Op. to W.C. Thompson, Pittsylvania Co. Att'y (Feb. 22, 1989).

In this instance, the County's voters elected seven supervisors from then existing election districts in November 1987. The terms of these incumbent supervisors will expire December 31, 1991. Although § 15.1-571.1(B) requires that the Board redistrict the County as a result of the annexation, no statute provides that vacancies shall be created as a result of that redistricting or that special elections shall be held to elect supervisors from the newly established districts. To the contrary, the statutory scheme provides for the immediate redistricting of the County but defers the actual representation from the newly established districts, except for the purpose of filling vacancies, until the next regularly scheduled election to elect members of the County's governing body. In this manner, the statutory scheme provides for the accommodation of the changes in a locality's boundaries and for continuity in government. See generally Att'y Gen. Ann. Rep.: 1987-1988 at 189, 191-92; 1981-1982 at 150. Consistent with the prior Opinion of this Office to you and the provisions of § 24.1-17, it is my opinion that the establishment of District 1 without an incumbent supervisor will not create a vacancy to be filled before the general election in November 1991.

You also ask whether the establishment of District 2 with two incumbent supervisors will create a vacancy to be filled before the general election in November 1991. For the reasons stated above, it is my opinion that the establishment of District 2, with two incumbent supervisors, will not create a vacancy to be filled before the November 1991 general election.
V. Vacancies Occurring After Redistricting Filled From Newly Established Districts

Your final question is whether vacancies that may occur, by resignation or otherwise, on the Board would be filled from the newly established districts or from the districts in effect prior to the annexation.

Section 24.1-17, quoted above, expressly provides that vacancies in a county's governing body following redistricting required as a result of annexation shall be filled from the districts so established. It is my opinion, therefore, that § 24.1-17 requires that any vacancies occurring after the redistricting becomes effective must be filled from the newly established districts.

1 The terms "reapportionment" and "redistricting" are used in different contexts, and sometimes interchangeably, in the statutes relevant to this Opinion. See 1987-1988 Att'y Gen. Ann. Rep. 189, 192 n. 4. I use these terms in this Opinion in the context in which the terms are used in the statute being referenced.

COUNTIES, CITIES AND TOWNS: COUNTY EXECUTIVE AND COUNTY MANAGER FORMS OF GOVERNMENT - EFFECTIVE CHANGE — URBAN COUNTY FORMS OF GOVERNMENT.

ELECTIONS: COMMONWEALTH AND LOCAL OFFICERS — THE ELECTION - SPECIAL ELECTIONS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - COUNTY AND CITY OFFICERS.

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

Petition seeking referendum mandating change in Fairfax County from urban county executive form of government to county manager form; effect of pending legislation governing scheduling of referendum.

March 21, 1990

The Honorable Robert T. Andrews
Member, House of Delegates

You ask four questions concerning a petition now being circulated in Fairfax County (the "County") seeking a referendum mandating a change in the form of county government. The County now operates under the urban county executive form of government; the petition seeks a referendum on the adoption of a county manager form. I understand that the members of the County Board of Supervisors (the "Board") serve four-year terms, which run concurrently. The terms of the present Board members expire on December 31, 1991.

1. Vote Favoring Conversion to County Manager Form of Government Would Not Affect Terms of Office of Current Members of County Board

A. Applicable Statutes

Section 15.1-586 of the Code of Virginia provides that
[w]hen [the county manager form of government] shall have been adopted by any county, the members of the board of county supervisors thereof shall be elected at the next succeeding regular November election; their term of office shall commence on the first day of January thereafter. Until the supervisors so elected, or a majority of them, shall have qualified and take office, the supervisors in office shall continue.

Section 15.1-760 provides:

If [the urban county executive form of government] be changed to some other form of county organization and government provided for by Article VII of the Constitution and the provisions of general law enacted pursuant thereto, all officers of the county and the district whose election is provided for by Article VII of the Constitution and the general law shall be elected at the next succeeding regular November election, held at least sixty days after such change shall have been voted upon . . . .

B. Terms of Office of Current Board Members Not Affected

You first ask about the effect of a vote mandating conversion of the form of government of the County to the county manager form upon the terms of office of the Chairman of the Board (who is elected at large) and the other members of the Board (who are elected from each magisterial district).

Sections 15.1-586 and 15.1-760 govern, respectively, the election of new supervisors when a county manager form is adopted and when an urban county executive form changes to another form. The proposed change in form of government proposed by the petition fits within the requirements of both statutes. Each provides that the new county officers shall be elected at the next succeeding regular November election. Since the term "next succeeding regular November election" is not defined, however, it is unclear whether the term as used in these provisions refers to the next general election in the county (November 1990) or the next election of the particular officers (November 1991).

Reference to other statutes and the Constitution of Virginia, however, provides a basis for the proper interpretation of the term. An interpretation of §§ 15.1-586 and 15.1-760 that would permit the supervisors to complete their full term of office is consistent with, and required by, Article VII, § 4 of the Constitution of Virginia (1971). That section, while authorizing a change in form of government for local governments, prohibits any such change from having the effect of reducing the terms of "any person holding an office at the time the election is held." Prior Opinions of this Office have held that this provision is applicable to both constitutional officers and members of local governing bodies. See Att'y Gen. Ann. Rep.: 1977-1978 at 141; 1973-1974 at 146; id. at 160.

Moreover, § 24.1-76(B), which governs the procedure for filling vacancies for local elected offices, requires that an election be ordered at the "next ensuing general election" to be held in the locality. If the General Assembly had intended to reduce the term of office of current members of the Board upon a change in form of government, therefore, it logically would have used the "next ensuing general election" language of § 24.1-76(B) (emphasis added) or language of similar import.

Accordingly, I am of the opinion that if the voters of the County elect to adopt the county manager form of government in 1990, the chairman and supervisors now in office would continue in office until January 1, 1992, following the regular November 1991 election for members of the new Board.
II. Number of Factors to Be Considered in Determining Whether Referendum May Be Conducted Prior to Next General Election

You next ask what factors must be considered in determining whether the special election sought by the petition may be held prior to the next November general election. Initially, the circuit court must determine that the petition is in proper order prior to the issuance of a writ of special election, and, thereafter, must schedule the election within a reasonable time. Section 24.1-165. All elections must be held on a Tuesday, but a special election may not be held on a primary election day. Section 24.1-1(5)(c).

No special election may be held unless it has been ordered at least sixty days prior to the date for which it was called and no such election may be held within sixty days prior to a general or primary election. See §§ 24.1-165, 24.1-1(5) (latter section defining general and special elections). Once an election has been held, the voting machines must remain locked for fifteen days after the results of the election have been ascertained. Section 24.1-224.


More specifically, federal law requires that any such proposed change of government must be submitted either to the United States District Court for the District of Columbia for a declaratory judgment that such change does not have the purpose or effect of abridging certain constitutional rights or to the Department of Justice for administrative clearance. 42 U.S.C. § 1973c; 28 C.F.R. § 51.10. The federal regulations provide for the submission of changes to the Department of Justice and give the United States Attorney General sixty days in which to interpose an objection. 28 C.F.R. § 51.9. Federal preclearance submissions are to be made by the chief legal officer of the submitting authority. 28 C.F.R. § 51.23.

III. Procedures for Holding Primary and General Elections Would Follow Statutory Timetables

You further ask what timetable would be applicable to holding a primary and general election if the petition leads to a successful referendum on the change of government to the county manager form. As discussed above, a proper interpretation of §§ 15.1-586 and 15.1-760 would mean that a new Board would be elected no earlier than November 1991. Such an election, therefore, would be held in accordance with the usual procedures and timetable applicable to a November general election. See, e.g., §§ 24.1-166, 24.1-174. It should be noted, however, that there is legislation that has been carried over by the 1990 Session of the General Assembly which would change election dates and filing deadlines for elective offices for 1991 in light of anticipated delays associated with the 1991 redistricting following the 1990 census. See H.B. No. 182 (1990 Sess.).

The State Board of Elections publishes an annual election calendar which sets forth election and deadline dates, as well as candidate information bulletins which provide filing requirements and specific deadlines for the various offices. In light of the pending legislation that could affect the scheduling of the November 1991 general elections, therefore, it is not possible at this time to set forth a specific timetable.
Your last question is, assuming that a valid petition for a referendum to change the form of government of the County is filed in court before July 1 and that the General Assembly enacts legislation effective July 1 requiring a referendum to be held at the next general election, when would the referendum be scheduled if it were not held prior to the effective date of the legislation?

Special elections in Virginia are regulated solely by statute. The legislation which is the subject of your request (S.B. No. 278) would add a new section numbered 24.1-165.2 to the Code. Ch. 585, 1990 Va. Acts 874 (Reg. Sess.) ("Chapter 585"). It applies solely to any county with a population in excess of 400,000, and provides that any referendum concerning any change in the county's form of government shall be ordered to be held at the next November election date, at least sixty days after the date of the court's order scheduling the referendum. The general rule of § 24.1-165, which governs special elections generally, would require that the referendum be scheduled within a reasonable time after the petition has been found to be in proper order.

Your question raises the issue of retroactivity of the new law, assuming that the petition is filed prior to the effective date of the statute and that the referendum has not been held prior to that effective date. The general rule that statutes are to be applied prospectively rather than retroactively is codified in § 1-16. That section provides, however, that while no right accrued under an old law shall be affected by a new law, "proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings." Whether a statute can be given retroactive effect, therefore, is dependent upon legislative intent and whether the right conferred by the statute is a substantive right:

A determination whether a newly enacted statute may be applied retroactively requires a two-step analysis. It must first be determined whether the General Assembly intended the statute in question to have retroactive effect. If the requisite legislative intent is found, the statute then only may be applied retroactively if such application does not impair substantive or vested rights.

It is apparent from a reading of Chapter 585 that it is the intent of the General Assembly that any referendum concerning the change in form of government for affected counties be held at the next November general election. The language of § 24.1-165.2(C) in Chapter 585 is unequivocal and mandatory concerning the scheduling of a referendum to change the form of government of affected counties:

Any referendum concerning any change in the county's form of government and organization shall be ordered to be held on the next November general election date at least sixty days after the date of the order. [Italics indicates amendatory language.]

I am of the opinion, therefore, that it is the intent of the General Assembly to give retrospective effect to the scheduling of a referendum governed by the new law if the referendum is not held prior to the effective date of the new statute.

The Supreme Court of Virginia has held that the legislature may change the organization and form of local government, absent a constitutional prohibition, notwithstanding any incidental effect upon the terms of office of incumbents. Lipscomb v. Nuckols,
161 Va. 936, 172 S.E. 886 (1934). This principle of law would apply equally to the scheduling of elections for those offices. Scheduling of special elections is not a matter of substantive entitlement and can be regulated retrospectively by the General Assembly. See 1976-1977 Att'y Gen. Ann. Rep. 74, 75-76.

Considering the above, it is my opinion that Chapter 585 would govern the scheduling of a referendum sought by a petition filed prior to the effective date of the statute if the referendum is not held prior to that effective date. 1

1 Several questions pertaining to this petition were addressed in a prior Opinion in which I concluded that (1) the petition must be signed by ten percent of the qualified voters in the County, and (2) a change in the form of government for the County would not affect certain powers granted to neighboring localities through enabling legislation classifying local governments based upon their proximity to a county which had adopted an urban county executive form. See Op. to Hon. Gladys B. Keating & Hon. Linda M. Rollins, H. Del. Mbrs. (July 27, 1989).

2 "General election" is defined by § 24.1-1(5)(a) as any election held in certain days in May or November "for the purpose of filling offices regularly scheduled by law to be filled at those times."

3 Because the county manager form of government does not provide for an elected at-large chairman (compare § 15.1-623 with § 15.1-729), that position would be abolished with the commencement of the new government on January 1, 1992. The composition of the new Board cannot be determined at this time because of the options that must be presented to, and decided by, the voters when the question to adopt the county manager form is presented. See § 15.1-623.1.

The General Assembly has passed legislation which, by its terms, is applicable only to any county with a population in excess of 400,000. See Ch. 585, 1990 Va. Acts 874 (Reg. Sess.). The Governor, however, has not yet signed this legislation. The wording of the legislation raises the question whether the law would be subject to challenge as "special legislation" in violation of Va. Const. Art. IV, § 14(11), which prohibits the General Assembly from enacting "any local, special, or private law" for "registering voters, conducting elections, or designating the places of voting."

The fact that a law applies only to certain territorial districts does not render it unconstitutional if it applies to all parts of the Commonwealth where similar conditions exist. See County Bd. of Sup'rs v. Am. Trailer Co., 193 Va. 72, 68 S.E.2d 115 (1951). If any state of facts can be shown to justify the classification made by the statute, it will survive constitutional challenge. Ex Parte Settle, 114 Va. 715, 77 S.E. 496 (1913) (applicability of statute to only one jurisdiction does not render classification unconstitutional if there is a reasonable basis for the classification).

Whether this particular legislation is unconstitutional would be based upon a factual determination by a court whether any facts exist that would justify the classification. An argument could be made in these circumstances, for example, that the issue of changing the form of government in a county having a population in excess of 400,000 should be considered only at a general election to ensure a maximum turnout of voters, thereby avoiding the possibility that a small segment of the population could effect the change in form of government for such a populous county.

3 This conclusion is also consistent with the rule of law that a change in a statute which a previously issued court order was meant to enforce may have the effect of modifying the order. See System Federation v. Wright, 364 U.S. 642, 652 (1961).

COUNTIES, CITIES AND TOWNS: GENERAL.

Payment by city council of monthly salary supplement to all city employees, to defer cost of health insurance or otherwise use as they see fit, does not obligate city to provide same payment to constitutional officers and their employees.
June 28, 1990

The Honorable James E. Hume
Commonwealth's Attorney for the City of Petersburg

You ask whether the payment of $63 per month by City Council of the City of Petersburg (the "council" and the "city") to all city employees, "to defer the cost of insurance or to otherwise use as they see fit," triggers a broader obligation upon the council to provide the same benefit to constitutional officers of the city and their employees pursuant to § 15.1-7.3 of the Code of Virginia.

I. Facts

You state that the council has announced that it would offer all city employees and all constitutional officers in the city a new insurance plan. Payment of the insurance rates for this plan is shared by the city and the employee. The rates of the new plan would be significantly higher than the rates under the existing plan. As a result, you state that the council has authorized all city employees to receive $63 per month "to defer the cost of insurance or to otherwise use as they see fit." Constitutional officers and their employees were offered enrollment in the new plan, but will not receive the $63 monthly supplement to be provided to city employees.

II. Applicable Statute

Section 15.1-7.3 authorizes the governing body of a county, city, or town to provide group life, accident and health insurance programs for its officers and employees. This statute further provides:

In the event a county or city elects to provide one or more of such [insurance] 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.

III. Monthly Payment to City Employees Does Not Require Same Payment to Constitutional Officers or Their Employees

Prior Opinions of this Office conclude that the purpose of § 15.1-7.3 is both to authorize a local governing body to provide employment benefits to its officers and employees and to require the local government to extend to constitutional officers and their employees the same benefits offered to the employees and officers of the local government. Prior Opinions interpreting § 15.1-7.3 also consistently construe this statute narrowly. For example, one prior Opinion concludes that an obligation to provide certain employment benefits to constitutional officers and their employees is not triggered by a county's payment of employee benefits for a single county official or employee. See 1987-1988 Att'y Gen. Ann. Rep. 181, 182. Another prior Opinion concludes that the provision by a county of health insurance benefits for one county department likewise does not trigger the application of § 15.1-7.3 and result in the requirement that this benefit be provided to constitutional officers and their employees. See 1984-1985 Att'y Gen. Ann. Rep. 74, 75. The General Assembly could, of course, amend the statute to change these prior interpretations, but it has not yet done so. "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in" that interpretation. Browning-Ferris v. Commonwealth, 225 Va. 157, 161, 300 S.E.2d 603, 605-06 (1983) (quoting Deal v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983)); Albemarle County v. Marshall, Clerk, 215 Va. 758, 761-62, 214 S.E.2d 146, 150 (1975).
The $63 monthly supplement to be paid by the city to its employees to defer the cost of health insurance or to otherwise use as they see fit is not a portion of the health insurance program offered to city employees, and is not limited to the payment of premiums for the insurance plan; it is a general salary supplement for city employees. Furthermore, all city employees receive the monthly supplement, regardless of whether they participate in the new insurance program. The benefits and costs of the new insurance plan are the same for city employees and for constitutional officers and their employees. Based on the above, it is my opinion that the payment of the $63-per-month general salary supplement to city employees in the facts you describe does not trigger an obligation for the city to provide the same payment to constitutional officers and their employees pursuant to § 15.1-7.3.

COUNTIES, CITIES AND TOWNS: INDUSTRIAL DEVELOPMENT AND BONDS.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

Industrial development authority may acquire industrial park through gift or purchase of stock from private development corporation in order to transfer ownership of park from corporation to city for purpose of attracting industrial clients to area.

March 20, 1990

The Honorable Joan H. Munford
Member, House of Delegates

This is in reply to your request for my opinion concerning the acquisition of stock in two private Virginia development corporations by an industrial development authority.

I. Facts

Two private development corporations own an industrial park in the City of Christiansburg (the "City"). The shareholders of the corporations have offered to transfer their shares to an industrial development authority ("IDA") which, in turn, will transfer ownership to the City. The City would operate and manage the park. I understand that 90% of the shareholders are willing to transfer their shares without any compensation. The remaining ten percent of the shares would be purchased by the IDA. The purpose for acquiring the industrial park is to attract industrial clients to the area.

II. Applicable Statutes

IDAs are created pursuant to the Industrial Development and Revenue Bond Act, §§ 15.1-1373 through 15.1-1392 of the Code of Virginia (the "Act"). The purpose of the Act, as set forth in § 15.1-1375, is as follows:

It is the intent of the legislature by the passage of this chapter [Chapter 33 of Title 15.1] to authorize the creation of industrial development authorities by the several municipalities in this Commonwealth so that such authorities may acquire, own, lease, and dispose of properties to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises and institutions of higher education to locate in or remain in this Commonwealth and further the use of its agricultural products and natural resources, and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit
of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity. [Emphasis added.]

Section 15.1-1375 further provides that the Act shall be "liberally construed in conformity with these intentions" and requires all activities of an IDA to be exercised for the benefit of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity. It is not intended hereby that any such authority shall itself be authorized to operate any such manufacturing, industrial or commercial enterprise or any facility of an institution of higher education.

The specific powers of an IDA, described in § 15.1-1378, include the powers (1) to acquire and equip authority facilities, "including all real and personal properties which the board of directors of the authority may deem necessary in connection therewith" (§ 15.1-1378(d)); (2) "to lease to others any ... of its facilities" (§ 15.1-1378(e)); and (3) "to sell, exchange, donate, and convey any or all of its facilities" (§ 15.1-1378(f)).

The term "authority facilities or facilities" is defined by § 15.1-1374 as any or all ... facilities for commercial enterprises; now existing or hereafter acquired, constructed or installed by or for the authority for lease or sale by the authority pursuant to the terms of this chapter ... Any facility may consist of or include any or all buildings, improvements, additions, extensions, replacements, machinery or equipment, and may also include appurtenances, lands, rights in land, water rights, franchises, furnishings, landscaping, utilities, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto, acquired, constructed, or installed by or on behalf of the authority.

Section 15.1-1392 expressly authorizes an IDA to acquire, develop, own and operate an industrial park and any utilities that are intended primarily to serve the park and to issue its bonds for such purposes. Such bonds may be secured by revenues generated by the industrial park or the utilities being financed or by any other funds of the authority.

III. IDA Has Power to Acquire Common Stock in Private Virginia Corporation in Order to Acquire Industrial Park for Valid Public Purposes

Any activity by an IDA must have a demonstrable public purpose. Whether a transaction is performed for a proper public purpose is a factual matter determined by the circumstances of each case. Generally, a transaction must benefit primarily the public and only incidentally private interests. Prior Opinions of this Office have concluded that an IDA has broad authority to manage and invest assets consistent with its statutory purposes. See, e.g., Att'y Gen. Ann. Rep.: 1987-1988 at 192 (power to make loan for public purposes); 1980-1981 at 197 (financing construction of office building).

Although § 15.1-1392 does not expressly authorize an IDA to acquire stock in a corporation, it does state that an IDA is "authorized to acquire, develop, own and operate an industrial park." Further, § 15.1-1378 authorizes acquisition by an IDA of all real and personal property (without limitation) deemed necessary by its board in connection with the acquisition of its facilities. The proposed acquisition is solely designed as a means by which an IDA may exercise its statutory authority to acquire an industrial park.
The proposed acquisition is also consistent with Article X, § 10 of the Constitution of Virginia (1971) (the "credit clause"), which prohibits the Commonwealth from incurring financial obligations through speculative financing. The Supreme Court of Virginia, however, has held that the performance of a proper governmental function for the public good is not precluded by the credit clause because it may incidentally benefit a private enterprise or assume the appearance of a proprietary venture. Harrison v. Day, 200 Va. 750, 107 S.E.2d 585 (1959). See also 2 A. Howard, Commentaries on the Constitution of Virginia, 1126-35 (1974); 1978-1979 Att'y Gen. Ann. Rep. 53. The purchase of corporate securities with state funds which are invested in the ordinary course of business for the State's benefit, and not for the purpose of aiding a private corporation, is not forbidden by the credit clause. Almond v. Day, 197 Va. 782, 91 S.E.2d 660 (1956).

The Supreme Court has determined that activities that stimulate industrial development are proper governmental functions not prohibited by the credit clause. Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966). Considering the expansive judicial interpretations of the authority of an IDA to accomplish its statutory mandate and the language of the pertinent statutes discussed above, it is my opinion that an IDA may acquire an industrial park through the gift or purchase of stock from a private development corporation for the purpose of transferring ownership of the park from the corporation to the City.

COUNTIES, CITIES AND TOWNS: INDUSTRIAL DEVELOPMENT AND BONDS.

TAXATION: REAL PROPERTY TAX.

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

Member of county board of assessors considered to be "officer" under Industrial Development and Revenue Bond Act; member of industrial development authority prohibited from serving concurrently on board of assessors.

November 2, 1990

Mr. Daniel M. Siegel
County Attorney for Dinwiddie County

You ask whether a director of a county industrial development authority may serve concurrently on that county's board of assessors.

I. Applicable Statutes

Section 15.1-1377 of the Code of Virginia, a part of the Industrial Development and Revenue Bond Act, pertains to directors of industrial development authorities and provides, in part, that "[n]o director shall be an officer or employee of the municipality" (with an exception for certain towns, not relevant to your inquiry).

Section 15.1-1374 defines "municipality," for purposes of the Industrial Development and Revenue Bond Act, as the "county or incorporated city or town ... with respect to which an authority may be organized ... ."

Section 58.1-3275 provides that
Every general reassessment of real estate in a city or county shall be made by a board of assessors of not fewer than three members, with not more than one member from each magisterial district within such city or county appointed by the governing body. The assessors shall be designated on or after July 1 in the year immediately preceding the year in which the general reassessment of real estate is required to be made.

Section 58.1-3276 requires that "[a]ny persons appointed to a board of assessors . . . shall be freeholders in the county or city for which they serve and shall be appointed by the governing body from the citizens of the county or city."

Section 2.1-639.2, a portion of the State and Local Government Conflict of Interests Act, defines "officer" as "any person appointed or elected to any governmental or advisory agency, whether or not he receives compensation or other emolument of office."

Section 2.1-639.2 further defines a "governmental agency" as each component part of the legislative, executive or judicial branches of state and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties.

II. Section 15.1-1377 Prohibits Member of County Industrial Development Authority from Serving on County Board of Assessors

As noted above, § 15.1-1377 prohibits a director of an industrial development authority from serving concurrently as an officer or employee of the county.

Whether a particular individual is an "employee" of a governmental agency depends on several factors, including whether the individual has a contract of employment, express or implied, whether the individual receives a salary or wages for his or her services, whether the services performed by the individual arise in the usual course of the trade, business or occupation of the governmental entity, and whether the entity exercises control over the manner and method in which the individual performs the services rendered. See Portsmouth v. Daniels, 157 Va. 614, 162 S.E. 324 (1932); Board of Supervisors v. Lucas, 142 Va. 84, 128 S.E. 574 (1925); cf. Ford v. City of Richmond, 239 Va. 664, 6 VLR 2241, 391 S.E.2d 270 (1990); Anderson v. Construction Company, 201 Va. 266, 110 S.E.2d 396 (1959), appeal dismissed, 363 U.S. 719 (1960). A determination whether a member of a board of assessors is an "employee" of his or her county would involve consideration of facts not provided in your inquiry. I assume, therefore, without deciding, that a member of a board of assessors would not be an "employee." The operative question thus becomes whether a member of a board of assessors is an "officer" for purposes of the Industrial Development and Revenue Bond Act.

I note first that a board of assessors falls within the definition of a "governmental agency" under § 2.1-639.2, and that appointees to such boards, therefore, are "officers" under that section, for purposes of the State and Local Government Conflict of Interests Act. While that definition is not necessarily controlling for purposes of the Industrial Development and Revenue Bond Act, it lends support to the conclusion that members of boards of assessors are "officers" under this latter Act.

A prior Opinion of this Office discusses whether a member of a city civil service commission is a city "officer," and states:
Generally speaking, a public officer is a position created by law with specified duties which involve an exercise of a portion of the sovereign power. Important indicia that the creation of an office was intended are the requirement of an oath, the fixing of a term of office, and a grant of authority conferred by law.


Several other Opinions of this Office conclude that certain local officials are officers because of the important duties they perform, although the officials in question are not statutorily designated officers. See Att'y Gen. Ann. Rep.: 1966-1967 at 225 (board of zoning appeals member); 1954-1955 at 178 (school board members); 1939-1940 at 168 (board of supervisors member).

Additionally, in Whitlock v. Hawkins, 105 Va. 242, 253-54, 53 S.E. 401, 404 (1906), the Supreme Court of Virginia held that tax assessors appointed by circuit courts "were officers, not only de facto, but de jure." While members of a board of assessors are now appointed by the local governing body and not by the circuit court, it does not appear that this change in the method of appointment should affect the determination whether they are officers.

Membership on the board of assessors is a position created by law, with the specific duties of performing assessments and reassessments, and with a term of office that runs from July 1 of the year immediately preceding the year in which the general reassessment is required to be made and expiring when the reassessment is complete. Section 58.1-3275. It is my opinion, based on the above, that a member of a board of assessors is an "officer" within the meaning of § 15.1-1377, and that § 15.1-1377, therefore, prohibits a member of a county's industrial development authority from serving concurrently on that county's board of assessors.

A member of the board of assessors is also an officer within the meaning of § 2.1-639.2, which defines an "officer" as "any person appointed or elected to any governmental or advisory agency . . . ."

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

Grandchildren considered "offspring" for whose benefit family subdivision may be created under provisions of county subdivision ordinance.

December 11, 1990

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

You ask whether grandchildren are considered "offspring" for whose benefit a "family subdivision" may be approved under § 15.1-466(A)(k) of the Code of Virginia.

I. Applicable Statute

Section 15.1-466(A)(k) provides that, among other requirements, local subdivision ordinances shall include "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." For the purpose of this requirement, § 15.1-466(A)(k) defines a "member of
the immediate family" as "any person who is a natural or legally defined offspring, spouse, or parent of the owner." (Emphasis added.)

II. Grandchildren Constitute Offspring for Whom "Family Subdivision" Allowed Under § 15.1-466(A)(k)

Section 15.1-466(A)(k) requires county subdivision ordinances to include a provision allowing a landowner to subdivide lots to be sold or given to his or her spouse, parents or "offspring" without complying with the full requirements of the ordinance. The term "offspring" is not defined in § 15.1-466(A)(k), and I am not aware of any definition of that term elsewhere in the Code.

In the absence of a statutory definition, nontechnical words in statutes are to be given their ordinary meaning. Board of Supervisors v. Boaz, 176 Va. 126, 130, 10 S.E.2d 498, 499 (1940); Op. to Hon. Joyce K. Crouch, H. Del. Mbr. (July 18, 1990). In ordinary usage "offspring" refers to a person's children or "descendants." Webster's New World Dictionary 988 (2d c. ed. 1974).

The terms "descendant," "issue" and "offspring" are synonyms, "ordinarily used to refer to those who have issued from [an] individual and include his children, grandchildren and their children to the remotest degree." 29A Words and Phrases 176 (West 1972) (citing First National Bank of Cincinnati v. Gaines, 15 Ohio Misc. 109, 121, 237 N.E.2d 182, 190 (1967)).


Based on the above, it is my opinion that grandchildren are "offspring" within the meaning of § 15.1-466(A)(k) for whom a "family subdivision" may be created under the provisions of a county subdivision ordinance required by that section.

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

Local board of supervisors authorized to enact zoning ordinance for certain county property while leaving remainder of county unzoned if area constitutes "substantial portion" of county; factual question for board to decide.

August 17, 1990

Mr. A. Willard Lester
County Attorney for Wythe County

You ask whether § 15.1-486 of the Code of Virginia allows the Board of Supervisors of Wythe County (the "Board" and the "County") to zone certain property in the County while leaving the remainder of the County unzoned.
1. Facts

You state that the Board wishes to adopt a zoning ordinance applicable to an area that encompasses between 14 and 25 square miles of the County's total of 459 square miles, and that contains between 3,000 and 5,000 of the County's total population of 26,000 people. The area in question extends along both sides of two interstate highways and is approximately eight miles long and three miles wide. You further state that this area has experienced a level of commercial development unequaled in almost any other portion of the County.

II. Applicable Statute

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 rational development of land, the availability of adequate public utilities, the economic development of communities, and 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 15.1-486 provides:

The governing body of any county or municipality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article....

III. Area Described Constitutes "Substantial Portion" of County; Board May Zone That Area Alone

I am not aware of any Virginia court decisions construing the meaning of "substantial portion," as used in § 15.1-486. However, a prior Opinion of this Office concludes that 3.2 square miles of a county (1.2% of the county's land area) containing 4,092 residents (20.35% of the county's 1980 population) is a "substantial portion" of that county under § 15.1-486, allowing the governing body to enact a zoning ordinance for that area alone. See 1981-1982 Att'y Gen. Ann. Rep. 467.

In the facts you present, 14 square miles comprise approximately 3% of the County's total land area. If this area contains 3,000 residents, it includes approximately 12% of the County's total population. Whether the area constitutes a "substantial portion" of the County ultimately is a factual question for the Board to decide in its legislative capacity. Based on the above, however, it is my opinion that the Board reasonably could conclude that the area described constitutes a "substantial portion" of the County, and that, based on such a conclusion, the Board would be authorized to enact a zoning ordinance for that area alone.

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

AVIATION: MUNICIPAL AND COUNTY AIRPORTS.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

County board of supervisors may not condition approval of subdivision plat upon fulfillment of any requirement not set forth in county's duly adopted zoning and subdivision ordinances. Need for navigation easement generated by presence of public airport, not presence of subdivision; county board lacks statutory authority to require conveyance or dedication of easement as condition of subdivision approval for properties near airport.
Constitutional requirement dictates that subdividing landowner be justly compensated when granting avigation easement.

August 16, 1990

The Honorable Lawrence R. Ambrogi
Commonwealth's Attorney for Frederick County

You ask whether a local governing body may require a landowner seeking to subdivide property near a publicly owned airport to dedicate an "avigation easement" for public use for the operation and navigation of aircraft over portions of the property being subdivided, as a condition of subdivision approval, if the local subdivision ordinance contains no requirement for such an easement. You also ask whether § 15.1-466(A)(d) of the Code of Virginia enables a locality to include a requirement in its subdivision ordinance for the dedication of such avigation easements on property near public airports.

I. Facts

You state that the owner of land near the Winchester Regional Airport (the "Airport") has submitted a preliminary subdivision plan, which you state complies with the applicable county zoning and subdivision ordinances, to the Frederick County Board of Supervisors (the "County" and the "Board"). The Board has approved the plan on the condition that the developer grant an avigation easement to the Airport.

II. Applicable Constitutional and Statutory Provisions

Article I, § 11 of the Constitution of Virginia (1971) provides

[t]hat no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly....

Virginia's subdivision enabling statutes are detailed in Article 7, Chapter 11 of Title 15.1, §§ 15.1-465 through 15.1-485. The primary purpose of these statutes is to assure the orderly subdivision of land and its development. See also § 15.1-427. Section 15.1-466 lists certain provisions that are required to be included in a subdivision ordinance and additional provisions that may be included in such an ordinance.

Section 15.1-466(A)(d) requires that a subdivision ordinance include regulations and "adequate provisions for drainage and flood control and other public purposes, and for light and air."

Article I, Chapter 3 of Title 5.1, §§ 5.1-31 through 5.1-41.1, grants local governments, acting alone or jointly with other localities, the authority for the acquisition, establishment, operation and maintenance of airports and related facilities. Section 5.1-32 provides specific authority for acquisition of avigation easements:

Where necessary to provide unobstructed airspace for the landing and taking off of aircraft utilizing airports or landing fields acquired or operated by any county, city or town under the provisions of this article, any such county, city or town may acquire, in the same manner as is provided for the acquisition of land for airport purposes, easements through or other interests or privileges with respect to lands or waters outside the boundaries of such airports or landing fields which are necessary to insure safe approaches to such airports or landing fields and the safe and efficient operation thereof....
Section 5.1-34 grants counties, cities and towns the power to acquire private property for airport purposes, if necessary, by exercise of the right of eminent domain.

III. Board May Not Impose Conditions on Subdivision Approval

You ask whether, in the absence of a provision in the County subdivision ordinance requiring conveyance of an avigation easement, the Board may require such a conveyance as a condition precedent to the approval of a preliminary or final subdivision plat. The Supreme Court of Virginia has held that approval of a subdivision plat is a ministerial act, enforceable by mandamus when an applicant has complied with all local ordinance requirements. Bd. of Supervisors v. Horne, 216 Va. 113, 119, 215 S.E.2d 453, 457 (1975).

It is, therefore, my opinion that the Board may not condition approval of a subdivision plat upon fulfillment of any requirement (including the avigation easement discussed above), unless the requirement is set forth in the County's duly adopted zoning and subdivision ordinances.

IV. County Lacks Constitutional and Statutory Authority to Include Provision in Subdivision Ordinance Requiring Unconditional Conveyance of Avigation Easement

You also ask whether § 15.1-466(A)(d) authorizes a county to include a provision in its subdivision ordinance requiring the conveyance of an avigation easement. An avigation easement "provides not just for flights in the air as a public highway—in that sense no easement would be necessary; it provides for flights that may be so low and so frequent as to amount to a taking of the property." United States v. Brondum, 272 F.2d 642, 645 (1959).

Besides requiring the inclusion of certain specific provisions in a subdivision ordinance, § 15.1-466(A)(d) authorizes localities to include regulations and provisions for "other public purposes." The precise question raised by your inquiry is whether this general grant of authority allows a county to include a provision in its subdivision ordinance requiring conveyance of an avigation easement, without compensation, as a condition of subdivision approval.

In past decisions, the Supreme Court of Virginia has construed the grant of powers in § 15.1-466 very narrowly, holding that, for example, it does not encompass the power, in the absence of specific statutory language, to level a $25 fee for reviewing a subdivision plat. Nat. Realty Corp. v. Virginia Beach, 209 Va. 172, 163 S.E.2d 154 (1968); see also County of York v. King's Villa, 226 Va. 447, 309 S.E.2d 332 (1983) (§ 15.1-466(A)(j) not authority for county administrator to fix sewer connection fees by contract).

The Court also has held that § 15.1-466 does not provide authority for a county board of supervisors to condition subdivision plat approval on the subdivider's reconstruction of two existing public highways abutting the proposed subdivision. Hylton v. Prince William Co., 220 Va. 435, 258 S.E.2d 577 (1979). There, the Court said:

[T]he authority granted by the statute to localities to coordinate streets within and contiguous to a subdivision with other existing or planned streets does not imply authority to charge a private landowner for the expense of reconstructing public highways.

Id. at 441, 258 S.E.2d at 581.

The Court in Hylton relied heavily on the earlier case of Bd. Sup. James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975). In Rowe the Court held that a
county board could not require mandatory dedication of road right-of-way when the need for the road improvements was substantially generated by public traffic demands rather than by the proposed development. The Court based that holding not only on the lack of statutory authority for the mandatory dedication, but also on a constitutional objection, expressed as follows:

The Board cites nothing in the constitution, enabling statutes, or case law of Virginia which empowers the sovereign to require private landowners, as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign, when the need for such facilities is not substantially generated by the proposed development. The private money necessary to fund the performance of such requirements is 'property', and we hold that such requirements violate the constitutional guarantee that 'no person shall be deprived of his life, liberty, or property without due process of law...'. Constitution of Virginia, Art. I, § 11.

Id. at 139-40, 216 S.E.2d at 209 (footnote omitted).

There is no question that the type of avigation easement the Board proposes to acquire is "property" protected by the constitutional guarantee cited in Rowe. As discussed above, §§ 5.1-32 and 5.1-34 empower the Board to acquire such easements by purchase or condemnation, either of which methods would provide the landowner with just compensation for the property right being acquired by the Board. It is well-settled that aircraft flights at levels and frequencies justifying the need for an avigation easement constitute a "taking" of property for which a landowner must be compensated. See Annotation, Airport Operations or Flight of Aircraft as Constituting Taking or Damaging of Property, 22 A.L.R.4th 863 (1983).

Under the principles enunciated in Rowe and Hylton, therefore, a local governing body could constitutionally require mandatory conveyance or dedication of avigation easements, as a condition of subdivision approval, only if the need for the easements were generated by the proposed subdivision itself. In the facts you present, it is the presence of the Airport, not the presence of the subdivision, that generates the need for the easements.

I am of the opinion, therefore, that the Board lacks the statutory authority to require conveyance or dedication of avigation easements as a condition of subdivision approval for properties near the Airport, and that, even if such statutory authority were found in § 15.1-466, applicable constitutional requirements would dictate that the subdividing landowner be justly compensated for granting the easement.

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

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

Town of Colonial Beach may not enact zoning ordinance requiring existing and nonconforming uses of property to conform to requirements of ordinance in conflict with enabling state law.

March 20, 1990

The Honorable W. Tayloe Murphy Jr.
Member, House of Delegates
You ask whether the Town of Colonial Beach (the "Town") has the authority to prohibit certain continued use of property in a manner not conforming to a zoning ordinance. Specifically, you question whether the Town may prohibit by zoning ordinance existing and nonconforming uses of property following a period of discontinuance of such use for one year when a state statute requires a two-year period of discontinuance.

I. Facts

The Town adopted a zoning ordinance on April 23, 1981 (Art. 15, § 15-1.c of the zoning ordinance of the Town), providing that any nonconforming property use which is discontinued for a period of one year following enactment of the ordinance shall be deemed abandoned, and any subsequent use must comply with the ordinance. Section 15.1-492 of the Code of Virginia provides for a two-year period of discontinuance before conformity with the terms of a zoning ordinance is required.

II. Applicable Statutes

Section 15.1-492 provides:

Nothing in this article [Article 8, Chapter 11 of Title 15.1] shall be construed to authorize the impairment of any vested right, except that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years . . . .

Section 1-13.17, also pertinent to your inquiry, provides:

When the council or authorities of any city or town, or any corporation, board, or number of persons, are authorized to make ordinances, bylaws, rules, regulations or orders, it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this Commonwealth.

III. Town Ordinance Conflicts with, and Is Preempted by, State Law

The portions of § 15.1-492, quoted above, severely limit the effect of a zoning ordinance upon nonconforming property uses existing on the effective date of the ordinance. Such nonconforming use may be prohibited only after it has been discontinued for two years subsequent to the adoption of the ordinance. Because the Town's ordinance requires conformity after only a one-year period of discontinuance, it conflicts with state law. Section 1-13.17 precludes localities from adopting ordinances that conflict with state law. See Loudoun County v. Pumphrey, 221 Va. 205, 269 S.E.2d 36 (1980). Accordingly, it is my opinion that the Town ordinance described in your request is preempted by state law and, therefore, is unenforceable.
Adjectives "chief" and "principal," used interchangeably, describe status of law-
enforcement officer; have same meaning.

August 3, 1990

The Honorable Michael F. Kavanaugh
Sheriff for Roanoke County

You ask whether the phrase "principal law-enforcement officer" as used in § 15.1-
131.11 of the Code of Virginia, authorizing the establishment of a police department for
the County of Roanoke, means the same thing as the phrase "chief law-enforcement offi-
cer" as used in other portions of the Code.

I. Applicable Law

A. Enabling Legislation and Ordinance

At its 1990 Session, the General Assembly enacted § 15.1-131.11 authorizing the
Board of Supervisors of Roanoke County (the "Board" and the "County") to establish a
police department for the County. That section provides that the police department shall
be headed by a chief of police who shall be the "principal" law-enforcement officer.

After § 15.1-131.11 became effective, the Board adopted County Ordinance
No. 62690-10 on June 26, 1990, establishing a police department and designating the
chief of police as the "principal" law-enforcement officer. The police department and its
officers are empowered to preserve and enforce the criminal laws of the Commonwealth
and the ordinances and regulations of the County; to preserve the peace and good order
of the community; and, except in civil matters, to execute all warrants and summonses
within the territorial limits of the County and one mile beyond. Co. Ord. No. 62690-10,
supra Art. III, § 16-8.

B. Other Relevant Statutes

Section 9-169 defines "law-enforcement officer" as any "full-time or part-time
employee of a police department or sheriff's office ... who is responsible for the preven-
tion and detection of crime and the enforcement of the penal, traffic or highway laws of
the Commonwealth." Prior Opinions of this Office have applied this definition to the
term "law-enforcement officer" used in other Virginia Code sections. See, e.g., Att'y
does not include officers of Alcoholic Beverage Control Board); 1970-1971 at 346 (state
fire marshals not within definition of term; inclusion of certain other officers dependent
on duties).

Various statutes throughout the Code of Virginia use the phrase "chief" law-
enforcement officer rather than "principal" law-enforcement officer. For example, §§ 19.2-76.1 and 19.2-390 define the "chief" law-enforcement officer as the chief of
police of a city or town or the sheriff of a county, unless the political subdivision has
otherwise designated its chief law-enforcement officer by appropriate resolution or ordi-
nance, in which case the local designation is controlling.

II. No Distinction Between "Chief" and "Principal" Law-Enforcement Officer

Another prior Opinion of this Office concludes that the "chief" law-enforcement
officer is the officer designated by local ordinance or resolution to act in that capacity,
or, in the absence of such local designation, the chief of police (in a city or town) or the
Standard dictionaries define "chief" and "principal" interchangeably. For example, *Black's Law Dictionary* defines the terms as follows:

**Chief.** One who is put above the rest. Principal; leading; head ... paramount; of leading importance.

**Principal, adj.** Chief; leading, most important or considerable; primary; original. Highest in rank, authority, character, importance, or degree. [3]

Similarly, *The American Heritage Dictionary* defines the terms as:

*chief* ... adj. 1. Highest in rank, authority, or office. 2. Principal; most important.

*principal* adj. First, highest, or foremost in importance, rank, worth, or degree; chief.[4]

Both phrases—"chief" law-enforcement officer and "principal" law-enforcement officer—are used throughout the Code of Virginia without distinction. See, e.g., § 15.1-131.5 ("chief"); § 15.1-131 ("principal").

A "law-enforcement officer" is defined clearly in the Code of Virginia and prior Opinions of this Office. The words "chief" and "principal" are mere adjectives describing the status of the law-enforcement officer. In general usage, these adjectives are interchangeable, and the designation "principal" law-enforcement officer is not inconsistent with the designation "chief" law-enforcement officer. It is my opinion, therefore, that "principal" law-enforcement officer and "chief" law-enforcement officer, as used in the Code of Virginia and in County Ordinance No. 626890-10 have the same meaning.

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2 This definition is contained in Chapter 27 of Title 9, which addresses the Department of Criminal Justice Services.

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**COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER.**

**COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENDITURES OF OFFICE - LAW-ENFORCEMENT EXPENDITURES.**

Scope of county's obligation to establish police force upon voters' approval by referendum determined by authorizing legislation ultimately enacted by legislature.

January 30, 1990

The Honorable G. Steven Agee
Member, House of Delegates

You ask whether the authorization by referendum for the Board of Supervisors of Roanoke County (the "Board" and the "County") to establish a police force is permissive or mandatory. On November 7, 1989, in a referendum conducted pursuant to § 15.1-131.6:1 of the Code of Virginia, the County's voters approved by majority vote the establishment of a police force in the County.
I. Applicable Statute

Section 15.1-131.6:1 provides:

Any county which does not presently have a police force shall not establish one until the voters of such county have approved establishment of a police force by majority vote in a referendum held for such purpose and the General Assembly enacts appropriate authorizing legislation. Also, any county which was previously authorized by the General Assembly to have a police force but has not as yet established one will be required to have its operation approved in a referendum conducted as provided for in paragraphs A and B below.

A. The governing body of any county shall petition the court, by resolution, asking that a referendum be held on the question, 'Shall a police force be established in the county?' The court, by order entered of record in accordance with § 24.1-165, shall require the regular election officials of the county to open the polls and take the sense of the qualified voters on the question as herein provided.

The clerk of the circuit court of such county shall publish notice of such election in a newspaper of general circulation in such county once a week for three consecutive weeks prior to such election.

B. The regular election officers of such county shall open the polls at the various voting places in such county on the date specified in such order and conduct such election in the manner provided by law. The election shall be by ballot which shall be prepared by the electoral board of the county and on which shall be printed the following:

'Shall a police force be established in the county?'

___ Yes
___ No

The ballots shall be counted, returns made and canvassed as in other elections, and the results certified by the electoral board to the court ordering such election. If a majority of the voters voting in such election shall have voted 'Yes,' thereupon, such court shall enter an order proclaiming the results of such election and a duly certified copy of such order shall be transmitted to the governing body of such county who shall proceed to establish such police force following the enactment of authorizing legislation.

II. Scope of County's Obligation to Establish Police Force Determined by Authorizing Legislation Ultimately Enacted by General Assembly

The voters' approval of the establishment of a county police force pursuant to § 15.1-131.6:1 is only one step required by general law to establish such a police force. The affirmative referendum does not, independently, establish a county's obligation, or even the authority, to proceed with establishing a police force. Rather, § 15.1-131.6:1 requires that authorizing legislation must be enacted after the referendum. In addition, an authorized police force must be duly organized by the local governing body. See § 15.1-131.7. Article 10, Chapter 1 of Title 14.1, §§ 14.1-84.1 through 14.1-84.7, provides for state funding to support local law-enforcement efforts. Section 14.1-84.6:1 imposes certain procedural requirements on a locality seeking to obtain state funding for a newly established police force. Numerous other practical steps also must be taken to ensure a smooth transition of the provision of law-enforcement services from a sheriff's department to a county police force.

In this instance, the County's voters have approved the establishment of a police force. Legislation has been proposed to authorize its establishment. See Ch. 56, 1990 Va. Acts 113 (Reg. Sess.). In my opinion, § 15.1-131.6:1 does not, independently, require that the Board establish a police force upon an affirmative referendum and the enactment of authorizing legislation. Rather, the scope of the Board's obligation must be determined primarily by reference to the authorizing legislation subsequently enacted by the General Assembly. There is, of course, an expectation that the Board will proceed diligently in establishing a police force upon the enactment of authorizing legislation. Once a county police force has been duly established, it may be abolished pursuant to existing statutes only with the voters' approval by referendum. See § 15.1-131.6:2. Compare 1983-1984 Att'y Gen. Ann. Rep. 149. It is my opinion, however, that the scope of the Board's obligation to establish a police force upon the voters' approval by referendum must be determined by reference to the authorizing legislation ultimately enacted by the General Assembly.

COUNTIES, CITIES AND TOWNS: PRIMARY HIGHWAY TRANSPORTATION IMPROVEMENT DISTRICT IN INDIVIDUAL COUNTIES.

Duties and obligations of funding transportation improvements within district imposed upon district commission; locality not obligated to assist in providing or obtaining financing for transportation improvements other than to levy and collect special improvements tax.

May 9, 1990

The Honorable Robert E. Russell Sr.
Member, Senate of Virginia

You ask,

if a locality establishes a transportation district under §§ 15.1-1372.21 through 15.1-1372.36 of the Code of Virginia, does the act of establishment of such a district create any legal obligation for that locality to assist in providing or obtaining financing for transportation facilities within the district other than to provide for the collection, safekeeping and transfer of the special assessment proceeds as provided in § 15.1-1372.27?

I. Applicable Statutes

The Primary Highway Transportation Improvement District in Individual Counties Act, §§ 15.1-1372.21 through 15.1-1372.36 (the "Act"), details procedures for the cre-
ation, operation, financing, and other related matters associated with transportation improvement districts in individual counties within the Commonwealth. The Act provides a mechanism for private property owners to petition a local board of supervisors to create a special tax assessment district to provide revenues for funding transportation improvements within the district. A district is created by resolution of the board of supervisors, upon petition to that board by the owners of commercially and industrially zoned property within the proposed district. See § 15.1-1372.23. In deciding whether a district should be created, the board of supervisors must determine that the creation of the proposed district will be in furtherance of the county's comprehensive plan for the development of the area, in the best interest of the residents and owners of real property within the proposed district, and in furtherance of the public health, safety and general welfare. See § 15.1-1372.23(C).

II. Powers, Duties and Obligations of District Exercised by District Commission

Once a district has been established by a local board of supervisors, the powers, duties and obligations of the district, including the funding of transportation improvements, are vested in a district commission composed of three members of the board of supervisors. The Chairman of the Commonwealth Transportation Board, or his designee, serves as an ex officio member of the district commission. See § 15.1-1372.24(A). To assist it in fulfilling its financial obligations to fund transportation improvements within the district, the district commission is authorized to request the board of supervisors to levy and collect an annual special improvements tax on taxable real property zoned for commercial or industrial use, or used for these purposes, or leasehold interests within the district. See § 15.1-1372.27.

III. County Has No Legal Obligation to Assist District Commission in Providing or Obtaining Financing for Transportation Improvements

As discussed above, the Act imposes the duties and obligations of funding transportation improvements within a transportation improvement district upon the district commission. I am aware of no provision in the Act that imposes any affirmative obligation upon a locality, based solely upon the establishment of the district itself, to assist in providing or obtaining financing for the transportation improvements other than to levy and collect the special improvements tax.

1The 1990 Session of the General Assembly amended various portions of the Act, but none of these amendments affects the conclusions reached in this Opinion.

2Your inquiry narrowly addresses the financial obligation of a county pursuant to the Act based solely upon the act of establishing the transportation district. As a result, this Opinion does not consider the potential obligation of the county in other instances following the establishment of the district, for example, when the district is abolished. See § 15.1-1372.35.

COUNTIES, CITIES AND TOWNS: PUBLIC FINANCE ACT.

Town's power to create parking authority survives town's transition to independent city status. By succeeding to town council's power, city council may adopt resolution to create local parking authority which may exercise powers enumerated in act adopted prior to transition.

September 19, 1990
The Honorable Jane H. Woods  
Member, House of Delegates

You ask whether the transition of the Town of Fairfax to independent city status, which occurred in 1961 and was continued by the adoption of a new city charter in 1962, impliedly repealed the power to create a local parking authority that had been granted to the town council by the General Assembly of Virginia in 1958.

I. Applicable Statutes

The Town of Fairfax Parking Authority Act (the "Act"), adopted by the General Assembly to be effective October 1, 1958, empowered the governing body of the Town of Fairfax (the "Town") to create an independent authority to finance, construct and operate public parking facilities within the corporate limits of the Town. Ch. 536, 1958 Va. Acts 675.

Section 3(c) of the Act defines "governing body" as "the board, commission, council or other body by whatever name it may be known in which the general legislative powers of the municipality are vested." 1958 Va. Acts, supra, at 677. Section 3(d) defines "municipality" to "mean the town of Fairfax in the Commonwealth of Virginia." Id. Other sections of the Act detail the public necessity for creation of a parking authority (id. § 2, at 676); the manner in which the zoning body must resolve to create the authority (id. §§ 4, 5, at 677-78); the powers to be exercised by the authority (id. § 6, at 678-79); provisions relating to the authority's issuance of revenue bonds (id. §§ 7-13, at 679-82); and other related matters (id. §§ 14-17, at 682).

In 1961, when the Town made the transition to become a city of the second class, the Code of Virginia contained certain general provisions applicable to such a transition. These included § 15-83 of the Code of Virginia, which provided:

Whenever an incorporated community becomes a city of the second-class by the increase of its population to the number of five thousand, or more, and is ascertained and declared to be such a city in the manner provided by the preceding sections, its charter, if it has one, shall remain in full force and effect in so far as its provisions do not conflict with this chapter, and its ordinances shall be the ordinances of the city, in so far as they are applicable, until they are repealed by the authorities of the city, and the officers of the town shall be and continue the officers of the city, until their successors are elected or appointed and qualify, except as hereinafter provided, and shall discharge all the duties and be subject to all the penalties imposed by such charter and ordinances and by the general laws; but provisions of the charter of such town in conflict with this title or other provisions of the general law shall be repealed thereby.

Section 15-86, also in effect in 1961, provided, in part: "The council of the town shall be and continue the common council of the city and discharge all the duties and exercise all the authority imposed on it by the charter and by the general law."

In 1962, a new charter was adopted for the City of Fairfax (the "City" and the "City charter"). See Ch. 468, 1962 Va. Acts 770. Section 1.1 of the City charter provides that the City "shall continue to be a body politic and corporate under the name of the City of Fairfax and as such shall have perpetual succession ...." Id. Section 2.1 provides that the City shall have and may exercise all powers which are now or may hereafter be conferred upon or delegated to cities under the Constitution and laws of the
Commonwealth and all other powers pertinent to the conduct of a city government... as fully and completely as though such powers were specifically enumerated in this charter....

Id. at 770-71.

Section 4.2 provides that "[a]ll powers vested in the city shall be exercised by the council...." Id. at 772.

II. Power to Create Parking Authority Not Repealed by Implication; City Council May Exercise Such Power as Successor to Town Council

You state that no action has ever been taken, either by the Town council before 1961 or by the City council thereafter, to adopt a resolution creating a parking authority as allowed by the Act. You inquire whether the power to do so survived the Town's transition to city status.

Neither the transition provisions of §§ 15-83 and 15-86 nor the provisions of the City charter adopted in 1962 specifically address whether the powers conferred on the Town council by the Act devolved upon the City council with the transition. Both §§ 15-83 and 15-86 reflect a general legislative intent, however, that the Town's powers should become the City's powers. Similarly, the provision of the Act conferring the Act's powers on the governing body of the municipality "by whatever name it may be known" (1958 Va. Acts, supra § 3(c), at 677) supports the conclusion that those powers survive the transition from town to city, since the City charter makes it clear that the "municipality" has continued in existence (see 1962 Va. Acts, supra § 1.2, at 770).

Under generally accepted principles of statutory construction, "[r]epeal... by implication is not favored, and, indeed, there is a presumption against a legislative intent to repeal 'where express terms are not used, or the later statute does not amend the former.' " Albemarle County v. Marshall, Clerk, 215 Va. 756, 761, 214 S.E.2d 146, 150 (1975) (quoting Newmarket, &c., Co. v. Keyser, 119 Va. 165, 170, 89 S.E. 251, 253 (1916)). See also Att'y Gen. Ann. Rep.: 1987-1988 at 153, 155; id. at 381, 383; 1983-1984 at 140, 141.

Based on the above, I am of the opinion that the provisions of the Act were not impliedly repealed by the Town's transition to City status and the subsequent adoption of the City charter. I further conclude, therefore, that the City council succeeded to the Town council's power, under the Act, to adopt a resolution to create a local parking authority, which when created, may exercise all powers enumerated in the Act.1

1Before issuing any bonds under the Act, in order to resolve any remaining question about its powers, the parking authority may wish to initiate a proceeding in the City circuit court to validate the bonds, pursuant to § 15.1-214.

COUNTIES, CITIES AND TOWNS: PUBLIC FINANCE ACT.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - DEBT.

ELECTIONS: THE ELECTION - SPECIAL ELECTIONS.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.
Local board of supervisors may not submit to county voters referendum question imposing county debt limit lower than that constitutionally permissible; may adopt ordinance, prior to holding referendum on being treated as city for bonded debt purposes, establishing debt limit lower than 10% of value of county's taxable real estate. Ordinances and resolutions subject to modification by future boards.

September 6, 1990

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

You state that the Board of Supervisors of Pulaski County (the "Board" and the "County") is considering calling for a voter referendum, pursuant to § 15.1-185.1 of the Code of Virginia, on the question whether the County should be treated as a city for the purpose of issuing bonds under the Public Finance Act, Chapter 5 of Title 15.1, §§ 15.1-170 through 15.1-227. You ask (1) whether the Board may so phrase the question to be posed in the § 15.1-185.1 referendum as to impose a debt limit on the County lower than the general debt limit imposed on cities by Article VII, § 10 of the Constitution of Virginia (1971); and if not, (2) whether the Board may, prior to holding the § 15.1-185.1 referendum, adopt an ordinance binding it and future boards to seek voter approval of any proposed bond issue in excess of such self-imposed lower debt limit.

I. Applicable Constitutional and Statutory Provisions

Article VII, § 10(a) states, in part:

No city or town shall issue any bonds or other interest-bearing obligations which, including existing indebtedness, shall at any time exceed ten per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes.

Section 1-13.17 states that

[w]hen the council or authorities of any city or town, or any corporation, board, or number of persons, are authorized to make ordinances, bylaws, rules, regulations or orders, it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this Commonwealth.

Section 15.1-185.1 provides that a county may elect to be treated as a city for the purpose of issuing bonds:

Any county may, upon approval by the affirmative vote of the qualified voters of the county voting in an election on the question, elect to be treated as a city for the purpose of issuing its bonds under this chapter. If a county so elects, it shall thereafter be subject to all of the benefits and limitations of Article VII, Section 10, of the Constitution and all provisions of this Code relating to bonded indebtedness applicable to cities, but in determining the limitation for a county there shall be included, unless otherwise excluded under Article VII, Section 10, of the Constitution, indebtedness of any town or district in that county empowered to levy taxes on real estate.

Section 24.1-165 provides that "[n]o referendum shall be placed on the ballot, unless specifically authorized by statute . . . or, in the case of a referendum to authorize the issuance of bonds of a city or town, by statute or by the charter of such city or town."
II. Referendum Pursuant to § 15.1-185.1 Limited to Question Posed in That Section

As noted above, § 24.1-165 provides that no question shall be placed on the ballot for voter approval except as specifically provided by general law.

Section 15.1-185.1 provides for an election on "the question" whether the qualified voters "elect to be treated as a city for the purpose of issuing its bonds," and further provides that, if the voters so elect, the County shall "thereafter be subject to all of the benefits and limitations of Article VII, Section 10, of the Constitution and all provisions of this Code relating to bonded indebtedness applicable to cities." (Emphasis added.)

Section 15.1-185.1 is the only provision of general law permitting a referendum on the question of the County being treated as a city for bonded debt purposes. By its plain language, § 15.1-185.1 calls for a referendum that would give the County "all of the benefits and limitations" applicable to city debt. "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.' " 1989 Att'y Gen. Ann. Rep. 144, 147 (citation omitted). Under § 24.1-165, moreover, no authority exists for submitting any question to the voters other than that specifically contemplated by § 15.1-185.1.

I am of the opinion, therefore, that the Board may not submit to the voters of the County a referendum question pursuant to § 15.1-185.1 that would impose a county debt limit lower than that permitted under Article VII, § 10.

III. Board May Adopt Debt Limit More Restrictive Than Constitutional Provision; Ordinances and Resolutions Subject to Modification by Future Boards

Your second inquiry relates to the authority of the Board to adopt, by ordinance or resolution, a self-imposed debt limit that is lower than the debt limit imposed by Article VII, § 10.

Any ordinance or resolution adopted by the Board must, of course, be consistent with state statutes and constitutional provisions. Section 1-13.17. The Supreme Court of Virginia has held, however, that it is not inconsistent for a locality to impose on itself by ordinance a requirement that is more restrictive than the constitutional restriction on the same subject. See Stendig Development Corp. v. Danville, 214 Va. 548, 202 S.E.2d 871 (1974) (city ordinance could require greater majority vote to sell city property than constitutional provision requires). I am of the opinion, therefore, that the Board may adopt an ordinance to impose on the County a debt limit lower than ten percent of the value of the County's taxable real estate. I am unaware of any constitutional or statutory provision that would prevent the Board from adopting such an ordinance before calling for a referendum on being treated as a city for bonded debt purposes, pursuant to § 15.1-185.1.

Prior Opinions of this Office consistently have held, however, that a local governing body does not have the power to take actions that irrevocably bind its successors in office, unless such binding action is expressly authorized by statute. See Att'y Gen. Ann. Rep.: 1984-1985 at 99, 101; 1974-1975 at 33; 1972-1973 at 37; 1949-1950 at 31; cf. Att'y Gen. Ann. Rep.: 1982-1983 at 151, 154 n.9; 1981-1982 at 48, 50. No legislative body, federal, state or local, can limit the power of its successors to amend or repeal statutes or ordinances. 1A N. Singer, Sutherland Stat. Const. §§ 22.02, 23.03 (4th ed. 1985). I am further of the opinion, therefore, that any ordinance adopted by the Board to establish a debt limit lower than that imposed by Article VII, § 10 would necessarily be subject to later amendment or repeal by the Board or its successors in office.
COUNTIES, CITIES AND TOWNS: VIRGINIA COALFIELD AUTHORITY.

TAXATION: LICENSE TAXES.

Virginia Coalfield Economic Development Authority may lend money received from Wise County for project in City of Norton without consent of county board of supervisors.

October 11, 1990

You ask whether the Virginia Coalfield Economic Development Authority may lend money it receives from Wise County coal and gas severance taxes adopted pursuant to § 58.1-3713 of the Code of Virginia to fund a project in the City of Norton without the consent of the Wise County Board of Supervisors (the "Wise County Board").

I. Applicable Statutes

Chapter 40 of Title 15.1, §§ 15.1-1635 through 15.1-1650, creates the Virginia Coalfield Economic Development Authority (the "Authority") and details its powers. The purpose of the Authority is to enhance the economic base of the coalfield region of southwest Virginia, which is comprised of "Lee, Wise, Scott, Buchanan, Russell, Tazewell and Dickenson Counties and the City of Norton." Section 15.1-1637. The Authority maintains the Virginia Coalfield Economic Development Fund (the "Coalfield Development Fund"), which is capitalized by mandatory contributions from each of the named jurisdictions of "twenty-five percent of the revenues collected [from] the coal and gas road improvement tax pursuant to § 58.1-3713." Section 15.1-1644.

Section 15.1-1645 provides, in part:

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 15.1-1650 provides that "[f]or the purpose of this Act the City of Norton shall be deemed a contributing jurisdiction of Wise County and moneys collected from Wise County may be used in the City of Norton."

II. Authority May Lend Money Collected from Wise County in City of Norton Without Consent of Wise County Board

Section 15.1-1645 provides that the Authority may use Coalfield Development Fund revenues received pursuant to § 15.1-1644 only in the county or the city from which those funds were received, unless the governing body of the county or city otherwise consents. Section 15.1-1650, however, states that, for purposes of the Act, Norton is a contributing jurisdiction of Wise County, and that funds collected from Wise County may be used in Norton.

It is a well-established 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 give effect to the legislative intent of each statute. Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1976). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or
insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 1986-1987 Att'y Gen. Ann. Rep. 228, 229 (quoting 2A N. Singer, Sutherland Stat. Const. § 46.05, at 104 (4th ed. 1984)). Section 15.1-1650 states that funds collected from Wise County may be used in Norton. To construe § 15.1-1650 as allowing the Authority to use § 58.1-3713 tax funds collected from Wise County in Norton only with the approval of the Wise County Board would render § 15.1-1650 superfluous, because § 15.1-1645 already provides that such funds may be used in a county or city other than the one from which they were received with the consent of the originating county or city's governing body.

Another accepted principle of statutory construction is that a law applicable to a particular set of facts must be treated as an exception to a general statute so comprehensive in its language as to cover all cases within the purview of the language used. Southern Railway Co. v. Com., 124 Va. 36, 56, 97 S.E. 343, 349 (1918); Att'y Gen. Ann. Rep.: 1989 at 214, 216; 1986-1987 at 263, 263-64. This principle further supports the conclusion that the more particular provision relating to the City of Norton in § 15.1-1650 should be viewed as an exception to the general requirement of § 15.1-1645.

It is my opinion, based on the above, that § 15.1-1650 authorizes the Authority to lend money received from Wise County for a project in the City of Norton without the consent of the Wise County Board.

1Section 58.1-3713 authorizes cities and counties to adopt a license tax on persons "engaging in the business of severing coal or gases from the earth." This tax may be imposed in addition to the severance tax authorized by § 58.1-3712. The tax under § 58.1-3713 may not exceed one percent of the taxpayer's gross receipts. Receipts from this tax generally must be credited to a special fund in each taxing jurisdiction called the Coal and Gas Road Improvement Fund (the "Road Fund"). In those jurisdictions comprising the Authority, however, only "three-fourths of the revenue" from the § 58.1-3713 tax is dedicated to their respective Road Funds; the remaining "one-fourth of the revenue" is allocated to the Coalfield Development Fund. Section 58.1-3713(A).

2The Coalfield Development Fund also receives "one-half of the revenues" generated from an additional one percent severance tax on gases, authorized by § 58.1-3713.4. Section 15.1-1645 provides that those revenues, unlike those the Coalfield Development Fund receives pursuant to § 15.1-1644 (from the § 58.1-3713 severance tax), may be spent "at the discretion of the [Authority]" without regard to their jurisdiction of origin. A prior Opinion of this Office concludes that all revenues of the Coalfield Development Fund are subject to the jurisdictional restriction of § 15.1-1645. 1989 Att'y Gen. Ann. Rep. 132, 134-35. That Opinion, however, predates the adoption of § 58.1-3713.4 and the addition to § 15.1-1645 cited in this footnote giving the Authority discretion with respect to § 58.1-3713.4 revenues.


COUNTIES, CITIES AND TOWNS: VIRGINIA INDOOR CLEAN AIR ACT.

COURTS NOT OF RECORD: DISTRICT COURTS.

CRIMINAL PROCEDURE: MAGISTRATES.

Aggrieved citizen may initiate action to enforce Virginia Indoor Clean Air Act through normal civil process. Civil penalties collected under Act deposited into general fund; multiple penalties may not be assessed when multiple plaintiffs bring suit to enforce single violation of Act. Civil penalties not payable to private plaintiff.
The Honorable Edgar L. Turlington Jr.
Judge, General District Court of the City of Richmond, Civil Division

You ask three questions about the Virginia Indoor Clean Air Act, §§ 15.1-291.1 through 15.1-291.11 of the Code of Virginia (the "Act"). You first ask who may bring an action to enforce the provisions of the Act. You also ask to what person or entity the civil penalty for violation of the Act is to be paid. Your third inquiry is whether the civil penalty assessed for a single violation should be multiplied by the number of plaintiffs seeking to enforce the Act.

I. Applicable Statutes

Section 15.1-291.2 provides that persons violating the Act "may be subject to a civil penalty of not more than twenty-five dollars." The Act does not designate who shall receive this civil penalty.

Section 15.1-291.10 provides that local ordinances enacted in compliance with the Act may impose civil penalties of up to twenty-five dollars for violations.

Civil suits brought under the Act may be initiated by a civil warrant issued by the clerk or deputy clerk of a general district court pursuant to § 16.1-69.40, or by a magistrate pursuant to § 19.2-45. Suit also may be initiated by the filing of a motion for judgment pursuant to § 16.1-81.

II. Act May Be Enforced by Citizen Through Normal Civil Process

No provision in the Act places the duty to enforce the Act on any public official or agency.


By the same reasoning, it is my opinion that, since the Act does not place any limit on who has standing to complain of violations, any aggrieved citizen may initiate an action to enforce the Act through a civil proceeding, as described above.

III. All Civil Penalties Collected for Violations of Act Should Be Deposited into General Fund

Your inquiry suggests that the civil penalty for violation of the Act might be paid to the individual plaintiff or other persons present at the time of violation. The Code contains numerous provisions for civil penalties. Some require the penalty to be paid to the Literary Fund. See, e.g., § 46.2-1131 (civil penalties for overweight vehicle violations). Others create a special fund to receive specific types of civil penalties. See, e.g., § 10.1-1406 (Virginia Solid and Hazardous Waste Contingency Fund). Some specifically provide for payments to the general fund. See, e.g., § 40.1-113 (civil penalties for child labor offenses). Many statutes, like the Act, are silent. I am not aware, however, of any provision authorizing payment of a "civil penalty" to a private plaintiff. Compare § 32.1-36.1 (individual complainant may receive damages for violation of confidentiality requirement concerning test for human immunodeficiency virus, but penalty shall be paid to Literary Fund). I conclude that, if the General Assembly had intended private individual complainants to receive the twenty-five dollars provided under the Act, it would have used the term "damages" rather than "civil penalty."
The Appropriations Act for the 1990-1992 biennium provides that "monies derived from all other sources as are not segregated by law to other funds... shall establish and constitute the general fund of the State treasury." Ch. 972 § 1(C), 1990 Va. Acts 1871 (Reg. Sess.). Section 4-11.00 of the 1990-1992 Appropriations Act further provides that "[t]his act shall prevail over all other laws of the Commonwealth which may be in conflict therewith...." Id. at 2206.

Because the General Assembly has not designated a specific fund into which civil penalties collected under the Act are to be placed, it is my opinion that all civil penalties collected under the Act must be deposited into the general fund of the Commonwealth. Accord 1986-1987 Att'y Gen. Ann. Rep. 66, 67 (absent statutory direction, noncriminal monetary penalties should be paid to State treasury and not to Literary Fund).

IV. Multiple Penalties May Not Be Assessed When Multiple Plaintiffs Bring Suit to Enforce Single Violation of Act

The Act subjects a violator to a civil penalty of not more than twenty-five dollars. See §§ 15.1-291.2(E)-(F), 15.1-291.10. It is clear that the General Assembly may authorize civil penalties to proscribe conduct which, though not criminal in nature, is in violation of a statutory regulatory scheme. The purpose of such a penalty is not punitive, but is, rather, to strengthen the effectiveness of the regulatory scheme of which it is a part. See 1977-1978 Att'y Gen. Ann. Rep. 162, 164. The penalty in the Act, therefore, is designed to deter prohibited conduct rather than to punish or to provide some measure of redress for injury occasioned by that conduct.

A general district court, in which suits brought pursuant to the Act typically are brought, operates under principles of law and equity, and whenever these principles conflict, the principles of equity prevail. See § 16.1-93. It is the policy of courts of equity to prevent a multiplicity of suits and to settle in a single suit all cases which involve a single subject matter. 7A M.J. Equity § 14 (Repl. Vol. 1985). Multiple suits to accomplish the same purpose harass a defendant, subject him to unnecessary costs, are "oppressive, and ought not to be sanctioned by a court of equity." Peery v. Elliott, 101 Va. 709, 710, 44 S.E. 919 (1903).

Because the civil penalty levied against one who violates the Act is designed to regulate conduct rather than to provide damages to an aggrieved plaintiff and, further, because courts of equity should avoid multiple suits involving a single subject matter, it is my opinion that multiple penalties may not be assessed when multiple plaintiffs bring suit to enforce a single violation of the Act.

Your specific question is: "For example, may each guest in a restaurant individually file a civil warrant and require the restaurant to pay each guest $25.00? For one infraction with 1,000 people in attendance... would the penalty be a total of $25,000 or $25.00 for each warrant filed?"

Because the Act is civil in nature, it would be inappropriate for a magistrate to issue a criminal warrant or summons under the provisions of §§ 19.2-71 through 19.2-82.

COURTS NOT OF RECORD: DISTRICT COURTS.

CIVIL REMEDIES AND PROCEDURE: LIMITATIONS ON ACTIONS.

Life of general district court judgment may be extended by docketing abstract of judgment in clerk's office of circuit court; filing of motion in circuit court extends enforcement period of judgment for successive 20-year periods.
January 31, 1990

The Honorable G. Steven Agee
Member, House of Delegates

You ask several questions concerning the term of a judgment rendered by a general district court that subsequently is docketed in the clerk's office of a circuit court. Specifically, you ask whether the period for the enforcement of this judgment is ten years or twenty years and whether it is necessary to secure an additional general district court order to extend the enforcement period of the judgment from ten years to twenty years.

I. Applicable Statutes

A judgment rendered by a general district court may be enforced for ten years. See §§ 16.1-94.1, 16.1-69.55(B)(2). A circuit court judgment, however, may be enforced for twenty years pursuant to § 8.01-251(A), and may be extended for successive twenty-year periods pursuant to § 8.01-251(B) on motion of the judgment creditor or his assignee.

Section § 16.1-69.55(B)(4) provides two methods for extending the enforcement period for a general district court judgment. The first method is a motion filed in the general district court to extend the enforcement period. If the general district court grants this motion and the fees required by this statute are paid, the case documents and fees are forwarded to the circuit court in the same jurisdiction as the general district court that rendered the judgment. The judgment thereafter is treated as a judgment of the circuit court. The circuit court then has the authority to extend the enforcement period for this judgment for successive twenty-year periods upon application of the judgment creditor or his assignee. See § 8.01-251(B).

The second method described in § 16.1-69.55(B)(4) to extend the enforcement period for a general district court judgment is to docket an abstract of that judgment in the circuit court. When this is done, the life of the judgment becomes twenty years, the same as the enforcement period for a judgment rendered by the circuit court. The judgment creditor thereafter may move the circuit court for extensions of the life of the judgment for additional twenty-year periods. The general district court documents, however, are retained in the general district court and, for all other purposes, the judgment remains one of the general district court.

II. Limitation on Enforcement of Judgment in Facts Presented is Twenty Years; Motion to Extend Enforcement Period May Be Made to Circuit Court

Based on the above, it is my opinion that the limitation on enforcement of a judgment in the facts you present is twenty years. This judgment may be extended for successive twenty-year periods by filing the appropriate motion made pursuant to § 8.01-251(B) in the circuit court. It is further my opinion, therefore, that it is unnecessary to seek another general district court order to extend the life of the judgment in the facts you present.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Agency to which juvenile committed and Commonwealth's attorney have statutory right of access to police records of juveniles; access for other agencies subject to factual determination by court, giving consideration to statutory purpose and rule of liberal construction to effect that purpose. Establishment of procedures in court order to ensure that juvenile records do not fall into hands of unauthorized persons.
The Honorable William Alan Becker  
Judge, Juvenile and Domestic Relations District Court, Thirty-First District

You ask whether §§ 16.1-301 and 16.1-305 of the Code of Virginia empower a juvenile and domestic relations district court ("juvenile court") to enter an order that authorizes agencies with legitimate interests in juvenile cases to have access to certain juvenile, police and court records.

I. Facts

In response to studies by the United States Department of Justice concluding that 3% of juvenile offenders may be responsible for as many as 60% of juvenile offenses, the Prince William County Police Department (the "County Police Department"), using funds from a federal grant, initiated the Serious Habitual Offender Comprehensive Action Program ("SHOCAP") to identify habitual juvenile offenders and to establish procedures for sharing information about those juveniles with other agencies in the community dealing with juveniles.

To implement SHOCAP, the chief of the County Police Department has promulgated two general orders that relate to the confidentiality of juvenile records and establish the conditions under which the other participating agencies may be granted access to those records. The county attorney has presented to your court a proposed order that would authorize the County Police Department to disclose and furnish records of juveniles identified as serious habitual offenders under SHOCAP to certain of the participating agencies, subject to limits described in the police chief's general orders. The proposed court order also would authorize the clerk of your court to allow the officer in the County Police Department who coordinates SHOCAP to examine the "face sheets" from the court's files of cases involving those juveniles. The order further would authorize your Court Services Unit to make available to the SHOCAP officer probation records of juveniles identified under SHOCAP.

II. Applicable Statutes

Section 16.1-301(A) provides that the courts "shall require all law-enforcement agencies to take special precautions to ensure that law-enforcement records concerning a child are protected against disclosure to any unauthorized person."

Section 16.1-301(B)(2) authorizes inspection of juvenile records held by law-enforcement agencies by "[t]he officers of public and nongovernmental institutions or agencies to which the child is currently committed."

Section 16.1-301(B)(3) provides that a juvenile court may enter an order authorizing any person, agency, or institution with a legitimate interest in a juvenile case or in the work of the law-enforcement agency to inspect juvenile records maintained by police departments and sheriffs.

Section 16.1-301(B)(4) authorizes a juvenile court to enter an order allowing law-enforcement officers of other jurisdictions to inspect such juvenile law-enforcement records when necessary for the discharge of their current official duties.

Section 16.1-305(A)(4) empowers a juvenile court to enter an order permitting any person, agency or institution with a legitimate interest in a juvenile case or in the work of the court to inspect juvenile case files maintained by the court.
III. Agency to Which Juvenile Committed and Commonwealth's Attorney Have Statutory Right of Access to Police Records of Juveniles; Access for Other Agencies Subject to Factual Determination by Court

A prior Opinion of this Office notes that statutes dealing with the powers of the juvenile court system must be construed liberally to effect the statutory purposes. That Opinion also identifies one of those purposes as the need "[t]o protect the community against those acts of its citizens which are harmful to others and to reduce the incidence of delinquent behavior." 1978-1979 Att'y Gen. Ann. Rep. 161, 162 (quoting § 16.1-227(4)).

Another prior Opinion of this Office concludes that the Department of Medical Assistance Services may obtain, by juvenile court order pursuant to § 16.1-305(A)(4), the names of juvenile defendants and their victims to assist in the recovery of Medicaid funds expended for medical care resulting from assaults. 1985-1986 Att'y Gen. Ann. Rep. 116.

The proposed order presented to your court grants access to County Police Department records by the Division of Youth Residential Services only for those juveniles committed to that agency's facilities. In my opinion that provision of the proposed order is authorized by the plain language of § 16.1-301(B)(2), cited in Part II above.

It is further my opinion that the Office of the Commonwealth's Attorney is, by virtue of its constitutional and statutory responsibilities, an "agency ... having a legitimate interest" in the cases of juveniles identified by SHOCAP and in the work of the County Police Department generally, within the meaning of § 16.1-301(B)(3). It is appropriate, therefore, for your court to grant that office access to the police records of those juveniles, without further inquiry.

For the court to allow the other participating city and town police departments access to the County Police Department's records under SHOCAP, however, it must find that such access is "necessary for the discharge of their current official duties," as provided by § 16.1-301(B)(4). Likewise, the part of the proposed order granting the SHOCAP officer access to the records of your court and its Court Services Unit requires a finding that that officer has a "legitimate interest" in the cases in question, as provided by § 16.1-305(A)(4).

These required findings are factual matters that the court must ultimately decide, giving due consideration to the statutory purposes and rule of liberal construction discussed above. The court also should satisfy itself, before entering the proposed court order, that the procedures established in the general orders promulgated by the chief of the County Police Department are adequate to ensure that juvenile records identified and disclosed to agencies participating in SHOCAP do not fall into the hands of other unauthorized persons. See § 16.1-301(A).

1The "participating agencies" in SHOCAP include the Office of the Commonwealth's Attorney, the Division of Youth Residential Services in the Department of Social Services, the Community Services Board and the County School Board. Also participating are the police departments of the towns of Haymarket, Quantico, Occoquan and Dumfries and the cities of Manassas and Manassas Park, in addition to the clerk of your court and your Court Services Unit.

2The agencies authorized by the proposed order to have access to County Police Department records concerning the identified juveniles include the Office of the Commonwealth's Attorney, the Division of Youth Residential Services (for juveniles confined to that agency's facilities), and the participating city and town police departments.
The proposed order would grant the SHOCAP officer access only to the "face sheets." Access to medical and psychological records, predisposition studies, reports of child abuse and neglect, and other records in the court files would be granted only by separate court orders sought and granted on a case-by-case basis.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Juvenile court's jurisdiction extends to persons over 18, but less than 21, in certain circumstances. Intake officers may order temporary detention of such persons in either adult or juvenile facility. Time limits within which detention order must be reviewed by judge; if confinement continued in juvenile facility, judge required to specify in order that such confinement consistent with safety of staff of facility and children confined there.

August 24, 1990

The Honorable James A. Leftwich
Judge, Juvenile and Domestic Relations Court

You ask whether § 16.1-249(G) of the Code of Virginia limits the authority of juvenile court intake officers to order the temporary predisposition detention of persons over the age of eighteen who are alleged to have committed offenses before their eighteenth birthday. If intake officers retain the authority to detain such persons notwithstanding the provisions of § 16.1-249(G), you ask whether such temporary detention may be ordered in an adult facility. Finally you ask whether, if the authority of intake officers independently to order detention of such a person is limited by § 16.1-249(G), juvenile and domestic relations district court ("juvenile court") judges may nevertheless delegate such authority to their intake officers.

I. Applicable Statutes

Section 16.1-242 provides that when a juvenile court has obtained jurisdiction over a child, it may retain such jurisdiction, with certain exceptions, after the child's eighteenth birthday until the child attains the age of twenty-one.

Section 16.1-246 enumerates the circumstances in which a child may be placed in immediate predisposition custody. One such circumstance is when a detention order has been issued by the judge or intake officer of a juvenile court or by the clerk of such a court who has been so authorized by the judge. Section 16.1-246(A).

Section 16.1-247 details procedures for the immediate notification of the parents, guardians or other persons standing in loco parentis of children detained under the various circumstances set forth in § 16.1-246 and for the expeditious review of the initial decision to detain a child. In several of the situations arising under § 16.1-246, § 16.1-247 authorizes review of the predisposition detention decisions by either a juvenile court judge or intake officer.

Section 16.1-248.1 establishes the conditions under which the judge or intake officer reviewing the initial detention of a child pursuant to § 16.1-247 may decide to continue holding such child in custody. Different criteria are provided by § 16.1-248.1 for holding a child in a secure facility or in shelter care.

Section 16.1-249 enumerates the types of facilities in which the continued predisposition detention or shelter care pursuant to § 16.1-248.1 may be ordered. Section
16.1-249 also makes certain additional provisions for children confined in jails or other adult facilities. Section 16.1-249(G) provides:

A judge may order the predispositional detention of persons eighteen years of age or older in a juvenile facility or in an adult facility. However, a judge shall not confine any person eighteen years of age or older in a juvenile facility unless he finds from evidence that the presence of such a person in a juvenile facility is consistent with assuring the safety of the children confined in the facility and the staff of the facility. Such finding shall be in writing and be included in the order of detention.

Finally, § 16.1-250 provides that a child placed in immediate custody pursuant to § 16.1-246, and not thereafter released as a result of the review provided by §§ 16.1-247 and 16.1-248.1, shall be brought before a judge on the next day on which the court sits in the locality in which the charge against the child is pending, or within a maximum of seventy-two hours. Unlike the procedures detailed in §§ 16.1-246 and 16.1-247, which may be conducted by an intake officer, the hearing required by § 16.1-250 must be conducted by a judge. The judge conducting the § 16.1-250 hearing may order the child's release or continue his detention until the disposition of the pending charges.

II. Juvenile Court Has Jurisdiction Over Adults Between Ages Eighteen and Twenty-One Under Certain Circumstances

A prior Opinion of this Office concludes that the juvenile court has jurisdiction, pursuant to § 16.1-242, of persons over the age of eighteen, but less than twenty-one, charged with committing offenses prior to their eighteenth birthday. 1986-1987 Att'y Gen. Ann. Rep. 155. The juvenile court's jurisdiction under § 16.1-242 also extends to persons placed on probation for offenses committed before their eighteenth birthday who are returned to the court before their twenty-first birthday for alleged probation violations. 1981-1982 Att'y Gen. Ann. Rep. 215; see also § 16.1-279(E). Therefore, the persons contemplated in § 16.1-246(G) necessarily are those over eighteen, but less than twenty-one, years of age.

Another Opinion of this Office concludes that a juvenile court may place an adult between the ages of eighteen and twenty-one, whose offense occurred prior to his eighteenth birthday, in a juvenile detention facility. 1987-1988 Att'y Gen. Ann. Rep. 244, 245. That Opinion cautions, however, that the juvenile detention system must be vigilant about any possible dangers such a person may pose to the children in the facility. Id. Any person eighteen years of age or older also may be confined in a jail in the same manner as an adult prisoner. 1982-1983 Att'y Gen. Ann. Rep. 319. In my opinion, the first sentence of § 16.1-249(G), therefore, merely restates existing law, allowing predispositional detention of persons over eighteen who are still subject to juvenile court jurisdiction to be confined in either an adult or a juvenile facility.

III. Intake Officers Authorized to Direct Temporary Placement of Certain Adults in Either Juvenile or Adult Facilities

As the prior Opinions of this Office mentioned above suggest, an individual between the ages of eighteen and twenty-one who comes under the juvenile court's jurisdiction is entitled to the same procedural safeguards as a child under the age of eighteen. These safeguards include the entire scheme of predispositional protection in the statutes discussed in Part I above. Thus, as you point out, intake officers have routinely issued detention orders pursuant to §§ 16.1-246 and 16.1-247 for persons between the ages of eighteen and twenty-one charged with offenses committed before their eighteenth birthday, or with violating probation for such offenses. Those two sections evidence a clear intention on the part of the General Assembly that the review of immediate detention
orders be expeditious, and that intake officers conduct such reviews and make the decision, where appropriate, to continue detention pending the hearing prescribed by § 16.1-250.

Under recognized principles of statutory construction, "[t]he ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms." Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976). There is no clearly expressed intent in § 16.1-249(G) to modify the authority granted to intake officers in §§ 16.1-246 through 16.1-248.1 to order detention pending the hearing required by § 16.1-250. I am of the opinion, therefore, that all the foregoing sections may be construed together consistently to permit intake officers to continue ordering the temporary detention of persons between the ages of eighteen and twenty-one who are within the juvenile court's jurisdiction, and that such detention may take place, as provided by § 16.1-249, in either an adult or a juvenile facility.

That authority, of course, continues to be circumscribed by the time limits set forth in § 16.1-250 within which the intake officer's detention order must be reviewed by a judge at a formal hearing. It is my further opinion that the purpose of § 16.1-249(G) is to require the judge who conducts the § 16.1-250 hearing for a person over eighteen years of age, if he continues the confinement of that individual in a juvenile facility, to make a written finding in the detention order that such confinement is consistent with the safety of the staff of the facility and the children confined there.

In view of the conclusions in Parts II and III above, it is not necessary to address your third inquiry.

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1 If the seventy-two hour period expires on a Saturday, Sunday or legal holiday, the seventy-two hours is extended to the next business day.

2 "It 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." 1986-1987 Att'y Gen. Ann. Rep. 155, 157.

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COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

CIVIL REMEDIES AND PROCEDURE: PROCESS — PERSONAL JURISDICTION IN CERTAIN ACTIONS.

Valid service of summons by certified mail, return receipt requested, effected even though return receipt signed by person as agent for party being served, or marked refused or unclaimed, if statutory requirements met.

January 18, 1990

The Honorable Herbert H.L. Feild
Judge, York County Juvenile and Domestic Relations District Court

You ask whether the service of a summons by certified mail, return receipt requested, pursuant to § 16.1-264 of the Code of Virginia, is valid when the receipt is returned signed by a person as the agent of the party being served, or marked refused or unclaimed. You state that you do not include other possible returns from mailing which may be made by the post office, such as "moved—left no forwarding address," "insufficient address" or "addressee unknown," because you conclude that these returns would not constitute valid service.
I. Applicable Statutes

Section 16.1-264(A) provides that, under certain circumstances, a summons may be served on a party by mailing a copy of the summons to the party by certified mail, return receipt requested:

If a party designated to be served in § 16.1-263 is within the Commonwealth and cannot be found, but his address is known or can with reasonable diligence be ascertained, the summons may be served upon him by mailing a copy thereof by certified mail return receipt requested. If he is without the Commonwealth but can be found or his address is known, or can with reasonable diligence be ascertained, service of summons may be made either by delivering a copy thereof to him personally or by mailing a copy thereof to him by certified mail return receipt requested.

Section 16.1-263 requires the juvenile and domestic relations district court to direct the issuance of summonses to those persons determined by the juvenile court to be necessary parties to appear personally to answer or testify before the court concerning allegations in a petition filed pursuant to § 16.1-260, the statute describing intake petitions under the Juvenile and Domestic Relations District Court Law.

The question presented by your inquiry is whether sufficient notice is provided by the mailing provisions of § 16.1-264 to meet due process requirements.

II. Valid Service Is Effectuated in Facts Presented by Compliance With Statutory Service Procedure

To be consistent with due process standards, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314 (1950). Under the Mullane test, a statutory method of notice is constitutionally adequate if it is "reasonably calculated to reach interested parties." Id. at 318.

While the Supreme Court of Virginia has not addressed the sufficiency of service by mail under § 16.1-264, the Court has considered an analogous question involving service of process pursuant to §§ 8.01-308 and 8.01-312. These statutes authorize service on nonresident motorists by the Commissioner of the Division of Motor Vehicles, as statutory agent, and provide that such substituted service on the Commissioner "shall have the same legal force and validity as if served within the Commonwealth personally upon the person for whom it is intended" if a copy of the process is sent by registered or certified mail, return receipt requested, to the person named in the process. Section 8.01-312(A). This form of service was held constitutional by the Supreme Court of Virginia in Carroll v. Hutchinson, 172 Va. 43, 200 S.E. 644 (1939). Compliance with a statute which requires service by certified mail, return receipt requested, is presumed to provide adequate notice. Id. at 50, 200 S.E. at 647.

Service under Virginia's long arm statute, as provided in § 8.01-329, also formerly allowed for service by certified mail return receipt requested. Service of a summons and complaint, as prescribed by the long arm statute, was held by the Fourth Circuit Court of Appeals to be sufficient to support a default judgment, when the receipt was returned marked "refused," "return to sender." Virginia Lime Co. v. Craigsville Distributing, 670 F.2d 1366 (4th Cir. 1982).

If the requirements of the statute prescribing the method of service are met, service is complete and conclusive. See Basile v. American Filter Service, Inc., 231 Va. 34,
38, 340 S.E.2d 800, 802 (1986) (default judgment upheld despite no actual knowledge of litigation by the defendant, where requirements of § 8.01-329 were met). In Basile, both the notice of motion for judgment and notice of default judgment were sent by certified mail, return receipt requested, and each was returned unclaimed. Id. at 36, 340 S.E.2d at 801.

In cases decided under statutes which require the return receipt to be filed as an exhibit, service generally is valid if the return receipt is signed by an authorized agent. Annotation, Statutory service on nonresident motorists: return receipts, 95 A.L.R.2d 1033, 1050-53 (1964).

In summary, the mailing provisions of § 16.1-264 provide notice which is reasonably calculated to inform the addressee of the proceedings. Since actual receipt or knowledge is not required, the form of the return receipt does not determine whether there has been valid service. It is my opinion, therefore, that if the requirements of § 16.1-264 are met, valid service may be made even though the return receipt for the mailing demonstrates that it was signed by a person as agent for the party to be served, or was marked refused or unclaimed.

1For purposes of this Opinion, I assume that the party to be served is a resident of the Commonwealth.

2This statute was amended by the 1987 Session of the General Assembly to permit service by regular mail, rather than by registered or certified mail, return receipt requested. See Ch. 449, § 8.01-329(B), 1987 Va. Acts 579, 580 (Reg. Sess.).

3See also Texas Real Estate Com'n v. Howard, 538 S.W.2d 429, 433 (Tex. 1976) ("[w]here service of notice by registered mail is expressly authorized by statute, service is effected when the notice is properly stamped, addressed, registered and mailed").

1990 REPORT OF THE ATTORNEY GENERAL

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS — DISTRICT COURTS.

Party's use of tape recorder in juvenile court criminal proceedings within discretion of court in juvenile cases; matter of statutory right in adult cases.

April 24, 1990

The Honorable Michael J. Valentine
Judge, Juvenile and Domestic Relations District Court
19th Judicial District

You ask whether a party may use a tape recorder for that party's note-taking purposes only, over the objection of another party, to record proceedings concerning alleged violations of criminal law in a juvenile and domestic relations district court ("juvenile court").

I. Applicable Statutes

The paramount concern of the Juvenile and Domestic Relations District Court Law, §§ 16.1-226 through 16.1-334 of the Code of Virginia (the "Juvenile Law"), is "the welfare of the child and the family." Section 16.1-227. The Juvenile Law explicitly provides that a juvenile judge "shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature," to attain this "humane purpose." Section 16.1-227.
In deference to this purpose, "[t]he general public shall be excluded from all juvenile court hearings and only such persons admitted as the judge shall deem proper ...." Section 16.1-302. Similarly, the disclosure of identifying information concerning a juvenile who is the subject of a proceeding in juvenile court is prohibited by § 16.1-309. A child or adult charged with a violation of a criminal law, however, has the right to a public hearing in a juvenile court. See § 16.1-302.

The jurisdiction of a juvenile court for alleged violations of the criminal law typically is invoked in several distinct contexts. As to juvenile defendants, a juvenile court generally determines the disposition of a juvenile charged with a delinquent act. See § 16.1-241(A)(1). The jurisdiction of the juvenile court extends to an adult charged with the perpetration of a criminal offense against the person of a child, as well as criminal offenses in which one adult family member is charged with an offense in which another family member is the victim. See § 16.1-241(A)(1), (J).

II. Use of Tape Recorder in Criminal-Related Juvenile Court Proceedings

Involving Juvenile Defendant Is Within Discretion of Court

"The conduct of a trial is left to the sound discretion of a trial court." Gray v. Commonwealth, 233 Va. 313, 344, 385 S.E.2d 157, 174, cert. denied, 484 U.S. 873 (1987). A juvenile court judge further is vested with broad legal and equitable powers to attain the ends of the Juvenile Law. See § 16.1-227. It is my opinion, therefore, that the use by a party of a tape recorder in a criminal-related juvenile court proceeding involving a juvenile defendant is a matter which lies within the sound discretion of the juvenile court judge. Factors relevant to this determination may include, for example, the stated reason for use of the recorder, the presence or absence of an official court reporter, and whether the juvenile court judge intends to order the preparation of a transcript.1

The utilization of a recording device is not inconsistent with the Juvenile Law's confidentiality provisions. Confidentiality clearly is not a concern if a juvenile charged with a criminal offense exercises his right to a public criminal proceeding. See § 16.1-302. If a closed hearing is requested, however, § 16.1-309 proscribes any use of a tape recording which would disclose identifying information concerning a juvenile. The juvenile court judge's broad legal and equitable powers enable the court to order that the contents of the recording not be disclosed to the public. See Atty Gen. Ann. Rep.: 1980-1981 at 217, 219; 1950-1951 at 186, 187.

III. Use of Tape Recorder in Criminal Proceeding Brought Against Adult

Defendant Pursuant to § 16.1-241(I) and (J) Is Matter of Right

Section 16.1-259 provides that "[i]n cases where an adult is charged with violations of the criminal law pursuant to subsections I or J of § 16.1-241, the procedure and disposition applicable in the trial of such cases in general district court shall be applicable to trial in juvenile court." (Emphasis added.) A party or his counsel is entitled to use a tape recorder in a general district court as a matter of right. See § 16.1-69.35:2.

It is my opinion that the decision whether to allow a party to use a tape recorder is a matter of procedure. It is further my opinion, therefore, that, in cases in which an adult is charged with a criminal offense pursuant to § 16.1-241(I) or (J), the use of a tape recorder by a party or his counsel in juvenile court is a matter of statutory right. See § 16.1-259.

1Section 16.1-69.35:2 provides that "[p]roceedings in a general district court may be tape recorded by a party or his counsel." (Emphasis added.) "General district courts" are defined as "all courts not of record, except juvenile and domestic relations district courts..."
..." Section 16.1-69.5 (emphasis added). Section 16.1-69.35:2, which authorizes the use of a tape recorder in a general district court as a matter of right, therefore, does not apply to a juvenile court proceeding involving a juvenile defendant.

COURTS OF RECORD: CIRCUIT COURTS.

COURTS NOT OF RECORD: VENUE, JURISDICTION AND PROCEDURE IN CIVIL MATTERS - PROCEDURE IN CIVIL CASES.

Circuit court jurisdiction to hear appeal from adverse ruling of general district court on motion for new trial.

March 5, 1990

The Honorable L. Cleaves Manning
Judge, Circuit Court of the City of Portsmouth

You ask whether a circuit court has jurisdiction to hear an appeal from an adverse ruling of a general district court on a motion for a new trial, when that motion is made within the thirty-day period described in § 16.1-97.1 of the Code of Virginia, but no appeal has been taken of the district court judgment within the ten-day period provided for in § 16.1-106. For the purposes of this Opinion, I assume the matter in controversy is of greater value than fifty dollars and that the appeal of the adverse ruling on the motion for a new trial has been taken within ten days from that ruling, as required by § 16.1-106.

I. Applicable Statutes

Section 17-123, the jurisdictional statute for circuit courts, provides, in part:

[Circuit courts] shall have appellate jurisdiction of all cases, civil and criminal, in which an appeal, writ of error or supersedeas may, as provided by law, be taken to or allowed by such courts, or the judges thereof, from or to the judgment or proceedings of any inferior tribunal.

Section 16.1-106, concerning appeals to circuit courts from courts not of record provides:

From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than fifty dollars, exclusive of interest, any attorney's fees contracted for in the instrument, and costs, or when the case involves the constitutionality or validity of a statute of the Commonwealth, or of an ordinance or bylaw of a municipal corporation, there shall be an appeal of right, if taken within ten days after such order or judgment, to a court of record. Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken.

Section 16.1-97.1, describing motions for a new trial in courts not of record, provides:

A. No new trial may be granted from any judgment in a district court unless a motion by one of the parties is made within thirty days after the date of judgment, not including the date of entry of such judgment. The motion for a new trial shall be heard by the judge who rendered the judgment, but if the
judge is not in office, is absent from the jurisdiction, or is otherwise unavailable to hear the motion for new trial, such motion may be heard by a judge of that district court.

B. A hearing shall be held by the court, as provided herein, and the court shall rule on any such motions not later than forty-five days after the date of judgment, not including the date of entry of such judgment. Nothing contained in this section shall operate to alter the granting of a new trial by the court pursuant to § 8.01-428, or to alter the requirements for appeal from any judgment of any district court as otherwise provided by law.

II. Circuit Court Has Jurisdiction to Hear Appeal from Adverse Ruling of General District Court on Motion for New Trial in Facts Presented

Section 17-123 establishes the jurisdiction of circuit courts. In addition to providing for original and general jurisdiction of cases at law, this statute also provides that circuit courts shall have appellate jurisdiction of all civil and criminal cases from the judgment or proceedings of any inferior tribunal in which an appeal is allowed by law. Section 16.1-106 grants an appeal of right to a circuit court, if taken within ten days from any order or judgment rendered in a court not of record in which the matter in controversy is greater than fifty dollars. A motion for a new trial in the facts you present, made pursuant to § 16.1-97.1, is not excluded from the broad language in § 16.1-106, which grants an appeal of right from "any order." As a result, it is my opinion that a circuit court has jurisdiction pursuant to § 17-123 to hear an appeal from the denial of a motion for a new trial, as long as the appeal is taken within ten days of the order of denial pursuant to § 16.1-106 and regardless of whether the appeal is taken more than ten days after the entry of the initial judgment on the merits. A party, therefore, has thirty days to make a motion for a new trial, and if the court denies this motion, the party has an additional ten days to appeal the denial of the motion for a new trial.

Although I am not aware of any appellate court decision in the Commonwealth that addresses the precise question you raise, several reported circuit court decisions acknowledge the right of a party to appeal a general district court order denying a motion for a new trial to the circuit court within ten days of the district court order, even where no appeal from the judgment was taken. Plaza Motors, Inc. v. Walker, 8 Va. Cir. 451 (Cir. Ct. City of Richmond 1987); Showman v. Mumaw, 6 Va. Cir. 43 (Cir. Ct. Shenandoah Co. 1983); Lake Holiday Country Club v. Morton, 6 Va. Cir. 21 (Cir. Ct. City of Winchester 1982). See also Rigg v. Old, 6 Va. Cir. 9, 10 (Cir. Ct. City of Norfolk 1981) ($ 16.1-106 authorizes appeal from order granting new trial pursuant to former § 16.1-97, predecessor statute to § 16.1-97.1). ¹

Based on the above, it is my opinion that a circuit court has jurisdiction to hear an appeal taken within ten days from an adverse ruling on a litigant's motion for a new trial in the general district court, even though the time period within which to appeal the general district court judgment has expired.

¹Each of these circuit court decisions was decided under former § 16.1-97 (Repl. Vol. 1982), the predecessor statute to § 16.1-97.1. Former § 16.1-97 did not contain the current language in § 16.1-97.1 that "[n]othing contained in this section shall operate ... to alter the requirements for appeal from any judgment of any district court." (Emphasis added.) This additional language, however, by its express terms applies only to the requirements for appealing a judgment; it does not limit the applicability of the circuit court decisions to the question you pose.
HEALTH: MEDICAL CARE SERVICES.

Virginia's current abortion statutes compatible with U.S. Supreme Court decisions; no legislation required during 1990 Session of General Assembly to conform Virginia statutes with federal decisions.

January 15, 1990

The Honorable Elmon T. Gray
Member, Senate of Virginia

You ask whether the plurality opinion of the Supreme Court of the United States in *Webster v. Reproductive Health Serv.*, 492 U.S. __, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989), has altered the status of Virginia's abortion statutes. I have thoroughly reviewed the *Webster* decision, in addition to other decisions of the United States and Virginia Supreme Courts on this issue, and compared the Missouri statutes at issue in *Webster* with Virginia's current statutes regulating abortions.

I. Virginia Abortion Statutes Differ from Missouri Statutes Contested in *Webster*

After this review and comparison, it is my opinion that the *Webster* decision has no direct effect on any existing Virginia statute and that it does not require the General Assembly to amend or reexamine any existing statutes. Virginia's statutes regulating abortion differ from the Missouri statutes at issue in *Webster* in many respects. The compatibility of Virginia's abortion statutes with the general provisions of *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny has been addressed fully by the Supreme Court of Virginia. See *Simopoulos v. Commonwealth of Virginia*, 221 Va. 1059, 277 S.E.2d 194 (1981), aff'd, 462 U.S. 506 (1983). Although the Supreme Court of the United States will consider two other abortion cases during this Term, one from Ohio and one from Minnesota, the outcome of these cases obviously cannot be predicted with certainty and may be determined under the specific facts of each particular case.

II. No Legislation Required to Conform Virginia Statutes with Federal Decisions

It is my opinion, therefore, that Virginia's current abortion statutes are compatible with the *Webster* and *Roe* decisions. As a result, no legislation is required to conform these statutes with existing law.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON - ASSAULTS AND BODILY WOUNDINGS.

Individual may be prosecuted for causing bodily injury to law-enforcement officer when injury does not involve breaking of skin.

April 17, 1990

The Honorable Elmon T. Gray
Member, Senate of Virginia

You ask whether a person may be prosecuted pursuant to § 18.2-51.1 of the Code of Virginia for bodily injury, such as bruises or broken bones, inflicted upon a law-enforcement officer if the injury does not involve a breaking of the skin.
I. Applicable Statutes

Section 18.2-51 provides:

If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Section 18.2-51.1 provides:

If any person maliciously causes bodily injury to another by any means ... with intent to maim, disfigure, disable or kill, and knowing or having reason to know that such other person is a law-enforcement officer ... engaged in the performance of his public duties as a law-enforcement officer, such person shall be guilty of a Class 3 felony, and, upon conviction, the sentence of such person shall include a mandatory, minimum term of imprisonment of two years.

If any person unlawfully, but not maliciously, with the intent aforesaid, causes bodily injury to another by any means, knowing or having reason to know such other person is a law-enforcement officer engaged in the performance of his public duties as a law-enforcement officer, he shall be guilty of a Class 6 felony, and upon conviction, the sentence of such person shall include a mandatory, minimum term of imprisonment of one year.

The provisions of § 18.2-51 shall be deemed to provide a lesser included offense hereof.

II. Individual May Be Prosecuted Pursuant to § 18.2-51.1 for Causing Bodily Injury to Law-Enforcement Officer When Injury Does Not Involve Breaking of Skin

Section 18.2-51.1 expressly provides that an offense under § 18.2-51 shall be deemed to be a lesser included offense. In Johnson v. Commonwealth, 184 Va. 409, 35 S.E.2d 594 (1945), the Supreme Court of Virginia construed § 18.2-51, holding that "wounding" and causing "bodily injury" are distinct offenses. The Court defined an "injury" as a "detriment, hurt, loss [or] impairment," and held that "'to wound' "means "'to hurt by violence, to produce a breach or separation of parts, as by a cut, blow or the like.'" 184 Va. at 416, 35 S.E.2d at 596 (citation omitted). In a later case, the Supreme Court also held that "'[b]odily injury comprehends ... any bodily hurt whatsoever.'" Bryant v. Commonwealth, 189 Va. 310, 316, 53 S.E.2d 54, 57 (1949) (citation omitted) (emphasis in original). The phrase "bodily injury," as it is used in §§ 18.2-51 and 18.2-51.1, therefore, clearly encompasses an injury which does not involve a breaking of the victim's skin. Accord R. Groot, Criminal Offenses and Defenses in Virginia 22 (2d ed. 1989).

The only element that § 18.2-51.1 includes which § 18.2-51 does not is the requirement that the accused know, or have reason to know, that his victim is a law-enforcement officer. These statutes, however, are identical with respect to their use of the term "bodily injury." Based on the above, it is my opinion that an individual causing bodily injury to a law-enforcement officer, even if that injury does not involve a break of the skin, may be prosecuted pursuant to § 18.2-51.1 in an indictment charging "bodily injury."
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

Offender may be tried and convicted of second offense of driving under influence of alcohol or drugs, regardless of whether offender represented by counsel at first conviction, for purpose of imposing three-year license suspension.

May 25, 1990

The Honorable John A. Garrett
Commonwealth's Attorney for Louisa County

You ask whether a person charged with a second offense of driving under the influence of alcohol or drugs pursuant to § 18.2-266 of the Code of Virginia may be convicted without the introduction of evidence that the defendant was represented by counsel at his first conviction for the offense. If the repeat offender appeals from a general district court conviction on such a charge in which no evidence was introduced that he was represented by counsel at his previous conviction, you also ask whether this evidence may be offered in the circuit court so that the offender may be sentenced to an enhanced penalty pursuant to § 18.2-270.

I. Applicable Statutes

Section 18.2-270 provides, in part:

Any person violating any provision of § 18.2-266 shall be guilty of a Class 1 misdemeanor.

Any person convicted of a second offense committed within less than five years after a first offense under § 18.2-266 shall be punishable by a fine of not less than $200 nor more than $1,000 and by confinement in jail for not less than one month nor more than one year. Forty-eight hours of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court. Any person convicted of a second offense committed within a period of five to ten years of a first offense under § 18.2-266 shall be punishable by a fine of not less than $200 nor more than $1,000 and by confinement in jail for not less than one month nor more than one year.

Section 18.2-271(B) provides, in part:

If a person is tried on a process alleging a second offense of violating § 18.2-266 . . . and is convicted thereof, such person's license to operate a motor vehicle . . . shall be revoked for a period of three years from the date of the judgment of conviction.

II. Offender May Be Tried and Convicted of Second Offense, Regardless of Whether Offender Was Represented by Counsel at First Conviction, for Purpose of Imposing Three-Year License Suspension

The Court of Appeals of Virginia has held that a defendant in the facts you present may be convicted of a second offense pursuant to § 18.2-266 without the introduction of evidence that the defendant was represented by counsel at his first conviction. Sargent v. Commonwealth, 5 Va. App. 143, 360 S.E.2d 895 (1987). A prior uncounseled misdemeanor conviction may not be used in sentencing, however, to enhance punishment involving the loss of liberty or imprisonment. See id. After being convicted of a second offense, therefore, an offender may not be sentenced to the enhanced penalties prescribed in
§ 18.2-270, if he was not represented by counsel at the prior conviction. 5 Va. App. at 149-53, 360 S.E.2d at 899-901.

Section 18.2-271(B) clearly provides that a person must be charged and convicted of a second violation of § 18.2-266 before his license may be revoked for the three-year period. Whether a person was represented by counsel at his prior conviction is not relevant to the determination of one's guilt of the second offense for the purpose of license revocation. See 1987-1988 Att'y Gen. Ann. Rep. 269, 270. It is my opinion, therefore, that even without evidence of whether he was represented by counsel at a prior conviction, a repeat offender may be charged and convicted of a second offense pursuant to § 18.2-266 for the purpose of having his license revoked for the three-year period pursuant to § 18.2-271.

III. Evidence Whether Prior Conviction Was Counseled
May Be Presented for First Time in Circuit Court

When a defendant appeals a second offense conviction under § 18.2-266 from a general district court to the circuit court and no proof was adduced in general district court that he was represented by counsel at his earlier conviction for that offense, the Commonwealth may, nevertheless, introduce such proof at the defendant's de novo trial in circuit court. Based upon that proof, the circuit court then may permissibly subject the offender to the enhanced criminal penalties in § 18.2-270.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court of the United States held that a defendant who obtains reversal of his conviction and then is retried may not be subjected to greater punishment after reconviction unless the record demonstrates that judicial vindictiveness was not the motive for the increased penalty. The Supreme Court of Virginia, however, has expressly distinguished the facts in Pearce from a trial de novo in a circuit court and held that increased penalties after the trial de novo are not barred. Evans v. Richmond and Commonwealth, 210 Va. 403, 407, 171 S.E.2d 247, 250-51 (1969). Accord Johnson v. Commonwealth, 212 Va. 579, 186 S.E.2d 53, cert. denied, 407 U.S. 925 (1972) (no due process violation when, after trial de novo following general district court conviction, circuit court jury imposes greater penalty than defendant received in lower court); cf. Colten v. Kentucky, 407 U.S. 104 (1972) (Kentucky's system subjecting defendant to greater punishment after trial de novo when he has appealed from lower court does not violate due process or Pearce).

Based on the above, it is my opinion that, in a trial de novo in a circuit court for a second offense violation of § 18.2-266, if the Commonwealth proves that the defendant was represented by counsel at his previous conviction, even though the Commonwealth failed to adduce such proof in general district court, the defendant may be subjected to the enhanced criminal penalties described in § 18.2-270.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

CRIMINAL PROCEDURE: PRELIMINARY HEARING.

Certificate of breath test analysis designed as evidentiary recording of facts not to be amended prior to trial; exception to hearsay rule by allowing individual who administered breath test to testify as to test results, such testimony being subject to rules concerning admissibility of expert scientific testimony; clerical error on certificate procedural rather than substantive, going to weight, not admissibility, of certificate.
You ask several questions concerning trial procedures in a prosecution for driving under the influence pursuant to § 18.2-266 of the Code of Virginia. Specifically, you ask whether (1) the Commonwealth may make a pretrial amendment to a "certificate of breath test analysis" (the "certificate"); (2) the Commonwealth may call the law-enforcement officer who administered the breath test to the witness stand to testify concerning the breath analysis rather than relying on the certificate; and (3) the certificate is admissible pursuant to § 18.2-268(Z) despite the fact that it contains a clerical error.

I. Facts

You state that a defendant, arrested by a law-enforcement officer for an alleged violation of § 18.2-266, elects to take a breath test for blood alcohol content. Another officer authorized to administer the breath test does so and then completes the certificate required by § 18.2-268(Y). The officer mistakenly enters the date on which the breath analysis was administered in the portion of the certificate where the date the breath analysis equipment last had been tested should have been entered.

II. Applicable Statutes

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 [of Consolidated Laboratory Services] shall issue a certificate which will indicate that the test was conducted in accordance with the Division's specifications, the equipment on which the breath test was conducted has been tested within the past six months and has been found to be accurate, the name of the accused, the date, the time the sample was taken from the accused, the alcoholic content of the sample, and by whom the sample was examined. The certificate, as provided for in this section, when duly attested by the authorized individual conducting the breath test, 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.

Section 18.2-268(Z) 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.

Section 19.2-187 provides, in part:
In any hearing or trial of any criminal offense, a certificate of analysis of a person performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or authorized by such Division to conduct such analysis or examination . . . when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein . . . .

***

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

III. Certificate May Not Be Amended Prior to Trial

The certificate is designed to evidence the recording of facts roughly contemporaneous with the occurrence of those facts. Like other evidentiary items, the certificate is not susceptible to amendment as if it were a pleading. It is my opinion that the Commonwealth may not amend the certificate prior to trial. As explained below, however, the Commonwealth does have the option of either not relying on the certificate, or relying on the certificate and introducing evidence to explain the clerical error.

IV. Legislative Intent of § 18.2-268(Y) Was to Create Exception to Hearsay Rule

Your second question is resolved by examining the statutory provisions of §§ 18.2-268(Y) and 19.2-187.

"Statutes which are not inconsistent with one another, and which relate to the same subject matter, are in para materia, and should be construed together; and effect should be given to them all, although they contain no reference to one another . . . ." Prillaman v. Commonwealth, 199 Va. 401, 406, 100 S.E.2d 4, 7 (1957) (quoting Mitchell v. Witt, 98 Va. 459, 461, 36 S.E. 528 (1900)).

When construed together, §§ 18.2-268(Y) and 19.2-187 are not inconsistent with one another and, in effect, complement each other.

"The validity of using other Code sections as interpretive guides is well established. The Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed." King v. Commonwealth, 2 Va. App. 708, 710, 347 S.E.2d 530, 531 (1986). Section 19.2-187 has been construed as creating an exception to the hearsay rule by permitting a written analysis to be admitted into evidence without requiring the in-court presence of the person who prepared the document. See Allen v. Commonwealth, 3 Va. App. 657, 662-63, 353 S.E.2d 162, 165 (1987); see also Gray v. Commonwealth, 220 Va. 943, 945, 265 S.E.2d 705, 706 (1980).

It is my opinion that the intent of the General Assembly in enacting § 18.2-268(Y) was, like § 19.2-187, to create an exception to the hearsay rule by permitting a certificate to be admitted in evidence without requiring the in-court presence of the individual who administered the breath test. If the Commonwealth elects not to take advantage of this exception, however, it remains free to present the individual who administered the breath test to testify as to the test results. Such testimony, of course, would be fully subject to the normal rules concerning the admissibility of expert scientific testimony.
V. Clerical Error in Certificate Is Procedural in Nature; Clerical Error Goes to Weight, Not Admissibility


Section 18.2-268(s) provides that '[t]he steps herein set forth relating to the taking, handling, identification, and disposition of blood or breath samples are procedural in nature and not substantive.' (Emphasis added.) Completion of the certificate relates both to the identification and to the disposition of the breath sample. Section 18.2-268(s) further states that procedural non-compliance goes merely to the 'weight of the evidence' and additionally provides that such 'evidence [of noncompliance] shall be considered ... with all the evidence in the case.'

While § 18.2-268(s) also grants the defendant the right to introduce evidence showing noncompliance with procedural requirements, such evidence should demonstrate that 'as a result [the defendant's] rights were prejudiced.' Id.

Based on the above, it is my opinion that § 18.2-268 permits the introduction of evidence by the prosecution or the defendant concerning procedural discrepancies relating to the certificate. This statute demonstrates that the primary issue ... is whether there has been prejudice to the defendant's rights resulting from the procedural errors.

It is my opinion, therefore, that the clerical error on the certificate in the facts you present is a procedural, rather than substantive, error and that this error goes to the weight, not the admissibility, of the certificate.

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1In the prior Opinion, the officer who administered the breath test mistakenly entered the date on which the breath analysis equipment was next scheduled for retesting in the portion of the certificate in which the date the breath analysis equipment last had been tested should have been entered.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - OTHER ILLEGAL WEAPONS.

Two firearm charges considered distinct, separate statutory offenses; double jeopardy clause does not bar simultaneous prosecution and cumulative punishment at one trial; collateral estoppel not applicable when two charges tried at same time.

July 11, 1990

The Honorable Eddie R. Vaughn Jr.
Commonwealth's Attorney for Hanover County

You ask whether there is a double jeopardy or collateral estoppel bar to prosecuting a person in one trial for (1) possessing a firearm and cocaine at the same time, in violation of § 18.2-308.4 of the Code of Virginia, and (2) for possessing a firearm after having been previously convicted of a felony, in violation of § 18.2-308.2.
I. Applicable Constitutional and Statutory Provisions

The double jeopardy clause of the Fifth Amendment to the Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

Section 18.2-308.2(A) makes it a Class 6 felony for a convicted felon knowingly to possess a firearm. Section 18.2-308.4 makes it a Class 6 felony simultaneously to possess cocaine and a weapon, including a firearm.

II. No Double Jeopardy Bar to Prosecuting Defendant for Violating §§ 18.2-308.2 and 18.2-308.4 at One Trial

The Supreme Court of the United States has held that the double jeopardy clause embodies three guarantees: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Because both charges involved in your inquiry are to be tried during one trial, only the third guarantee--the guarantee against multiple punishments--is pertinent to a resolution of your question. See Turner v. Commonwealth, 221 Va. 513, 529, 273 S.E.2d 36, 46-47 (1980).

In a single trial setting, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977). The proscription on multiple punishments, in turn, requires a determination whether the legislature intended to authorize cumulative punishment for two offenses arising out of the same act or transaction. See Whalen v. United States, 445 U.S. 684, 688-89 (1980).

The test to decide legislative intent in this context is "whether each [offense] requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). The assumption underlying this rule is that the legislature usually "does not intend to punish the same offense under two different statutes." Bail v. United States, 470 U.S. 856, 861 (1985). And, for the purposes of the Blockburger test, the two offenses must be examined in the abstract, not with reference to the facts of the particular case involved. Whalen, 445 U.S. at 694 n.8.

The charge of violating § 18.2-308.4 requires proof that the defendant possessed cocaine or another specified controlled substance; the charge of violating § 18.2-308.2 does not require proof of this fact. Conversely, the § 18.2-308.2 charge requires proof that the accused is a convicted felon; this fact, however, is not an element in a prosecution pursuant to § 18.2-308.4.

It is my opinion, therefore, that the two firearm charges are distinct and separate offenses under the Blockburger test, and that the double jeopardy clause of the Constitution of the United States does not bar their simultaneous prosecution and cumulative punishment.

III. Collateral Estoppel Does Not Affect Joint Prosecution of Charges Pursuant to §§ 18.2-308.2 and 18.2-308.4

The doctrine of collateral estoppel is an outgrowth of the protection against double jeopardy. Lee v. Commonwealth, 219 Va. 1108, 254 S.E.2d 126 (1979). Collateral estoppel means that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970) (prior acquittal for robbery of
one victim because of lack of identification of robber bars subsequent prosecution for robbing second victim involved in same incident). By its very nature, therefore, the doctrine of collateral estoppel does not apply when two charges are tried at the same time. Based on the above, it is my opinion that collateral estoppel would have no effect on a prosecution for violating §§ 18.2-308.2 and 18.2-308.4 in a single trial setting.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES.

Fraternal association eligible to conduct bingo games may use bingo proceeds for acquisition, construction or maintenance of building to be used for that organization's lawful purposes; organization's use of building for bingo games must be ancillary to building's religious, charitable, community or educational purpose and use. Limit as to days per week building may be used to conduct bingo games. Decision whether use of property for bingo games constitutes property's principal or ancillary use to be made by locality issuing organization's annual bingo permit, or local Commonwealth's attorney.

October 31, 1990

The Honorable John H. Chichester
Member, Senate of Virginia

You ask under what circumstances a fraternal association, eligible to obtain a permit to conduct bingo games, may use proceeds from these games to upgrade existing facilities or build new ones for playing the games.

I. Applicable Statutes

Article 1.1, Chapter 8 of Title 18.2, §§ 18.2-340.1 through 18.2-340.14 of the Code of Virginia, details the basis on which certain specified types of organizations may obtain a permit for, and may conduct, bingo games and raffles.

Section 18.2-340.3(3) provides that an organization obtaining a permit for bingo games "shall be operated currently and shall have always been operated in the past as a nonprofit organization."

Section 18.2-340.9 provides, in part:

A. Except for reasonable and proper operating costs, including costs associated with providing clerical assistance in the conduct of bingo games or raffles for organizations composed of or for deaf or blind persons, publicizing the time and place of bingo games and raffles, and prizes, no part of the gross receipts derived by an organization, as herein defined, permitted to conduct bingo games or raffles may be used for any purpose other than (i) those lawful religious, charitable, community or educational purposes for which the organization is specifically chartered or organized and (ii) expenses relating to the acquisition, construction, maintenance, or repair of any interest in the real property involving the operation of the organization and used for lawful religious, charitable, community or educational purposes.

D. No building or other premises shall be utilized in whole or in part for the purpose of conducting bingo games more frequently than two calendar days
in any one calendar week, and the local governing body of any county, town, or city may adopt an ordinance establishing a reasonable limitation on the number of bingo games that may be conducted in any one calendar day. . . . No building or other premises owned by an organization as defined in § 18.2-340.1 of this article and qualified as a tax-exempt organization pursuant to § 501 (c) of the Internal Revenue Code shall be utilized in whole or in part for the purpose of conducting bingo games more frequently than four calendar days in any one calendar week.

II. Fraternal Association May Use Bingo Receipts for Improvements to Real Property Used for Organization's Lawful Purposes; Use of Property for Bingo Games Must Be Ancillary to Other Purposes

The plain language of § 18.2-340.9(A)(ii) authorizes organizations lawfully conducting bingo games to use the gross receipts derived from the games to acquire, construct, maintain or repair real property "involving the operation of the organization and used for lawful religious, charitable, community or educational purposes." Section 18.2-340.9(D), however, limits the conduct of bingo games in any one building to four days per week if the building is owned by a tax-exempt organization eligible to conduct bingo games, or two days per week if the building is owned by someone other than the tax-exempt organization.

Section 18.2-340.3(3) requires that an organization conducting bingo games "shall be operated currently and shall have always been operated in the past as a nonprofit organization."

It is an established principle of statutory construction that statutes relating to the same subject must be read together to give effect to the legislative intent. See Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957); see also 1989 Att'y Gen. Ann. Rep. 315, 316-17.

Reading the statutes cited above together, it is my opinion that the General Assembly intended to permit organizations eligible to conduct bingo games to use bingo proceeds for the acquisition, construction or maintenance of a building used for that organization's lawful religious, charitable, community or educational purposes, and that, if the organization owns the building, it may use it for the bingo games if that use is ancillary to the building's religious, charitable, community or educational purposes and use. Section 18.2-340.9. Because § 18.2-340.3(3) precludes the organization from having a profit-making activity as its principal purpose, it is further my opinion that a building acquired, constructed or used solely or principally for the operation of the bingo games, which are not central to the organization's religious, charitable, community or educational purposes, would not fulfill the requirements of § 18.2-340.9(A)(ii).

The decision whether a particular organization's use of property for bingo games constitutes the property's principal use or an ancillary use is ultimately a factual one to be made by the locality issuing the organization's annual bingo permit, or by the local Commonwealth's attorney.

CRIMINAL PROCEDURE: ARREST.

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

COURTS NOT OF RECORD: JURISDICTION AND PROCEDURE (1) IN CIVIL MATTERS AND (2) IN CRIMINAL MATTERS.
Statutory provisions for courts to amend warrants and other process support conclusion that legislature did not intend such amendments to be made by nonjudicial officers. Corrections to warrants and other process may not be made by sheriff's department; may be made by issuing authority prior to issuance or, if errors noticed after document served, corrections may be made by court in which warrant will be tried, or to which process is returnable.

October 12, 1990

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

You ask whether a sheriff's department that receives from a local court or magistrate a warrant or other process containing apparent errors in the information identifying the subject to be served may correct such errors before serving the warrant or process.

I. Applicable Statutes

Section 19.2-71 of the Code of Virginia provides that process for the arrest of a person charged with a criminal offense may be issued by a judge, clerk of court, or any magistrate. Section 16.1-129.2 provides that, upon the trial of a warrant, the general district court may, on its own motion or at the request of counsel for either side, "amend the form of the warrant in any respect in which it appears to be defective."

Section 16.1-79 provides that civil warrants issued and delivered to an officer for service may not be altered, and that no blank therein may be filled, except by order of the court. Section 8.01-277 provides for amendment by the issuing court to cure defects in any civil process, when such defects have been raised by motion to quash.

II. Changes to Be Made Only by Appropriate Judicial Officer

Sections 8.01-277 and 16.1-129.2 indicate, and prior Opinions of this Office conclude, that changes or corrections to warrants should be regarded as amendments. See Att'y Gen. Ann. Rep.: 1975-1976 at 87; 1954-1955 at 220.

It is an accepted principle of statutory construction that a statute stating the manner in which something may be done or the entity that may do it also evinces the legislative intent that it not be done otherwise. See Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 790 (1982); Christiansburg v. Montgomery County, 216 Va. 654, 222 S.E.2d 513 (1976); 1986-1987 Att'y Gen. Ann. Rep. 130, 131. The provisions in §§ 16.1-79, 16.1-129.2 and 8.01-277 for courts to amend warrants and other process support the conclusion that the General Assembly did not intend such amendments to be made by nonjudicial officers. I am of the opinion, therefore, that corrections to warrants and other process may not be made by the sheriff's department.

If a sheriff or deputy sheriff becomes aware of an error or omission made in a warrant or other court process at the time of issuance, he or she should bring it to the immediate attention of the issuing authority, so that it may be promptly corrected. Errors noticed in such a document before it has been served may be corrected by returning the process to the issuing authority. When such errors are noticed only after the document has been served, they should be brought to the attention of the court in which the warrant will be tried, or to which the process is returnable, so that they may be corrected by the court.
While you did not inquire about changes to a summons issued by a sheriff or deputy sheriff under § 19.2-74, I note that such a summons may be amended by the issuing officer before it is served. After service upon the defendant, however, such a summons may be amended only by the court to which it is returnable.

CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES.

Due process notice and hearing necessary before forfeiture of cash bond posted by third-party surety for nonappearing defendant; bond may not be applied against fine and costs.

January 2, 1990

The Honorable John F. Ewell
Judge, General District Court of Warren County

You ask whether, in a proceeding held pursuant to § 19.2-143 of the Code of Virginia, the cash bond posted by a surety for the appearance of a criminal defendant may be declared forfeited immediately when the defendant does not appear for trial. You also ask whether this cash bond may be applied to the payment of a fine and costs against the defendant, if the defendant is tried in his absence. Finally, you ask what procedure should be followed if the cash bond may not be forfeited immediately in the facts you present.

I. Applicable Statute

Section 19.2-143 provides, in part, that

[w]hen a person, under recognizance in a case, either as party or witness, fails to perform the condition of appearance thereof, if it is to appear before a court of record, or a district court, 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.

II. Due Process Is Required in Forfeiture Proceedings

In E.P. Heacock v. Commonwealth, 228 Va. 235, 321 S.E.2d 645 (1984), the Supreme Court of Virginia held that a surety on a cash bond, who had signed a "Conditions of Release, Recognizance, and Bond" form, was entitled to notice and a hearing prior to revocation and forfeiture of the bond. The Court ruled that the same due process requirements applicable to termination of public assistance payments and revocation of parole or probation must be met in bond forfeiture proceedings. Id. at 242, 321 S.E.2d at 649. The Court found that the surety on the cash recognizance "was an essential party to the bond forfeiture proceeding and, under the provisions of . . . §§ 19.2-135 and 19.2-143, was entitled to notice and a hearing." Id. at 240, 321 S.E.2d at 648.

A prior Opinion of this Office interpreting § 19.2-143 concludes that, even when a criminal defendant personally has signed a bond form that provides, in part, that "[f]ailure to fulfill the terms of release and recognizance or any violation thereof may result in your arrest and forfeiture of the bond," this bond may not be forfeited summarily upon his nonappearance. 1987-1988 Att'y Gen. Ann. Rep. 289, 290 (the "Weckstein Opinion"). Such a defendant "must be informed that he is entitled to a hearing on the forfeiture of his bond so that, if he desires, he may present to the court any valid excuses for his nonappearance, present witnesses on his behalf, or confront and cross-examine any adverse witness." Id.
Another Opinion of this Office interpreting § 19.1-137, the statutory predecessor to § 19.2-143, concludes that "the applicable law envisions the issuance of process to try a forfeited recognizance, and it is questionable whether a valid judgment may be rendered ... without such process or proceedings by scire facias." 1966-1967 Att'y Gen. Ann. Rep. 17, 18.

III. Due Process Requires Notice and Opportunity to Be Heard

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). That right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314 (1950). "The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests." Greene v. Lindsey, 456 U.S. 444, 451 (1982). Failure to provide notice which is "reasonably calculated" to apprise the person affected of the possible loss of property is a violation of due process. Robinson v. Hanrahan, 409 U.S. 38, 40 (1972). The notice of a hearing "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

IV. Due Process Requires Notice of Forfeiture Hearing; Bond May Not Be Applied Against Fine and Costs

Based on the above, it remains my opinion that the surety posting a cash bond for a criminal defendant is entitled to notice and a hearing before this bond may be forfeited by a court. The surety posting the cash bond must be advised that he is entitled to a hearing and to the opportunity to present witnesses and other pertinent evidence. E.P. Heacock, 228 Va. at 241-42, 321 S.E.2d at 649. Since I conclude that the cash bond may not be forfeited without notice and a hearing, it is further my opinion that the cash bond may not be applied against the fine and costs in the facts you present, even if the defendant is tried in his absence.

1The bond form in this prior Opinion is Form DC-330 5/87, distributed to circuit and district courts by the Office of the Executive Secretary of the Supreme Court of Virginia.
2You do not provide a copy of the bond form executed by the third-party surety. The bond form presently distributed to district courts by the Office of the Executive Secretary of the Supreme Court of Virginia, entitled "Conditions of Release and Recognizance" (Form DC-330 5/87 (114:9-015 5/89)), contains no such advice and is identical to the language of the bond form construed in the Weckstein Opinion.

CRIMINAL PROCEDURE: EVIDENCE AND WITNESSES — RECOVERY OF FINES AND PENALTIES.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE ADMINISTRATION OF JUSTICE.

Magistrate may not testify in criminal case where magistrate himself neither accused nor victim, if testimony relates to anything that came before him in course of official duties. Statutory exceptions.

August 17, 1990
The Honorable Thomas G. Baker Jr.
Member, House of Delegates

You ask whether a magistrate may testify about matters he or she has witnessed in a criminal case when that case is one in which the magistrate is neither the accused nor the victim.

I. Applicable Statutes

Section 19.2-271 of the Code of Virginia provides that no magistrate shall be "competent to testify in any criminal or civil proceeding, except proceedings wherein the defendant is charged with perjury, as to any matter which came before him in the course of his official duties," unless the defendant is charged pursuant to the provisions of § 18.2-460 (obstruction of justice) or in any proceeding authorized pursuant to the provisions of § 19.2-353.3 (payment refused on check or credit card given for fines, costs, etc.). A magistrate who is the victim of a crime, however, is competent to testify in any criminal or civil proceeding arising out of that crime.

Section 4781 of the Code of Virginia of 1924, predecessor to § 19.2-271, made certain judicial officers incompetent to testify against a criminal defendant in a court of record with respect to any statements that the defendant made at his trial or preliminary examination before any such officer.

II. Magistrates Barred by § 19.2-271 from Testifying About Matters Heard in Their Official Capacities

In Baylor v. Commonwealth, 190 Va. 116, 121, 56 S.E.2d 77, 79 (1949), the Supreme Court of Virginia stated that § 4781, as amended by the General Assembly in 1924, was "designed and intended to protect an accused against the testimony of certain judicial officers before whom he has appeared as to admissions or confessions made by him." A trial justice was therefore barred from testifying in circuit court to the fact that the accused had entered a guilty plea when his case was heard below.

In Bartlett v. Bank of Carroll, 218 Va. 240, 248, 237 S.E.2d 115, 120 (1977), however, the Supreme Court of Virginia held that § 19.2-271, the successor statute to § 4781, prohibits a circuit court judge from being summoned to testify in order to explain a decree he had entered.

A comparison of the two statutes and these two cases makes it clear that the provisions of § 19.2-271 are much broader than those of § 4781. Section 4781 was applicable only to criminal prosecutions and then only in cases pending in a circuit court. Section 19.2-271, however, applies to both civil and criminal proceedings in all courts and makes judicial officers incompetent to testify about any matter that came before them in their official capacity. It is applicable to all cases except those few which are specifically enumerated, and its provisions may be invoked by any party or witness.


It is my opinion, based on the above, that a magistrate may not testify in a criminal case where the magistrate himself is neither the accused nor the victim, if his testimony will relate to anything that came before him in the course of his official duties. The only
exceptions are when the defendant has been charged with perjury or with an offense under the provisions of § 18.2-460, or when the magistrate is testifying in any proceeding authorized under § 19.2-353.3.

CRIMINAL PROCEDURE: GRAND JURIES.

Return of sufficient indictment based upon testimony of person other than eyewitness to alleged criminal activity or of officer not involved in case but testifying from report of investigating police officer.

April 4, 1990

The Honorable Charles S. Sharp
Commonwealth's Attorney for the City of Fredericksburg

You ask whether a grand jury may return an indictment based upon the testimony of a person other than an eyewitness. You also ask whether a police officer who was not involved in a particular case, but is testifying from the official police report of the investigating officer, may provide testimony to a grand jury to support an indictment.

I. Applicable Statute

Section 19.2-202 of the Code of Virginia provides, in part, that a grand jury may make a presentment or find an indictment upon the information of two or more of its own body, or on the testimony of witnesses called on by the grand jury, or sent to it by the court. If only one of their number can testify as to an offense, he shall be sworn as any other witness. When a presentment or indictment is so made or found, the names of the grand jurors giving the information, or of the witnesses, shall be written at the foot of the presentment or indictment.

This statute does not prescribe the nature of the evidence upon which an indictment may be returned. Rather, it merely provides that the grand jury may find an indictment upon information of two or more grand jurors or on the testimony of a witness, even if the witness is a lone grand juror.

II. Grand Jury May Return Proper Indictment Based upon Testimony of Officer Not Involved in Case Relying on Investigative Notes of Another Officer

The Supreme Court of the United States has held that the Constitution of the United States does not prescribe the kind of evidence on which grand juries may rely. Costello v. United States, 350 U.S. 359, 362 (1956). In Pittsburgh Plate Glass Co. v. U. S., 360 U.S. 395, 400 (1959), the Supreme Court further held that "indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves." The Court later explained that a facially valid indictment is not subject to attack based upon the type or quality of evidence before the grand jury:

The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.
United States v. Calandra, 414 U.S. 338, 344-45 (1974) (citations omitted). The Constitution of the United States, therefore, provides no bar to an indictment based upon the testimony of an officer who was not involved in the case and who testified before the grand jury from the investigator's notes.

The Supreme Court of Virginia has held that a defendant may not question the sufficiency of the proof underlying an indictment found by a lawfully constituted grand jury. Wadley's Case, 98 Va. 803, 805, 35 S.E. 452, 453 (1900). The Court explained that "[t]he presumption is that every indictment is found upon proper evidence. If anything improper is given in evidence before a grand jury, it can be corrected on the trial before the petit jury." Id. See also Siklek v. Commonwealth, 133 Va. 789, 793-94, 112 S.E. 605, 606 (1922).

Based on the above, it is my opinion that a grand jury may consider the testimony of a witness who was not an eyewitness to the alleged criminal activity. It is further my opinion that a grand jury may consider the testimony of an officer, not involved in the case, who testifies from the report of an investigating police officer. In both cases, the grand jury may return a sufficient indictment based solely upon such testimony.

CRIMINAL PROCEDURE: RECOVERY OF FINES AND PENALTIES.

Service of show cause summons and failure of defendant to appear are preconditions for issuance of capias, when defendant fails to pay fine and costs, as ordered by court, on deferred or installment payment plan.

June 6, 1990

The Honorable J. Allen Walker
Judge, Loudoun County General District Court

You ask two questions concerning a respondent's failure to pay fines and costs following the entry of an order for deferred payment of fines and costs. You first ask whether § 19.2-358 of the Code of Virginia requires service of a Form DC-360 and a subsequent failure by the respondent to appear as preconditions for the issuance of a Form DC-361 for the respondent's failure to pay fines and costs, as previously ordered on a Form DC-349 12/84 (114:9-015 1/90), entitled "Petition and Order for Deferred Payment of Fine and Costs," pursuant to § 19.2-354.

You also ask how the answer to your first question would be affected by the addition of the following language to Form DC-349: "If I am unable to pay in full by the payment date, I must appear in court at 9:00 AM on that date to request further deferment or to show cause why I should not be punished for my failure to pay by that date."

I. Applicable Statute

Section 19.2-354 authorizes a court to order the payment of a fine and costs on a deferred date, in installments, or upon other terms and conditions established by the court and provides:

A. Whenever (i) a defendant . . . is sentenced to pay a fine . . . and (ii) the defendant is unable to make immediate payment of the fine . . . or penalty and costs, the court, on motion of the defendant, may order the defendant to pay such fine . . . and any costs which the defendant may be required to pay in installments or upon such other terms and conditions within such period of time as may enable the defendant to pay such amounts due.
C. When the court has authorized deferred payment or installment payments, the clerk shall give notice to the defendant that upon his failure to pay as ordered he may be fined or imprisoned pursuant to § 19.2-358.

Form DC-349 embodies a petition and order for deferred payment of fine and costs in accordance with § 19.2-354.

Section 19.2-358 prescribes the procedure to be followed upon default in the deferred payment or any installment payment of the fine and costs as ordered in § 19.2-354 and provides, in part:

A. When an individual obligated to pay a fine [and] costs ... defaults in the payment or any installment payment, the court upon the motion of the Commonwealth or upon its own motion, may require him to show cause why he should not be imprisoned or fined for nonpayment.

B. Following the order to show cause, unless the defendant shows that his default was not attributable to an intentional refusal to obey the sentence of the court, or not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the defendant imprisoned as for a contempt for a term not to exceed sixty days or impose a fine not to exceed $500.

C. If it appears that the default is excusable under the standards set forth in subsection B hereof, the court may enter an order allowing the defendant additional time for payment, reducing the amount due or of each installment, or remitting the unpaid portion in whole or in part.

Form DC-360 embodies a show cause summons in accordance with § 19.2-358(A).

II. Section 19.2-358 Requires Service of Show Cause Summons upon Defendant on Default in Deferred Payment or Any Installment Payment of Fine and Costs


Former §§19.1-339 and 19.1-340 pertained to a "capias pro fine." The former statute authorized a court where any judgment or fine was rendered to commit a defendant to jail until the final costs were paid or to issue a capias pro fine before or after the return of a writ of fieri facias. The latter statute authorized a clerk to issue a capias pro fine at the next succeeding term of court against the defendant if a writ of fieri facias were returned unsatisfied, unless the court directed otherwise.

Title 19.1 was repealed in 1975 and § 19.2-358 replaced § 19.1-347.6. See Ch. 495, 1975 Va. Acts 846, 909-10. The current version of § 19.2-358 is substantially unchanged from former § 19.1-347.6 with regard to its show cause provision upon default in the payment of a fine.

It is my opinion, therefore, that service of Form DC-360, the show cause summons, and the failure of the defendant to appear are preconditions for the issuance of a Form DC-361, the capias, when a defendant fails to pay a fine and costs, as ordered by the court, on a deferred or installment payment plan.

III. Addition of Proposed Language to Form DC-349 Does Not Alter Requirement of Issuance of Show Cause Summons

The pertinent language in § 19.2-358(A) authorizing the issuance of a show cause summons provides that "the court upon the motion of the Commonwealth or upon its own motion, may require [the defendant] to show cause." The addition of the language you suggest, quoted above, to Form DC-349 would eliminate the need for the motion by the Commonwealth or the court which § 19.2-358 clearly requires.

A prior Opinion of this Office discusses whether a defaulting defendant may be arrested for the failure to pay an installment fine if he submitted with his petition for payment an acknowledgment that a capias pro fine would be issued for his arrest in the event of a default on payment of an installment. See 1976-1977 Att'y Gen. Ann. Rep. 81, 83. Noting that a statutory basis no longer existed in Virginia for the issuance of a capias pro fine, the prior Opinion concludes that

having a defendant submit an acknowledgment that he would be arrested in the event that he defaulted on an installment payment provides no legal authority for such an arrest. Pursuant to § 19.2-358, however, a court may require a defendant to show cause why he should not be imprisoned for non-payment when a default occurs. Following a show cause hearing the court may order the defendant imprisoned for contempt.

Id.

While the additional language you suggest does not require a defendant to acknowledge that he may be arrested, it does require him to acknowledge that he will appear on a certain date to show cause, without further notice. The failure by the defendant to appear then may result in his arrest. This result circumvents the requirement of § 19.2-358(A) that "the court upon the motion of the Commonwealth or upon its own motion, may require [the defendant] to show cause," because it eliminates the necessity for a motion by the Commonwealth or the court. Furthermore, § 19.2-358(B) contemplates the issuance of an order to show cause in its first sentence.

It is my opinion, therefore, that the addition of the proposed language to Form DC-349 would not eliminate the requirement in § 19.2-358 for the issuance of a show cause summons and the defendant's subsequent failure to appear as preconditions for the issuance of a capias upon the defendant's default in the payment of fine and costs as ordered pursuant to § 19.2-354.

1Form DC-360 6/88 (114:9-015 4/89), entitled "Show Cause Summons," is provided to district courts by the Office of the Executive Secretary of the Supreme Court of Virginia.

2Form DC-361 6/88 (114:9-015 9/89) is entitled "Capias: Attachment of the Body."
CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE.

COUNTIES, CITIES AND TOWNS: GENERAL.

RULES OF VIRGINIA SUPREME COURT: VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY.

District court, in its discretion and under its continuing control, may allow crime victim to retain private prosecutor for misdemeanor trial when neither Commonwealth's attorney nor assistant present in court to undertake prosecution. Private attorney who represented victim in related civil matter ineligible to serve in prosecutorial role because of conflict of interests. Victim may seek restitution for medical bills; decision whether to grant request remains within court's discretion. Admissibility of complainant's medical bills to prove defendant's manner or intent dependent upon factual determinations of trial court, applying rules of evidence established by law.

December 19, 1990

The Honorable Charles R. Cloud
Chief Judge, Norfolk General District Court

You ask whether, and if so under what circumstances, a private prosecutor hired by the victim of a crime may prosecute a misdemeanor charge for that crime. You also ask whether the victim may, in the absence of the Commonwealth's attorney, ask the court to order restitution for medical bills and whether those medical bills are admissible evidence at any time before conviction of the accused.

I. Facts

You describe a situation in which a complainant, upon advice of a private attorney, secures a criminal warrant charging his neighbor with assault and battery, after the neighbor has struck the complainant in the jaw and caused him to incur $5,000 in medical expenses. Before trial of the charges, the complainant hires the private attorney to serve as a private prosecutor in the case. The defendant waives counsel, and, on the day of trial, no public prosecutor appears.

II. Applicable Statutes

Section 15.1-8.1(B) of the Code of Virginia provides:

The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duty and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging felony and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors . . . .

Section 19.2-303 provides that, as a condition of a suspended sentence, a defendant may be required to make "at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense for which convicted." Section 19.2-305 similarly permits a court to order "restitution or reparation" as a condition of probation.

III. Victim May Retain Private Prosecutor for Misdemeanor Subject to Discretion and Continuing Control of Trial Court

In Cantrell v. Commonwealth, 229 Va. 387, 329 S.E.2d 22 (1985), the Supreme Court of Virginia acknowledged the historic right of a crime victim or his family to retain pri-
vate counsel to assist in the prosecution of the alleged perpetrator of a crime. The Court noted, however, that this right is not absolute, but "lies within the discretion and continuous control of the trial court." Id. at 392, 329 S.E.2d at 26. Detailing the limits on a private prosecutor's activities, the Court stated:

His role is more limited than that of the public prosecutor. By the weight of authority, he may not initiate a prosecution or appear before the grand jury; he may appear only by leave of the trial court; he may participate only with the express consent of the public prosecutor; he may make a closing jury argument only in the court's discretion; and he may take no part in a decision to engage in plea bargaining, deciding the terms of a plea bargain, or a decision to accept a plea of guilty to a lesser crime or to enter a nolle prosequi. Although there is no arbitrary limitation as to the proportion of work which may be done by a private prosecutor, the public prosecutor must remain in continuous control of the case.

Id. at 393, 329 S.E.2d at 26 (citations omitted).

The Court's use of the phrase "in continuous control" of the public prosecutor in Cantrell supports an inference that, in the facts presented in that case, the Commonwealth's attorney or one of his assistants must be physically present in court during the trial. Cantrell, however, involved a felony prosecution. Pursuant to the requirements of § 15.1-8.1(B), the Commonwealth's attorney or one of his assistants always will be present at the trial of a felony. Cantrell's requirements for the consent and continuous control of the Commonwealth's attorney are obviously necessary in a felony case, therefore, to avoid conflicts between the Commonwealth's attorney and the private prosecutor that might otherwise occur.

Those same considerations are not present in a misdemeanor trial when the Commonwealth's attorney has chosen not to be present. That choice clearly is within the Commonwealth's attorney's discretion under § 15.1-8.1(B). See 1987-1988 Att'y Gen. Ann. Rep. 176, 179. The decision of the Commonwealth's attorney not to appear in a misdemeanor case may be based on staffing considerations or other factors that do not involve the validity of the complaint. In many misdemeanor prosecutions, the accused will be represented by counsel. If the accused is indigent, counsel must be provided at public expense for Class 1 and 2 misdemeanor charges, which can result in imposition of a jail sentence. See Argersinger v. Hamlin, 407 U.S. 25 (1972). Even when the accused is unrepresented, the trial court will, of necessity, permit him to cross-examine the complainant. To deny the complainant the ability, at his own expense, to have counsel assist in presenting the complainant's version of the facts when the Commonwealth's attorney cannot or will not be present, in my opinion, would be manifestly unfair. It is my opinion that Cantrell does not dictate such a result.

Based on the above, it is further my opinion that a district court, in its discretion and under its continuing control, may allow a private prosecutor employed by the complainant to proceed with prosecution of a misdemeanor charge when neither the Commonwealth's attorney nor one of his assistants is present in court to undertake that prosecution.

IV. Attorney Who Has Represented Victim in Related Court Matter ineligible to Serve as Private Prosecutor

Cantrell makes it clear that if a private attorney also has represented the victim or the victim's family in a civil matter related to the same events that gave rise to the criminal charge, that attorney is ineligible to serve in the prosecutorial role because of a conflict of interests. 229 Va. at 393-94, 329 S.E.2d at 26.
The Cantrell holding in this regard is based upon DR 8-101(A)(2) and EC 8-10 of the Virginia Code of Professional Responsibility (see Va. Sup. Ct. R. Pt. 6, § II, Canon 8), and Legal Ethics Opinions of the Virginia State Bar interpreting that provision. These provisions and opinions apply to both felony and misdemeanor prosecutions. The facts you present do not indicate clearly whether the private attorney in question has represented or will represent the victim in a civil action or claim against the misdemeanor defendant. In my opinion, Cantrell and the authorities cited therein make it clear that if that is the case, the private attorney is ineligible to participate in the capacity of prosecutor of the criminal case.

V. Victim Not Prohibited from Requesting Court to Order Restitution

Under §§ 19.2-303 and 19.2-305, all trial courts have discretion to require a person convicted of a misdemeanor to make at least partial restitution to the aggrieved party for damages or loss caused by that offense, as a condition of either a suspended sentence or probation. ¹ Under § 19.2-305, the defendant may submit a restitution proposal to the court. Typically, of course, such a proposal could also come from the prosecutor, as part of his sentence recommendation. I am not aware of any statute or court decision that would prohibit the victim from also requesting restitution. The decision whether to grant that request would, of course, remain within the discretion of the court.

VI. Admissibility of Complainant's Medical Bills to Prove Assault Dependent on Factual Determination by Court

The common law offense of assault and battery is defined as any bodily hurt, however slight, done to another in an angry, rude or vengeful manner. Jones v. Commonwealth, 184 Va. 679, 36 S.E.2d 571 (1946). Whether the complainant's medical bills are relevant to proving the defendant's manner or intent will depend upon facts not identified in your request. Other objections to admission of the complainant's medical bills could be based on the authenticity of the documents, whether they are the "best evidence" of what they purport to show and whether they are hearsay. Of necessity, these are factual determinations that must be made by the trial court on a case-by-case basis, applying the rules of evidence established by law.

¹The Supreme Court of Virginia has held that a trial court is without power to order restitution by a defendant convicted and sentenced to a fine and jail term, when neither probation nor a suspended sentence is involved. Baker v. Commonwealth, 230 Va. 252, 335 S.E.2d 276 (1985).

CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE — PRELIMINARY HEARING.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY — CRIMES INVOLVING HEALTH AND SAFETY.

COURTS NOT OF RECORD: DISTRICT COURTS.

CIVIL REMEDIES AND PROCEDURE: EVIDENCE.

RULES OF VIRGINIA SUPREME COURT: GENERAL DISTRICT COURTS — CRIMINAL AND TRAFFIC — DISCOVERY.
Commonwealth must present evidence at district court preliminary hearing of previous larceny sentences as part of sufficient cause to charge defendant with "third offense" petit larceny; defendant's right to refute by testimony existence of previous convictions. Commonwealth obligated to prove at trial that defendant had assistance of counsel in previous convictions, but not required to prove same at preliminary hearing. Obligation of Commonwealth to offer sufficient proof of fact of previous offenses. Authority for district court to direct bill of particulars to ascertain previous convictions forming basis for charge does not extend to preliminary hearings.

December 20, 1990

The Honorable Charles R. Cloud
Chief Judge, Norfolk General District Court

You ask several questions concerning the conduct of a preliminary hearing by a district court for a defendant charged with the felony of "third offense" petit larceny—petit larceny committed after having been sentenced twice before for a larceny offense—pursuant to § 19.2-297 of the Code of Virginia. Specifically you ask:

1. Whether, at such a preliminary hearing, the previous larceny convictions are in issue or whether they serve only to enhance the punishment at trial in the circuit court.

2. Whether a defendant may, through testimony, place the question of previous convictions in issue at the preliminary hearing.

3. Whether, at the preliminary hearing, it is material whether the defendant was represented by counsel or waived counsel in the previous larceny proceedings.

4. Whether the Commonwealth may satisfy its burden of proof at the preliminary hearing concerning the previous convictions by introducing a copy of the local police record that identifies a person with the same name and social security number, having two previous larceny convictions.

5. Whether § 19.2-183(B), concerning the taking of evidence at preliminary hearings, applies to the proof of previous larceny offenses.

6. Whether the prosecutor at the preliminary hearing must marshal all witnesses and be prepared to address the issue of previous larceny convictions in the same manner as for the felony trial in circuit court.

7. Whether the defendant is entitled to have a district court direct a bill of particulars concerning the alleged previous convictions upon which the prosecutor will rely.

I. Facts

You state that a store manager apprehends a person believed to have concealed goods and to have left the store without paying for them. The police are called, and a check of local police records reveals that the defendant has been convicted twice before of petit larceny. Based on this information, the store manager obtains a felony warrant that alleges a "third offense" petit larceny, but contains no further description of the two earlier petit larceny offenses.

At the preliminary hearing, the prosecutor offers the store manager's testimony to establish probable cause for the current larceny and proffers a copy of the local police record showing two previous convictions for petit larceny, for a person having the same name and social security number as the defendant.
II. Applicable Statutes

Section 19.3-297 provides:

When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or found by the jury or judge before whom he is tried, that he has been before sentenced in the United States for any larceny or any offense deemed to be larceny by the law of the sentencing jurisdiction, he shall be confined in jail not less than thirty days nor more than twelve months; and for a third, or any subsequent offense, he shall be guilty of a Class 6 felony.

Section 19.2-186 provides, in part:

If a judge consider that there is sufficient cause to charge the accused with an offense that he does not have jurisdiction to try then he shall certify the case to the appropriate court having jurisdiction . . . .

Section 19.2-183 details procedures for the conduct of preliminary hearings, and provides:

B. At the hearing the judge shall, in the presence of the accused, hear testimony presented for and against the accused in accordance with the rules of evidence applicable to criminal trials in this Commonwealth. In felony cases, the accused shall not be called upon to plead, but he may cross-examine witnesses, introduce witnesses in his own behalf, and testify in his own behalf.

III. Commonwealth Must Offer Proof of Defendant's Previous Larceny Sentences at Preliminary Hearing

Section 19.2-297 makes petit larceny subject to punishment as a felony only when the defendant has been convicted and sentenced for larceny on two previous occasions. The statute "explicitly requires that it be alleged in the indictment and either admitted or proved that the accused has previously been sentenced for larceny in order for the enhanced punishment provisions to become applicable." Brown v. Commonwealth, 226 Va. 56, 59, 307 S.E.2d 239, 240 (1983).

In a preliminary hearing on a felony warrant, the district court must determine whether there is "sufficient cause" for charging the accused with the crime alleged. If there is reasonable ground to believe that the felony has been committed and the accused is the person who committed it, the district court must certify the case to the circuit court. Section 19.2-186. If there is not sufficient cause to charge the defendant, he may be released or tried by the district court for a misdemeanor disclosed by the evidence presented. See Moore v. Commonwealth, 218 Va. 388, 391, 237 S.E.2d 187, 190 (1977) (interpreting former § 19.1-106).

Although § 19.2-297 speaks of the earlier convictions as a circumstance warranting enhanced punishment, the existence of two previous sentences for larceny is the single fact that makes the offense a felony. Certification of the existence of the previous sentences, therefore, is a necessary part of the preliminary hearing. If it does not have "sufficient cause" to believe that the defendant has twice before been sentenced for a larceny offense, the district court has only a misdemeanor charge before it for consideration and must proceed to try the defendant on that charge. Section 19.2-186. It is my opinion, therefore, that the Commonwealth must present evidence of the past convictions as part of the "sufficient cause" to charge the defendant with the felony offense.
IV. Defendant May Question Existence of Previous Offenses at Preliminary Hearing

Section 19.2-183(B) requires the district court judge to hear testimony presented "for and against the accused," and specifically permits a defendant to "introduce witnesses ... and testify in his own behalf." Because the Commonwealth must present evidence of the previous convictions to persuade the district court to certify the case to the circuit court, it is my opinion that § 19.2-183 permits the defendant to refute the existence of the previous convictions by testimony in the preliminary hearing.

V. Whether Defendant Had Assistance of Counsel in Previous Cases Material at Trial but Not at Preliminary Hearing

The validity of the defendant's previous convictions is not subject to re-examination in a subsequent prosecution, but the Constitution of the United States limits the later use of convictions obtained when a defendant was not represented by counsel. See Baldasar v. Illinois, 446 U.S. 222 (1980); Sargent v. Commonwealth, 5 Va. App. 143, 360 S.E.2d 895 (1987).

The previous convictions on which the felony of a "third offense" petit larceny is based may be Class 1 misdemeanors under § 18.2-96, punishable by a maximum fine of $2,500 and/or confinement in jail for as much as twelve months, or offenses under similar statutes in other states. The Sixth Amendment to the Constitution of the United States guarantees a right to counsel for all offenses that could lead to imprisonment. Arger singer v. Hamlin, 407 U.S. 25 (1972). Virginia law likewise provides that a defendant shall be informed of his right to counsel for any criminal offense that may be punished by confinement in jail. Section 19.2-157. The defendant may waive counsel, or the court may determine in advance of trial that no confinement will be imposed and try the case without the appointment of counsel. Section 19.2-160. It is possible, therefore, that a previous larceny conviction may have been obtained in a case in which the defendant had no counsel.

In Baldasar, the Supreme Court of the United States considered an Illinois statute that converted misdemeanor theft into a felony upon proof of a previous theft conviction. The defendant had not been represented by counsel and had not waived counsel at the time of the first theft conviction. 446 U.S. at 223. In a split decision, the Court held that a previous misdemeanor conviction for which the defendant had no counsel "may not be used ... to convert a subsequent misdemeanor into a felony with a prison term." Id. at 222. Five justices joined in a per curiam opinion reversing the conviction, but for different reasons expressed in three concurring opinions. Id. at 224-30. The four dissenting justices would have permitted the conviction to stand because the previous conviction was valid and the enhanced punishment was for the subsequent offense only. Id. at 230-31.

The fractured opinion of the Supreme Court on this issue has led to confusion on the later use of uncounseled convictions. Relying on Baldasar, however, the Court of Appeals of Virginia has held that at trial, the Commonwealth must prove that previous convictions used for enhancement of punishment were counseled convictions, or that the accused waived counsel. Sargent, 5 Va. App. at 147, 360 S.E.2d at 897-98.

The defendant in Sargent was charged with driving under the influence of intoxicants ("DUI") as a third offense within five years. 5 Va. App. at 145, 360 S.E.2d at 896. Under § 18.2-270, enhanced penalties are imposed for repeated DUI offenses. The court records offered by the Commonwealth did not show that Sargent was either represented by counsel or that he validly waived counsel for the previous offenses. Id. at 149, 360 S.E.2d at 899.
The court of appeals held in Sargent that at trial the Commonwealth has the burden of proving every material fact necessary to establish the offense, and that those facts include proof that the defendant had counsel or waived counsel for the previous offenses. Absent such proof, the Commonwealth may not rely on the previous convictions for enhancement purposes. Id. at 153, 360 S.E.2d at 901.

A preliminary hearing is not a trial in its ordinary sense. The primary purpose of a preliminary hearing is to ascertain whether there is reasonable ground to believe that a crime has been committed and that the person charged is the one who committed it. Peyton v. Ellyson, 207 Va. 423, 429, 150 S.E.2d 104, 109 (1966); see also 5B M.J. Criminal Procedure § 17 (1990); R. Bacigal, Va. Crim. Proc. § 11-3 (2d ed. 1989). Neither Sargent nor any decision from another state of which I am aware suggests that full proof of defendant's assistance by or waiver of counsel in the previous convictions must be introduced at the preliminary hearing. Neither does § 19.2-186 impose such a requirement; that section specifies only that the district court find "sufficient cause to charge" the defendant with a felony before certifying the case to the circuit court. Based on the above, it is my opinion that, once the Commonwealth has introduced prima facie evidence of the two previous larceny convictions and the present petit larceny violation, a district court may certify a felony charge under § 19.2-297, without inquiring whether defendant had or waived counsel for the previous convictions, and that the latter inquiry is a matter for the Commonwealth to prove at trial in the circuit court.

VI. Section 19.2-183(B) Applies to Proof of Previous Larceny Convictions; Commonwealth Must Offer Evidence of Two Earlier Convictions in Conformity with Rules of Evidence

In the facts you present, the prosecutor offers a local police record as evidence of the previous larceny offenses. Section 19.2-183(B) clearly requires that the court consider evidence "presented .. against the accused in accordance with the rules of evidence applicable to criminal trials in this Commonwealth." This requirement applies to the Commonwealth's obligation to offer sufficient proof of the fact of the previous offenses. A local police record that identifies two previous larceny convictions for an individual with the same name and social security number as the defendant is sufficient to satisfy the Commonwealth's obligation, in my opinion, if the record is properly authenticated by its custodian.

You also ask whether the Commonwealth must marshall all witnesses and be prepared to address fully the issue of previous convictions, as it would at trial in the circuit court. As discussed in Part V above, the Commonwealth need only establish "sufficient" cause to believe defendant committed the previous offenses to satisfy its obligation under § 19.2-297. This is typically accomplished by introducing certified court orders describing the previous convictions and sentences. Certified copies of court orders and papers are specifically made admissible as prima facie evidence of the facts recited therein. Section 8.01-389. It is my opinion, therefore, that judgment orders of a circuit court, or the warrant from a district court conviction, will support a finding of sufficient cause concerning previous convictions of the defendant.

VII. District Court May Not Direct Bill of Particulars to Ascertain Previous Convictions Forming Basis for Charge

A district court may direct a bill of particulars only for cases to be tried in the district court. Section 16.1-69.25:1. This authority does not extend to preliminary hearings, which occur in cases to be tried in circuit court. The rules of court permit a defendant, before the preliminary hearing, to seek discovery of his criminal record. See Va. Sup. Ct. R. 7C:5(e)(2). That record, in my opinion, should provide the defendant with sufficient notice of the facts of his previous convictions.
CRIMINAL PROCEDURE: TAXATION AND ALLOWANCE OF COSTS — EXCEPTIONS AND WRITS OF ERROR.

Indigent defendant not responsible for payment of costs of initial criminal proceeding when conviction reversed and annulled on appeal; not responsible for payment of fees of court-appointed attorney on appeal.

April 30, 1990

The Honorable H.P. Haymore Jr.
Clerk, Circuit Court of Pittsylvania County

You ask whether a criminal defendant whose circuit court conviction is reversed by the Court of Appeals of Virginia is responsible for the payment of the costs of the initial criminal prosecution. You also ask whether the defendant is liable for attorney's fees for the appeal.

I. Facts

The criminal defendant in the facts you present was convicted by the circuit court of first degree murder. On appeal to the Court of Appeals of Virginia, you state that the appellate court's order held that the circuit court's "[J]udgment is reversed and annulled, the verdict of the jury is set aside, and the case is hereby remanded to the trial court for a new trial." 

On remand, this defendant entered a plea of guilty to a charge of manslaughter and was sentenced to the time he previously had served on his original conviction.

II. Applicable Statutes

Section 19.2-326 of the Code of Virginia, which provides for court-appointed attorneys in criminal appeals, provides, in part: "If the conviction is upheld on appeal, the attorney's fees, costs and necessary expenses of such attorney paid by the Commonwealth ... shall be assessed against the defendant."

Section 19.2-336 further provides, in part:

In every criminal case the clerk of the circuit court in which the accused is found guilty ... shall as soon as may be, make up a statement of all expenses incident to the prosecution ... and execution for the amount of such expenses shall be issued ....

III. Defendant in Facts Presented Not Found "Guilty" in Original Proceeding, Not Responsible for Costs

Under § 19.2-336, a criminal defendant is responsible for the payment of the costs of his conviction without the formal entry of a judgment against the defendant for the costs. Commonwealth v. McCue, 109 Va. 302, 63 S.E. 1066 (1909). It is clear, however, that the accused must be convicted in order to be responsible for the payment of these costs. See Att'y Gen. Ann. Rep.: 1982-1983 at 141; 1978-1979 at 333, 334; 1968-1969 at 46; 1965-1966 at 55, 57.

Prior Opinions of this Office discuss what constitutes a finding of "guilty," as that term is used in § 19.2-336 and in former § 19.1-320, the predecessor statute to § 19.2-336. These prior Opinions rely on the holding of the Supreme Court of Virginia in Anglea &c. v. Commonwealth, 51 Va. (10 Gratt.) 696 (1853), that costs are not penal in
nature but are imposed to reimburse the public treasury for the costs incurred as a result of a defendant's conduct, and conclude that a criminal defendant is responsible for costs in a number of different situations. See Att'y Gen. Ann. Rep.: 1984-1985 at 85 (defendant charged with felony and found guilty, or pleads guilty, to misdemeanor); 1953-1954 at 41 (when trial postponed by Commonwealth, defendant liable for expenses of two juries).

The facts upon which these prior Opinions are based, however, are distinguishable from those you present. In each factual situation in the prior Opinions cited above, the defendant ultimately was convicted in the circuit court of the offense charged, or of a lesser-included offense; the circuit court conviction was not overturned. In the facts you present, the defendant's original conviction was "reversed and annulled" by the Court of Appeals. In these facts, it is my opinion that no conviction exists for this first trial and, therefore, that the defendant is not responsible for the payment of the costs of the first trial.

IV. Indigent Defendant Not Responsible for Costs of Attorney on Appeal if Conviction Reversed

Your second question is governed by § 19.2-326, quoted above, which requires that a conviction be "upheld on appeal" in order for attorney's fees, costs and necessary expenses of such attorney paid by the Commonwealth to be assessed against a defendant. Since the defendant's conviction was not upheld by the Court of Appeals in the facts you present, it is my opinion that the defendant is not responsible for the payment of the fees of his court-appointed attorney on appeal.

DOMESTIC RELATIONS: UNLAWFUL MARRIAGES GENERALLY.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Juvenile court authorized to give consent to marriage for child whose custody assumed by court and transferred pursuant to any of statutory dispositional alternatives for abused or neglected children, children in need of services or delinquents. Exception when child committed to Department of Corrections.

June 7, 1990

The Honorable Robert P. Frank
Judge, Newport News Juvenile and Domestic Relations District Court

You ask for the circumstances under which a judge of a juvenile and domestic relations district court ("juvenile court") may consent to a marriage pursuant to § 20-49 of the Code of Virginia. More specifically, you ask who is a "ward of the State," as that term is used in § 20-49.

I. Applicable Statute

Section 20-49 provides:

If any person intending to marry be under eighteen years of age, and have not been previously married, the consent of the father or mother or guardian of such person or persons, shall be given either personally to the clerk or judge, or in writing subscribed by a witness, who shall make oath before the clerk or judge that the writing was signed or sworn to in his presence by such father, guardian, or mother, as the case may be, or the writing shall be
sworn to before a notary public or some person authorized to take acknowledgments to deeds under the laws of this State, which oath shall be properly certified by such officer. If there be no father, guardian, or mother, or if such person or persons be abandoned by his or her parents, the judge of the circuit court of the county or city wherein such person or either of them resides, either in term or vacation, may on verified petition of such person or persons intending to marry, authorize a marriage license to be issued, or issue the same, as the case may be.

If any such person under eighteen years of age be a ward of the State[1] by virtue of having been adjudicated a delinquent, in need of services, abused or neglected child pursuant to § 16.1-279 of this Code, the consent required by this section shall be given by the judge having jurisdiction to control the custody of such person; or, if such person so adjudicated shall have been committed to the Board of Corrections, such consent shall be given personally by the Director of the Department of Corrections or by some person thereto authorized by him, such authorization to be in writing, attested or sworn to as hereinabove provided.

II. Statute Must Be Interpreted to Give Meaning to All of Its Provisions

The term "ward of the State" is not defined in Title 20 or in any other title of the Code. The word "ward" is a common term which, in general usage, refers to an individual under the care or protection of another. The American Heritage Dictionary 1363 (2d c. ed. 1985). The word "state" also is a common term and is susceptible of a variety of meanings, depending upon the context in which the word is used. The word is sometimes used to describe a governmental unit within geographically fixed boundaries. Black's Law Dictionary 1262 (5th ed. 1979). The term is applied at times to governmental agencies authorized by a state, such as a municipal corporation. See County of Spokane v. Gifford, 9 Wash. App. 541, 543, 513 P.2d 301, 302 (1973). In its largest sense, however, the term "state" refers to a body politic. Black's Law Dictionary, supra.

It is a fundamental principle of statutory construction that a statute should be construed so that effect is given to all of its provisions and no part will be rendered void or inoperative. 2A N. Singer, Sutherland Stat. Const. § 46.06 (4th ed. 1984). Within the context of § 20-49, the term "ward of the State" does not refer solely to commitment of a child to the State as a governmental unit. The only dispositional alternative available to a juvenile court that would result in a child being committed to a state agency is one which authorizes a child to be committed to the Department of Corrections. See § 16.1-279. Consent to marriage on behalf of children committed to the Department of Corrections is treated separately in the second paragraph of § 20-49. If the term "State" were intended to refer only to the governmental unit of the State, the first part of the second paragraph of § 20-49 would be superfluous.

III. Phrase "Ward of the State" Refers to Child Whose Custody Has Been Assumed by Juvenile Court and Transferred Pursuant to § 16.1-279

The only meaning of the term "ward of the State" that gives meaning to all the language in § 20-49 is one that refers to the "State" as a body politic and includes any child whose custody has been assumed by the juvenile court and transferred pursuant to any of the dispositional alternatives for abused and neglected children, children in need of services or delinquents in § 16.1-279. The juvenile court exercises the interests and responsibilities of the body politic through its continuing jurisdiction over the custody of such child, taking into account the welfare of the child and the interests of the public. See § 16.1-285.
It is my opinion, therefore, that a juvenile court judge is authorized to give the consent to marriage required by § 20-49 for any child whose custody has been assumed by the juvenile court and transferred pursuant to any of the dispositional alternatives for abused or neglected children, children in need of services or delinquents in § 16.1-279. The only exception to this authorization, as provided later in the second paragraph of § 20-49, is when the child is committed to the Department of Corrections.

1Effective July 1, 1990, the phrase "ward of the State" has been amended to "ward of the Commonwealth." See Ch. 733, 1989 Va. Acts 1945, 1977 (Reg. Sess.). Within the context of § 20-49, there is no substantive distinction between the phrase "ward of the State" and "ward of the Commonwealth."

"Section 20-49 refers to children committed to the Board of Corrections. The 1981 Session of the General Assembly substituted "Department of Corrections" for "State Board of Corrections" in the dispositional portion of § 16.1-279(D) and (E). See Ch. 487, 1981 Va. Acts 733, 735-36 (Reg. Sess.). While the reference in § 20-49 was not amended to reflect this change, it is clear the legislature intended that the Director of the Department of Corrections be authorized to give the required consent for children committed to the state correctional system.

EDUCATION: PUBLIC SCHOOL FUNDS.
COUNTIES, CITIES AND TOWNS: BUDGETS.

Appropriations to school board may be based on expectation of receipt of funds from Literary Fund.

March 6, 1990

Dr. S. John Davis
Interim Superintendent of Public Instruction

You ask whether the governing body of a county, city or town may appropriate funds to its school board for a particular construction project, if these funds will be received from the Literary Fund in the future but are not available at the time of the appropriation by the board of supervisors or council.

I. Applicable Statutes

The process for the preparation and submission of a local school board budget to the governing body of a county, city or town is detailed in §§ 22.1-92 and 22.1-93 of the Code of Virginia. Section 22.1-94, which describes the appropriation process for public schools, provides:

A governing body may make appropriations to a school board from the funds derived from local levies and from any other funds available, for operation, capital outlay and debt service in the public schools. Such appropriations shall be not less than the cost apportioned to the governing body for maintaining an educational program meeting the standards of quality for the several school divisions prescribed as provided by law. The amount appropriated by the governing body for public schools shall relate to its total only or to such major classifications prescribed by the Board of Education pursuant to § 22.1-115. The appropriations may be made on the same periodic basis as the governing body makes appropriations to other departments and agencies.
II. School Board Budget Prepared on Basis of Estimated Revenues and Expenses; Appropriations Made on Basis of Approved Budget

An appropriation is the act of setting money apart for a special use or purpose by a governing body in clear and unequivocal terms through a duly enacted law. See 1977-1978 Att'y Gen. Ann. Rep. 291, 292. After a local governing body makes a proper appropriation to its school board, the school board is authorized to spend the funds appropriated. Id.

Before appropriations are made pursuant to § 22.1-94, the local governing body must approve the school board budget. See § 22.1-93. The budget is prepared using estimates of expected expenses and revenues. See §§ 22.1-92, 22.1-93. Although approval of the budget by the local governing body is not an authorization to expend funds, the approved budget is the basis for determining amounts to be appropriated. See § 15.1-162; Att'y Gen. Ann. Rep.: 1981-1982 at 33, 34; 1980-1981 at 9; 1976-1977 at 228. The nature of the budget and appropriations process dictates that appropriations be made on the basis of estimated revenues anticipated to be received during the relevant appropriations period. I am unaware of any constitutional or statutory authority which prohibits a locality from making appropriations based upon a reasonable expectation of the receipt of sufficient revenues in the then current fiscal period to meet such appropriations.¹

III. Local Governing Body May Appropriate Funds to School Board Based on Expectation of Receipt of Funds from Literary Fund

Based on the above, it is my opinion that a local governing body may appropriate funds to its school board for a construction project, if the funds appropriated are expected to be received from the Literary Fund during the current appropriations period, even though the funds are not available at the time the appropriation is made.²

¹No debt is created if appropriations that have been made do not exceed cash on hand or reasonably anticipated revenues for the fiscal period in which the appropriation is made. See American-LaFrance v. Arlington County, 164 Va. 1, 7-8, 178 S.E. 783, 785 (1935). See also King v. Sheppard, 157 S.W.2d 682, 685 (Tex. Civ. App. 1941).

²It is important that contracts that are made in reliance upon such appropriations be drafted in a manner that minimizes exposure of the local government to honor these contractual commitments. See Att'y Gen. Ann. Rep.: 1980-1981 at 9; 1979-1980 at 300.

EDUCATION: PUBLIC SCHOOL FUNDS.

COUNTIES, CITIES AND TOWNS: BUDGETS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - DEBT.

Local governing body may not appropriate funds to school board for school construction project when funds not expected to be received from Literary Fund during current appropriations period, unless borrowing permitted pursuant to constitutional and statutory or charter provisions.

May 9, 1990

Ms. Suzanne F. Thomas
President, Board of Education
You ask whether the governing body of a county, city or town may appropriate funds to its school board for a school construction project if these funds are not expected to be received from the Literary Fund during the current appropriations period.

I. Prior Opinion Concludes Funds May Be Appropriated if Expected to Be Received During Current Appropriations Period

A prior Opinion of this Office concludes that a local governing body may appropriate funds to its school board for a construction project if the funds appropriated are expected to be received from the Literary Fund during the current appropriations period, even though the funds are not available at the time the appropriation is made. See Op. to Dr. S. John Davis, Interim Supt. Pub. Instr. (Mar. 6, 1990). The condition of a reasonable expectation of receipt of the appropriated funds during the current appropriations period is basic to the entire budget and appropriations process, which generally involves (1) the preparation of a budget detailing the estimated revenues and expenditures anticipated during a specific period of time and (2) a legislative authorization for spending for a particular period based upon this budget.

Authorization to spend funds which are not anticipated to be available for spending during the fiscal period of the appropriation would constitute debt. A local governing body may authorize such an appropriation only if the locality may borrow to meet the debt created under the applicable constitutional and statutory or charter provisions governing debt for the locality. See 1970-1971 Att'y Gen. Ann. Rep. 83.

II. Local Governing Body May Not Appropriate Funds to School Board When Funds Will Be Received After Close of Appropriations Period Unless Debt Created Is Permissible

Based on the above, it is my opinion that a local governing body has no authority to appropriate funds to its school board for a school construction project when it has no expectation of receiving the funds from the Literary Fund during the current appropriations period, unless the locality may borrow to meet the deficit in revenue pursuant to Article VII, § 10 of the Constitution of Virginia (1971) and the controlling statutory or charter provisions.

1See Va. Code Ann. § 22.1-92 (division superintendents required to prepare estimates of amount of money needed during the next fiscal year); § 22.1-93 (governing body required to prepare and approve annual budget for educational purposes); § 15.1-160 (budget to contain plan of contemplated expenditures and all estimated revenues and borrowings of the locality for the ensuing fiscal year).


EDUCATION: SCHOOL BOARDS; SELECTION, ETC. - ALTERNATE METHOD OF SELECTING SCHOOL BOARDS IN SCHOOL DIVISIONS COMPRISED OF A SINGLE COUNTY.
Two at-large members of local school board may not complete current four-year terms when both at-large positions abolished by resolution of board of supervisors.

May 1, 1990

Mr. Douglas W. Napier
County Attorney for Warren County

You ask whether the two at-large members of the Warren County School Board may complete their current four-year terms if both at-large positions have been abolished by the local board of supervisors.

I. Facts

You state that Warren County has selected the alternate method of selecting school board members described in Article 3, Chapter 5 of Title 22.1, §§ 22.1-41 through 22.1-46 of the Code of Virginia. The county has seven school board positions, one from each election district and two at-large positions selected pursuant to § 22.1-44. The terms of the two at-large members of the school board expire on June 30, 1992, and June 30, 1993, respectively.

By resolution adopted on February 5, 1990, the board of supervisors voted to abolish the two at-large positions on the school board, effective immediately. This action reduced the school board membership from seven to five, one from each of the five election districts in the county.

II. Applicable Statute

As discussed above, § 22.1-44 provides that "[t]he governing body of the county may appoint no more than two additional members [to the school board] from the county at large."

III. Authority to Create Membership and Terms of School Board Implies Authority to Abolish Certain Members and Terms

The power to create an office—in the facts you present, the two at-large school board positions—generally includes the power to abolish it.

Public offices are not held by grant or contract; but are created by the law-making power, and no person has a vested right in them. The governmental authority which possesses the power to create an office has, in the absence of some restriction imposed by a higher authority, the implied power to abolish such office....

***

...'The incidental effect may be to oust or deprive the old officers of their offices before the expiration of their terms. When these officers accepted their respective offices they did so with the knowledge that [their offices may be abolished].'

(authority to establish school board positions carries with it the implied power to abolish these positions); 1981-1982 at 163 (legislature may create and abolish offices as necessary or superfluous); 1979-1980 at 158, 159 (legislative body may modify terms of office even though effect may be to curtail incumbent's unexpired term); 1974-1975 at 54 (town council authorized to abolish, terminate or reorganize local planning commission).

Based on the above, it is my opinion that the resolution of the board of supervisors you describe, which immediately abolishes the two at-large positions on the local school board, operates to extinguish the terms of the two at-large members of the school board. It is further my opinion, therefore, that these two at-large members may not complete their current four-year terms.

ELECTIONS: FAIR ELECTIONS PRACTICES ACT.

Member of county board of supervisors may distribute letter to county employees soliciting political contribution only if letter informs recipient of right to refuse without reprisal.

November 28, 1990

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask whether the Fair Elections Practices Act, §§ 24.1-251 through 24.1-263 of the Code of Virginia, permits a member of a county board of supervisors (the "supervisor") to distribute a letter to all employees of the county, urging them to vote against a particular referendum question, if the letter also contains a request to "[s]end in a contribution of less than $100.00" to a political action committee properly formed and registered to oppose the question presented in the referendum, and the letter contains the additional statement that "[f]unds are needed immediately."

I. Applicable Statute

Section 24.1-254.2(B) governs the establishment of political action committees and provides, in part:

1. No political action committee shall make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisal, or threat of force, or as a condition of employment.

2. Any person soliciting a contribution to such a political action committee shall, at the time of such solicitation, inform the person being solicited of (i) his right to refuse to contribute without any reprisal; and (ii) the political purposes of such political action committee.

II. Solicitation of Political Contribution Must Inform County Employees of Right to Refuse Without Reprisal

Under well-recognized principles of statutory construction, the primary goal in interpreting a particular statute is to give effect to the intent and purpose of the legislature. 1989 Att'y Gen. Ann. Rep. 128, 131; 256, 257; 325, 326. The obvious purpose of the General Assembly in enacting § 24.1-254.2(B) was to ensure that no person will feel coerced to make a donation to a political action committee, particularly when the donation is solicited in the workplace.
Section 24.1-254.2(B) does not define what constitutes the "soliciting" of contributions to a political action committee. In the absence of a statutory definition, a term must be given its plain and ordinary meaning. 1989 Att'y Gen. Ann. Rep. 317, 318. In ordinary legal usage, to "solicit" means

[t]o appeal for something ... to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication.


As the governing body of a Virginia county, a board of supervisors has the power to hire county employees and fix the terms and conditions of their employment. See Commonwealth v. Arlington County Bd., 217 Va. 558, 578, 232 S.E.2d 30, 43 (1977). Because the board is the "employer" of county employees, a county employee receiving a written request from an individual supervisor to "[s]end a contribution of less than $100.00" because "[f]unds are needed" may reasonably infer that he is expected to contribute as a condition of his employment. In my opinion, this is exactly the form of persuasion the General Assembly sought to prevent by adopting the requirement in § 24.1-254.2(B)(2) that such communications must include a statement that the employee has a right to refuse to contribute without reprisal.

It is my opinion, therefore, that the supervisor lawfully may send a letter containing the language you describe to county employees only if the letter also includes a statement that informs the recipients of their right to refuse to contribute to the political action committee without any reprisal, as required by § 24.1-254.2(B)(2).

FIRE PROTECTION: LOCAL FIRE MARSHALS.

Local governing body may authorize fire marshal and designated assistants to exercise, without limitation, same police powers as exercised by sheriff, police officer or other law-enforcement officer.

August 29, 1990

Mr. David T. Stitt
County Attorney for Fairfax County

You ask whether § 27-34.2:1 of the Code of Virginia authorizes a local governing body to grant its fire marshal and his or her assistants the same powers as a sheriff, police officer or other law-enforcement officer for the investigation and prosecution of crimes.

I. Applicable Statutes

Section 27-30 provides that each county, city or town may appoint a fire marshal. Section 27-31 requires that each local "fire marshal shall make an investigation into the origin and cause of every fire occurring within the limits for which he was appointed."

Section 27-34.2:1 provides, in part:
In addition to such other duties as may be prescribed by law, the local fire marshal and those assistants appointed pursuant to § 27-36 designated by the fire marshal shall, if authorized by the governing body of the county, city or town appointing the local fire marshal, have the same police powers as a sheriff, police officer or law-enforcement officer. The investigation and prosecution of all offenses involving fires, fire bombings, bombings, attempts or threats to commit such offenses, false alarms relating to such offenses, possession and manufacture of explosive devices, substances and fire bombs shall be the responsibility of the fire marshal or his designee, if authorized by the governing body of the county, city or town appointing the local fire marshal.

II. Local Governing Body May Authorize Fire Marshal and Designated Assistants to Exercise Full Police Powers

Until 1988, § 27-34.2:1 provided that

the local fire marshal and those assistants appointed pursuant to § 27-36 designated by the fire marshal shall, if authorized by the governing body of the county, city or town appointing the local fire marshal, have the same police powers as a sheriff or police officer in the investigation and prosecution of all offenses involving fires, fire bombings, bombings, attempts or threats to commit such offenses, false alarms relating to such offenses, possession and manufacture of explosive devices, substances and fire bombs. [Emphasis added.]

An amendment adopted by the General Assembly at its 1988 Session removed to a separate sentence the language that limited the police powers localities may delegate to their fire marshals to those dealing with fire-related offenses. Ch. 65, 1988 Va. Acts 69.

In the amended version, fire marshals are given responsibility for the investigation and prosecution of such fire-related offenses, but local governing bodies are authorized to grant them "the same police powers as a sheriff, police officer or law-enforcement officer." Section 27-34.2:1.

When new provisions are added to existing legislation by an amendatory act, a presumption normally arises that a change in the law was intended. Wisniewski v. Johnson, 223 Va. 141, 266 S.E.2d 223 (1982); see also 1986-1987 Att'y Gen. Ann Rep. 272, 273.


Based upon the comparison of the pre-1988 and current versions of § 27-34.2:1 discussed above, I am of the opinion that a local governing body may grant to its fire marshal and those assistants designated by the fire marshal the same police powers as are exercised by a sheriff, police officer or other law-enforcement officer, without limitation as to the types of offenses for which the fire marshal or assistant fire marshals may exercise those police powers.

GAME, INLAND FISHERIES AND BOATING: ADMINISTRATION OF GAME AND INLAND FISHERIES — WILDLIFE AND FISH LAWS.

Release of hunting dogs by raccoon hunters and following dogs in vehicle constitutes hunting; possession of firearm by one member of hunting party during raccoon chase sea-
son places other members of party with knowledge of that possession in violation of agency regulations.

April 6, 1990

The Honorable Terry G. Kilgore
Commonwealth's Attorney for Scott County

You ask two questions concerning the hunting of raccoons. You first ask whether raccoon hunters who release their hunting dogs and follow the dogs in vehicles are "hunting" before these hunters actually exit their vehicles. You also ask whether raccoon hunters who hunt during the raccoon chase season, with the knowledge that one member of the party carries a firearm, are in violation of the regulation that prohibits the carrying of firearms during the raccoon chase season.

I. Applicable Statutory, Case and Regulatory Authorities

Section 29.1-100 of the Code of Virginia defines the term "hunting" to include the act of or the attempted act of taking, hunting, trapping, pursuing, chasing, shooting, snaring or netting birds or animals, and assisting any person who is hunting, trapping or attempting to do so regardless of whether birds or animals are actually taken . . . . The Board of Game and Inland Fisheries may authorize by regulation the pursuing or chasing of wild birds or wild animals during any closed hunting season where persons have no intent to take such birds or animals.

The Supreme Court of Virginia has defined "hunting" to include "[following] with dogs or guns for sport or exercise." Commonwealth v. Bailey, 124 Va. 800, 802, 97 S.E. 774, 774-75 (1919).

Regulations of the Board of Game and Inland Fisheries issued by the Department of Game and Inland Fisheries ("Board Regulations") provide for seasons when it is lawful to chase raccoons with dogs without actually capturing or taking the raccoons. During these seasons, it is "unlawful to have in immediate possession a firearm . . . while hunting." Board Regulations VR 325-02-19 Pt. I (Sept. 1987).

II. Pursuing Raccoons in Vehicles Constitutes Hunting

In the facts you present, the activity at issue involves the release of hunting dogs to begin a chase for raccoons. The dogs are followed by individuals in a vehicle. The provisions of § 29.1-100 quoted above, as well as the ruling of the Supreme Court of Virginia in Commonwealth v. Bailey, clearly demonstrate that the activity you describe constitutes "hunting," as that term is defined in § 29.1-100. It is my opinion, therefore, that raccoon hunters who release their hunting dogs and follow these dogs in vehicles are hunting even prior to exiting the vehicles.

III. Assisting Armed Member of Hunting Party During Raccoon Chase Season Violates Regulation

With respect to your second question concerning the raccoon hunting party, the Supreme Court of Virginia has held that a person who does not have actual possession of an object will be said to have constructive possession if the object is subject to his "dominion or control." Woodfin v. Commonwealth, 218 Va. 458, 460, 237 S.E.2d 777, 779 (1977). As a result, other members of a hunting party who, themselves, are not carrying firearms and who do not have dominion or control over the firearm carried by another cannot be said to be in "immediate possession" of the firearm.
Nonetheless, the armed member of the party is hunting in violation of Board Regulations VR 325-02-19 Part I, quoted above, and "assisting any person who is hunting" constitutes hunting by the unarmed members of the party. Section 29.1-100. The unarmed members of the hunting party who assist the armed member, therefore, are doing more than merely chasing the raccoon; they are hunting outside the hunting season authorized by the regulation. It is my opinion, therefore, that the raccoon hunters you describe who hunt during the raccoon chase season with the knowledge that one member of the party is carrying a firearm violate Board Regulations VR 325-02-19 Part I, which prohibits the carrying of firearms during the raccoon chase season.

Note that § 29.1-505.1 defines the crime of conspiracy to commit a violation of the Board Regulations. If additional facts exist to show that members of the hunting party you describe are acting in concert with the armed hunter to violate the Board Regulations, prosecution pursuant to this statute may be appropriate.

HEALTH: DISEASE PREVENTION AND CONTROL - DISEASE CONTROL MEASURES.

No statutory requirement that patient sign statement indicating receipt of information concerning implied consent to testing for human immunodeficiency virus infection; health care provider has no right to refuse treatment to patient unless patient signs document acknowledging receipt of information concerning implied consent provision. No requirement that person charged with driving while intoxicated sign statement indicating receipt of information concerning implied consent provision as condition for taking voluntary blood sample.

February 20, 1990

The Honorable J. Randolph Smith Jr.
Commonwealth's Attorney for the City of Martinsville

You ask whether § 32.1-45.1(A) of the Code of Virginia, which provides for the implied consent of a patient to testing for human immunodeficiency virus infection when a health care provider or its agent is exposed to the patient's body fluids in specified circumstances, gives the health care provider the right to refuse treatment to a patient unless the patient signs a document acknowledging receipt of information concerning the provisions of § 32.1-45.1(A).

You also ask whether a person charged with driving while intoxicated may be required to sign a document acknowledging that he has been advised of the implied consent provisions of § 32.1-45.1(A) as a condition for taking a voluntary blood sample.

I. Applicable Statute

Section 32.1-45.1(A) provides:

Whenever any health care provider, or any person employed by or under the direction and control of a health care provider, is directly exposed to body fluids of a patient in a manner which may, according to the then current guidelines of the Centers for Disease Control, transmit human immunodeficiency virus, the patient whose body fluids were involved in the exposure shall be deemed to have consented to testing for infection with human immunodeficiency virus. Such patient shall also be deemed to have consented to the release of such test results to the person who was exposed. In other
than emergency situations, it shall be the responsibility of the health care
provider to inform patients of this provision prior to providing them with
health care services which create a risk of such exposure.

II. Statute Does Not Require Signed Document Indicating
Patient's Receipt of Information Concerning Implied
Consent, Creates No Condition Precedent to Treatment

Section 32.1-45.1(A) clearly provides that a patient "shall be deemed to have con-
sented" to testing for human immunodeficiency virus ("HIV") infection if a health care
provider or its agent is directly exposed to the patient's body fluids, under certain enu-
merated circumstances. The term "deem" means "[t]o hold; consider; adjudge; believe;
condemn; determine; treat as if; construe." Black's Law Dictionary 374 (5th ed. 1979).
This term, as it is used in § 32.1-45.1(A), neither connotes nor requires express written
acceptance of information or actual consent by the patient.

The sole mandatory requirement in § 32.1-45.1(A) is for the health care provider to
provide information concerning the informed consent to the patient. The burden is upon
the health care provider to assure that this information is given, not upon the patient to
demonstrate receipt of that information. The health care provider must inform patients
of the implied consent provision of this statute, but it is my opinion that the provider
may do so in any one of a number of demonstrable ways, such as prominently displaying
posters, or providing written statements to patients, or by any other method that reason-
ably conveys this information to the patient.1

In enacting § 32.1-45.1, it is presumed that the General Assembly did so with
knowledge of its impact. See 2A N. Singer, Sutherland Stat. Const. § 45.12 (4th ed. 1984);
contravention of the statute's clear mandate to imply consent for HIV testing when speci-
fied circumstances occur. When the General Assembly has intended that a signed con-
sent document is necessary, it has described this requirement with clarity. See, e.g.,
§ 54.1-2971 (requiring informed, written consent in advance of breast biopsy). Based on
the above, it is my opinion that § 32.1-45.1(A) does not require a patient to sign a state-
ment indicating receipt of information concerning the implied consent provision of
§ 32.1-45.1(A) and, therefore, does not give a health care provider the right to refuse
treatment to a patient unless the patient signs a document acknowledging receipt of
information concerning that implied consent provision.

For the same reasons as those discussed in Part II of this Opinion, it is further my
opinion that § 32.1-45.1(A) does not require a person who has been charged with driving
while intoxicated to sign a statement indicating receipt of information concerning the
implied consent provision of that statute.

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1The Department of Health has been advised by this Office to post prominent notices,
with recommended language, in pertinent areas of local health departments, such as
waiting rooms and treatment rooms, informing patients of the statutory provisions for
informed consent pursuant to § 32.1-45.1(A).

HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD,
ETC. - ROADS OVER DAMS.

Owners of dams on which highway located responsible for repair and restoration of dam.
Commonwealth Transportation Commissioner may spend state funds to strengthen and
widen dam to accommodate traffic demands; secondary roads funds may not be allocated
to pay for engineering study to determine restoration or repairs to be made to dam.

March 20, 1990

The Honorable Shirley F. Cooper
Member, House of Delegates

You ask whether the Virginia Department of Transportation, pursuant to
§§ 33.1-176 through 33.1-181 of the Code of Virginia, may allocate secondary roads funds
for the purpose of an engineering study to widen and strengthen a dam upon which a sec-
ondary road is built.¹

I. Facts

Based on the materials you submitted, the following facts are disclosed. On
August 18, 1989, a severe storm surge exacerbated existing structural damage to a dam
and spillway at Queens Lake in York County, Virginia, which supports the Queens Drive
bridge. The damage to the dam necessitated the closing of the bridge to traffic.

The York County Board of Supervisors, by resolution, has requested that
$15,000 of the County’s secondary roads funds be reallocated for an engineering study to determine
what improvements to the dam are necessary and practical. You ask whether § 33.1-177
would permit secondary roads monies to be reallocated and spent for this study.

II. Applicable Statutes

Section 33.1-176 provides that “[e]very owner or occupier of a dam
shall, so far as any state highway passes over the same, keep such dam in good order
. . . .” Section 33.1-177 provides, in pertinent part, that

[The] [Commonwealth Transportation] Commissioner may, at his own cost
and expense, widen or strengthen any such dam or bridge to a width suffi-
cient properly to provide for the traffic which uses that section of road or
which such dam or bridge forms a part. [Emphasis added.]

III. Secondary Roads Funds May Not Be Used for Restoration or Repair of Dam

Section 33.1-177 gives the Commonwealth Transportation Commissioner (the
"Commissioner") discretion to spend highway funds only for the purpose of widening or
strengthening a dam to a width sufficient to accommodate the traffic using the roadway.
If the existing roadway were two lanes and the Commissioner decided to add two more
lanes because of traffic demands, for example, § 33.1-177 would authorize the Commis-
sioner to spend state funds to widen the dam to accommodate the two additional lanes. If
the dam were already wide enough to build the two additional lanes but needed strength-
ingen to accommodate the two new lanes, again, § 33.1-177 would authorize the Commis-
sioner to spend state funds to strengthen the dam.

Although the General Assembly could, of course, amend § 33.1-177 to provide oth-
ervise, it appears that it was the General Assembly's intent to authorize highway funds
to be used to widen or strengthen a dam only where traffic demand, as opposed to the
inherent deficiency of the dam, requires that the dam be widened or strengthened. Like-
wise, it appears to have been the General Assembly's intent that the owner of the dam,
not the Commissioner or the Department of Transportation, must keep the dam in good
order and repair so that existing traffic may safely use the road crossing the dam. See
§ 33.1-176. Because the cost of an engineering study may be a necessary expense of such repairs, § 33.1-176 also places that cost responsibility on the owner of the dam. If the General Assembly had intended that state funds be used for expenses associated with the restoration or repair of a dam, it could have so provided in § 33.1-176.

Based on the above, it is my opinion that secondary roads funds may not be used to pay for an engineering study to determine what restoration or repair needs to be made to the dam in the facts you present.

Additional information received subsequent to your request posed two additional questions. First, are there other state laws that authorize the Commonwealth Transportation Commissioner (the "Commissioner") to share in the expense of repairing or strengthening the dam? Second, are there state funds other than secondary roads funds available to the Commissioner that he could use to share in the expense of repairing or strengthening the dam? I can find no statutory authority for the Commissioner to share in the expense of repairing a dam, other than the authority set forth in §§ 33.1-176 to 33.1-181. Section 33.1-180 gives the Commissioner the authority to share in the cost of construction if a larger spillway is needed. Section 33.1-179 provides for a sharing of costs of reconstruction of a dam only if the dam is washed out and the owner refuses to replace it. Neither section is applicable to the facts you present.

HIGHWAYS, BRIDGES AND FERRIES: OUTDOOR ADVERTISING IN SIGHT OF PUBLIC HIGHWAYS.

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

Federal Highway Beautification Act of 1965, as amended, does not require payment of just compensation when billboards removed pursuant to local zoning ordinance. Payment by local governing body of just compensation, plus cost of removing sign, when removing billboards made nonconforming by local ordinance; ordinances may not require removal of lawful, nonconforming billboards, except as provided by Virginia law.

April 4, 1990

The Honorable J. Granger Macfarlane
Member, Senate of Virginia

You ask several questions concerning a proposed Roanoke County sign ordinance. You first ask whether payment of the taxable value of a billboard, which has been removed by a local governing body because it does not conform to a local zoning ordinance, is "just compensation" as required by the federal Highway Beautification Act of 1965, as amended, 23 U.S.C.A. § 131 (West 1966 & Supp. 1989) (the "Beautification Act"). You also ask whether a county may require that nonconforming billboards be removed, even if fair market value is paid for the billboards.

I. Facts

You state that Roanoke County has proposed an ordinance which provides, in part:

Nonconforming signs may remain, provided they are kept in good repair, except for the following:

* * *
(d) Off-Premises Signs. Off-premises signs located in agricultural or residential zoning districts are, due to their location, inconsistent with the purposes of this ordinance. All off-premises signs located in agricultural or residential zoning districts shall be removed by January 1, 2000. After this date, the Zoning Administrator may order the removal of any such sign, provided Roanoke County compensates the owner for the taxable value of the sign structure. Nothing in this section shall prohibit the Chief Building Official from ordering the removal, without compensation, of damaged or neglected signs in accordance with [another provision of the ordinance].

You further state that the majority of the billboards in question are located along federal-aid primary highways or the interstate highway system. You indicate that some of these billboards were erected in the 1950s.

II. Applicable Statutes

The Beautification Act was enacted by the Congress of the United States to control the erection and maintenance of advertising signs adjacent to the interstate highway system in order to protect the public investment in these highways, to promote the safety and recreational value of public travel and to preserve natural beauty. See 23 U.S.C.A. § 131(a) (West 1966). The failure by a state to comply with the Beautification Act may result in the withholding of 10% of federal highway funds to a noncomplying state upon a determination by the United States Secretary of Transportation that the state failed to comply with the Beautification Act. See 23 U.S.C.A. § 131(b) (West Supp. 1989). The Beautification Act further provides, in part, that "[j]ust compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section." 23 U.S.C.A. § 131(g) (West Supp. 1989).

Chapter 7 of Title 33.1, §§ 33.1-351 through 33.1-381 of the Code of Virginia, entitled "Outdoor Advertising in Sight of Public Highways" ("Chapter 7"), governs the regulation of outdoor advertising along public highways in the Commonwealth. The purpose of Chapter 7 is to promote the safety, convenience and enjoyment of travel on and protection of the public investment in highways within this Commonwealth, to attract tourists and promote the prosperity, economic well-being and general welfare of the Commonwealth, and to preserve and enhance the natural scenic beauty or aesthetic features of the highways and adjacent areas.

Section 33.1-351(a).

Section 33.1-370 specifically concerns advertisements along interstate and federal-aid primary highways. This statute was enacted in 1960 as former § 33-317.1 to regulate advertising along the interstate highway system (Ch. 406, 1960 Va. Acts 640, 646-47) and amended in 1966 in response to the Beautification Act (Ch. 663, 1966 Va. Acts 1037, 1039-41). Section 33.1-370(e) provides, in part, that nothing shall prohibit the local governing bodies from removing signs, advertisements, or advertising structures which are made nonconforming solely by local ordinances so long as those ordinances require the local governing bodies to pay 100% of the cost of removing them and just compensation upon their removal.

The general statutory authority of counties, cities and towns to enact zoning ordinances is found in Article 8, Chapter 11 of Title 15.1. Section 15.1-492 provides:
Nothing in this article shall be construed to authorize the impairment of any vested rights, except that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition.

III. Beautification Act Does Not Require Payment of Just Compensation When Billboard Is Removed Pursuant to Local Zoning Ordinance

You first ask whether payment of the taxable value of a billboard which has been removed by a local governing body for noncompliance with a local zoning ordinance constitutes "just compensation" within the meaning of the Beautification Act. In Metromedia, Inc. v. City of San Diego, 164 Cal. Rptr. 212, 228-29, 592 P.2d 728, 744-45 (1979), subsequent op. on rehearing, 164 Cal. Rptr. 516, 610 P.2d 407 (1980), rev'd on other grounds, 453 U.S. 490 (1981), on remand, 185 Cal. Rptr. 260, 649 P.2d 902 (1982), it was held that the Beautification Act does not require the state to pay just compensation when billboards adjoining interstate or primary highways must be removed to comply with local zoning ordinances. The legislative history of that act indicates that the Congress intended to require payment of compensation only for billboards removed pursuant to the Highway Beautification Act or state statutes enacted to conform to that act. Courts have uniformly held that local zoning ordinances which ban billboards located on interstate and primary highways are not preempted by state laws enacted to conform to the Highway Beautification Act.

In the facts you present, the billboards would be removed pursuant to a local sign ordinance rather than pursuant to the Beautification Act. Based on the above, it is my opinion that the Beautification Act does not require that just compensation be paid when signs are removed pursuant to a local sign ordinance.

IV. Removal of Certain Nonconforming Billboards Permitted by Chapter 7; Just Compensation Must Be Paid

Chapter 7 regulates outdoor advertising along public highways in the Commonwealth. Section 33.1-370 contains special provisions pertaining to interstate and federal-aid primary highways. As used in Chapter 7, "sign" is defined as "any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any highway." Section 33.1-351(b)(20). Section 33.1-370(e) provides that a local governing body may remove signs which are made nonconforming by a local ordinance if the ordinance requires the local governing body to pay 100% of the cost of removing the signs and just compensation.

The provisions of § 33.1-370(e), permitting the removal of signs by local ordinance, were enacted after the language of § 15.1-492, quoted in Part IV above, prohibiting this impairment by a zoning ordinance of vested rights in property. See Ch. 275, 1980 Va. Acts 294, 298. As a result, it is my opinion that the enabling provisions of § 33.1-370(e) are an exception to the general limitations of § 15.1-492. Moreover, the provisions of § 33.1-370(e) are specific to sign ordinances, whereas the coverage of § 15.1-492 is general in nature. When the General Assembly has enacted a specific statute concerning the authority of a local governing body to act, reliance upon the general statutory grant of police power is not appropriate. See 1987-1988 Att'y Gen. Ann. Rep. 363, 364. It is my
opinion, therefore, that a local governing body may remove billboards which are made nonconforming by a local ordinance if the billboard satisfies the definition of "sign" in Chapter 7, and provided the ordinance requires the governing body to pay the entire cost of removing the sign, in addition to just compensation.

V. Reference in Chapter 7 to "Just Compensation" Means Fair Market Value

The Supreme Court of Virginia has held that, in eminent domain proceedings, a landowner is entitled to "just compensation" for land taken, and that "just compensation" is measured by the fair market value of the property. *Tremblay v. Highway Commissioner*, 212 Va. 166, 183 S.E.2d 141 (1971). In *Tremblay*, the Court further held that "[m]arket value is the price which one, under no compulsion to sell, is willing to take for property and which another, under no compulsion to buy, is willing to pay." *Id.* at 168, 183 S.E.2d at 143. The removal of signs for public purposes, as described in Chapter 7, is, in my opinion, equivalent to eminent domain proceedings, in which a governing body takes the property of individuals for public use in return for fair compensation. It is further my opinion, therefore, that the reference to "just compensation" in Chapter 7 refers to the fair market value of the billboard.

VI. Except as Provided Under Chapter 7, Local Zoning Ordinances May Not Require Removal of Lawful, Nonconforming Billboards

You next ask whether a county may require that lawful, nonconforming billboards not covered by Chapter 7—i.e., not along the public highways in the Commonwealth—be removed if the county pays fair market value for the billboards. Former § 15-843 (Repl. Vol. 1356), which has since been superseded by § 15.1-492, provided that

[n]othing in this article [Article 1, Chapter 24 of Title 15] contained shall be construed as intended to authorize the impairment of any vested right; provided, however, that reasonable regulations may be adopted by councils of cities and towns of the Commonwealth for the gradual elimination of uses of land and buildings that do not conform to such regulations and restrictions.

In contrast, however, § 15.1-492 states that nonconforming uses may continue so long as the existing use continues and is not discontinued for more than two years, and so long as the structure is maintained in its "then structural condition." It is clear that the legislative intent was to allow lawful, nonconforming uses to continue until the existing use is abandoned for more than two years, so long as the structure is maintained in its "then structural condition." 1981-1982 Att'y Gen. Ann. Rep. 465, 466.

In *Knowlton v. Browning-Ferris*, 220 Va. 571, 260 S.E.2d 232 (1979), the Supreme Court of Virginia held that "[e]xcept for a change from a nonconforming use to a 'more restricted use,' the statute [§ 15.1-492] clearly envisions the protection of the use 'existing on the effective date of the zoning restriction.'" *Id.* at 576, 260 S.E.2d at 236 (citing *C. & C. Incorporated v. Semple*, 207 Va. 438, 439 n.1, 150 S.E.2d 536, 537 n.1 (1966) (emphasis in original)).

According to the facts that you describe, the billboards lawfully pre-existed the ordinance. Based on the above, it is my opinion that Roanoke County may not require removal of lawful, nonconforming billboards even if fair market value is paid, with the exception of billboards subject to Chapter 7, which are discussed in Part IV of this Opinion.

1For purposes of this Opinion, I assume that the billboards in question are commercial in nature. A prior Opinion of this Office concludes that it is questionable whether
§ 33.1-370 could withstand constitutional scrutiny under the First Amendment of the United States Constitution to the extent that the section operates as an abridgement of free speech by prohibiting political campaign posters. That Opinion notes that the Supreme Court of the United States, while generally upholding regulations of outdoor advertising in the realm of commercial speech, has struck down such regulations as unconstitutional if they also regulate protected, noncommercial speech. See 1983-1984 Att'y Gen. Ann. Rep. 190.

For purposes of this Opinion, I assume that these billboards were not constructed or located in violation of any ordinance in effect at the time of their construction.

Although a prior Opinion of this Office concludes that it would be unconstitutional to require removal of a nonconforming use through a sign ordinance (see 1981-1982 Att'y Gen. Ann. Rep. 465, 466), the conclusion in that Opinion was questioned in a subsequent Opinion which concludes that a local sign ordinance, if authorized by statute, could require a gradual removal of advertising signs according to a reasonable amortization schedule. See 1983-1984 Att'y Gen. Ann. Rep. 269.

HOMESTEAD AND OTHER EXEMPTIONS: HOMESTEAD EXEMPTION OF HOUSEHOLDER — OTHER ARTICLES EXEMPT.

Debtor may claim benefit of additional 1990 exemptions for property newly included in revised homestead statutes, levied upon, but not sold prior to effective date of amendments. Protection of defendant householder's property by filing homestead deed prior to sheriff's sale of property unchanged by 1990 amendments. Validity of writ of fieri facias issued, but not executed, before effective date of amendments.

September 7, 1990

The Honorable Frank Drew
Sheriff for the City of Virginia Beach

You ask whether a sheriff has the authority to sell at auction items that were levied upon before July 1, 1990, but that would be exempt from sale under amendments to §§ 34-4 and 34-26 of the Code of Virginia, effective that date. You also ask how those amendments affect writs of fieri facias issued before July 1, 1990, but not yet executed.

I. Applicable Statutes

Before it was amended at the 1990 Session of the General Assembly, § 34-4 provided:

Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, distress or garnishment under §§ 34-26, 34-27 and 34-29, to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding $5,000. The word 'debt,' as used in this title [Title 34], shall be construed to include a liability incurred as the result of an unintentional tort.

As amended, § 34-4 provides an additional exemption to a householder with dependents:
Every householder shall be entitled, in addition to the property or estate exempt under §§ 34-26, 34-27, 34-29, and 64.1-151.3, to hold exempt from creditor process arising out of a debt, real and personal property, or either, to be selected by the householder, including money and debts due the householder not exceeding $5,000 in value. In addition, upon a showing that a householder supports dependents, the householder shall be entitled to hold exempt from creditor process real and personal property, or either, selected by the householder, including money or monetary obligations or liabilities due the householder, not exceeding $500 in value for each dependent.

For the purposes of this section, 'dependent' means an individual who derives support primarily from the householder and who does not have assets sufficient to support himself, but in no case shall an individual be the dependent of more than one householder. [Emphasis added.]

Section 34-26 creates a further "poor debtor's exemption" from creditor process for certain enumerated articles of personal property. Before July 1, 1990, it provided:

In addition to the estate, not exceeding in value $5,000, which every householder residing in this State shall be entitled to hold exempt, as provided in Chapter 2 (§ 34-4 et seq.) of this title, he shall also be entitled to hold exempt from levy or distress the following articles or so much or so many thereof as he may have, to be selected by him or his agents:

(1) The family Bible.

(1a) Wedding and engagement rings.

(2) Family pictures, schoolbooks and library for the use of the family.

(3) A lot in a burial ground.

(4) All necessary wearing apparel of the debtor and his family, all beds, bedsteads and bedding necessary for the use of such family, 2 dressers or 2 dressing tables, wardrobes, chifforobes or chests of drawers or a dresser and a dressing table; carpets, rugs, linoleum or other floor covering; and all stoves and appendages put up and kept for the use of the family not exceeding 3.

(5) All cats, dogs, birds, squirrels, rabbits and other pets not kept or raised for sale; 1 cow and her calf until 1 year old, 1 horse, 6 chairs, 6 plates, 1 table, 12 knives, 12 forks, 2 dozen spoons, 12 dishes, or if the family consists of more than 12, then a plate, knife, fork and 2 spoons, and a dish for each member thereof; 2 basins, 1 pot, 1 oven, 6 pieces of wooden or earthenware; 1 dining room table, 1 buffet, china press, 1 icebox, freezer or refrigerator of any construction, 1 washing machine, 1 clothes dryer not to exceed $150 in value, 1 loom and its appurtenances, 1 kitchen safe or 1 kitchen cabinet or press, 1 spinning wheel, 1 pair of cards, 1 axe and provisions other than those hereinafter set out of the value of $50; 2 hoes; 50 bushels of shelled corn, or, in lieu thereof, 25 bushels of rye or buckwheat; 5 bushels of wheat, or 1 barrel of flour; 20 bushels of potatoes, 200 pounds of bacon or pork, 3 hogs, fowl not exceeding in value $25, all canned and frozen goods, canned fruits, preserved fruits or home-prepared food put up and prepared for use and consumption of the family, $25 in value of forage or hay, 1 cooking stove and utensils for cooking therewith, 1 sewing machine, and in case of a mechanic, the tools and utensils of his trade, and in case of an oysterman or fisherman...
his boat and tackle, not exceeding $1,500 in value; if the boat and tackle exceed $1,500 in value the same shall be sold, and out of the proceeds the oysterman or fisherman shall first receive $1,500 in lieu of such boat and tackle.

No officer or other person shall levy or distrain upon, or attach, such articles, or otherwise seek to subject such articles to any lien or process.

The 1990 amendment to § 34-26 revised and expanded the list of exempt items as follows:

(1) The family Bible.

(1a) Wedding and engagement rings.

(2) Family portraits and family heirlooms not to exceed $5,000 in value.

(3) A lot in a burial ground.

(4) All wearing apparel of the householder not to exceed $1,000 in value.

(4a) All household furnishings including, but not limited to, beds, dressers, floor coverings, stoves, refrigerators, washing machines, dryers, sewing machines, pots and pans for cooking, plates, and eating utensils, not to exceed $5,000 in value.

(5) All animals owned as pets, such as cats, dogs, birds, squirrels, rabbits and other pets not kept or raised for sale or profit.

(6) Medically prescribed health aids.

(7) Tools, books, instruments, implements, equipment, and machines, including motor vehicles, vessels, and aircraft, which are necessary for use in the course of the householder's occupation or trade not exceeding $10,000 in value, except that a perfected security interest on such personal property shall have priority over the claim of exemption under this section. 'Occupation,' as used in this subdivision, includes enrollment in any public or private elementary, secondary, or vocational school or institution of higher education.

(8) A motor vehicle, not held as exempt under subdivision (7), owned by the householder, not to exceed $2,000 in value, except that a perfected security interest on the motor vehicle shall have priority over the claim of exemption under this subsection.

II. Section 34-26 Exemption Applicable to Property Newly Included Within Section, Levied Upon but Not Sold Before Effective Date of Amendments

One part of your first inquiry concerns personal property that would not have been exempt under the pre-1990 version of the "poor debtor's exemption" in § 34-26, but that is included within the listing of exempt items in the amended version of the section (e.g., motor vehicles, newly exempt from creditor process under § 34-26(7) or § 34-26(8)). You ask whether you may proceed to sell such property if it was levied upon, but not sold, before the amendments to § 34-26 took effect on July 1, 1990.
The Supreme Court of Virginia has held that an execution by levy under a writ of fieri facias is not complete until the property is sold:

The levy does not divest the defendant of the property and transfer of title to the plaintiff, or even to the sheriff. The property still remains in the defendant, notwithstanding the levy, and only a special interest is vested in the sheriff, as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. While subject to the levy it is in the custody of the law, and the sheriff has a naked power to sell it and pass the title from the owner to the purchaser. . . . Now until this last step is taken [the sale], the thing remains in fieri, and may, in a certain manner and under certain circumstances, be so undone as that the plaintiff may be placed in the same situation in which he was before he sued out execution . . . .


Based on the above, it is clear that any property levied upon, but still in the sheriff's possession on July 1, 1990, was still titled in the defendant. It is my opinion, therefore, that the new exemptions to § 34-26, effective on that date, became applicable to such property. A sheriff, therefore, should not proceed with the sale of any items in his possession that were newly included within the exemption of § 34-26 as of July 1, 1990, but should return those items to the defendant.

III. Right of Defendant to Exercise Homestead Exemption at Any Time Prior to Sheriff's Sale of Property Unchanged by 1990 Amendments

Your first inquiry also relates to the sale of property levied upon before July 1, 1990, on which a homestead exemption is claimed pursuant to § 34-4.

While the 1990 amendments to § 34-4 allow a defendant householder to claim an additional $500 homestead for each dependent, they do not alter the method by which such exemption is claimed. Unlike the "poor debtor's exemption" created by § 34-26, the homestead exemption is not automatic. It must be exercised by the defendant householder, by recording a homestead deed, as provided in § 34-14.

Before July 1, 1990, § 34-17 provided that the householder could "set apart" his homestead exemption by recording the homestead deed "at any time before it is subjected by sale or otherwise under judgment, decree, order, execution or other legal process." The amended version of this section provides that the exempt property may be "set apart at any time before it is subjected by sale under creditor process, or, if such creditor process does not require sale of the property, before it is turned over to the creditor."

The Supreme Court of Virginia has interpreted the pre-1990 language of § 34-17 to mean that the homestead deed may be filed at any time before a court order is entered subjecting the property to sale or garnishment. Wilson v. Virginia National Bank, 214 Va. 14, 15, 196 S.E.2d 920, 921 (1973). In my opinion, a writ of fieri facias is the functional equivalent of the garnishment summons that had been issued prior to recordation of the homestead deed in Wilson. Both are "legal processes," but, in my opinion, they do not, by themselves, "subject" the defendant's property to sale within the meaning of the Supreme Court's holding in Wilson. It is my opinion, therefore, that under the pre-1990 language of § 34-17, a defendant householder could effectively protect his or her property by filing a homestead deed after a writ of fieri facias is issued but before the property levied upon was sold.
While the 1990 amendment to § 34-17 changed that section's wording to conform to the "creditor process" terminology being used in the other amended sections of Title 34, it is not apparent that those changes in wording were intended to affect the time within which the defendant householder may claim the benefit of the homestead exemption. Under recognized principles of statutory construction, when there has been a general revision of a substantial part of the Code, the presumption is that the old law was not intended to be changed, unless a contrary intention is plainly evident from the new statutory language. See 1989 Att'y Gen. Ann. Rep. 20, 21-22.

I am further of the opinion, therefore, that the time within which a householder may claim a homestead exemption under § 34-4 is unaffected by the 1990 amendments to § 34-17, and that both the $5,000 individual exemption and the newly created exemption of $500 per dependent may be claimed by filing a homestead deed pursuant to § 34-6 at any time before the sheriff actually sells the property under a writ of fieri facias.

IV. Validity of Writs of Fieri Facias Issued, but Not Executed, Before July 1, 1990, Dependent on Whether Property Is Subject to § 34-4 or § 34-26 Exemption; July 1, 1990, Effective Date Not Material

The answer to your second inquiry, concerning the validity of a writ of fieri facias issued, but not executed, before July 1, 1990, is dependent upon which type of exemption, if any, applies to the property the sheriff is seeking to levy upon. Based upon my answer to your first inquiry, such a writ could not be used to levy upon property newly included within the "poor debtor's exemption" by the 1990 amendments to § 34-26. A pre-July 1, 1990, writ would still be valid, however, for levying on nonexempt property. Because the defendant householder may still file a homestead deed to perfect § 34-4 exemptions until the date you actually sell his or her property, the July 1, 1990, effective date of the amendments to §§ 34-4 and 34-26 is not material for purposes of that exemption. Based on the above, it is my opinion that if the homestead deed is not filed, the writ is still valid; if the homestead deed is filed, the writ cannot reach the exempt property, regardless of whether it was issued before or after July 1, 1990.

1Section 34-1 defines "creditor process" as "all methods used by creditors to collect unsecured debts."

HOUSING: HOUSING AUTHORITIES LAW - COMMISSIONERS, OFFICERS, AGENTS AND EMPLOYEES - REGIONAL AND CONSOLIDATED HOUSING AUTHORITIES.

Commissioner of regional housing authority not prohibited from serving on authority once elected to town council within one of counties participating in authority; town council member not considered county officer.

June 6, 1990

The Honorable Clarence E. Phillips
Member, House of Delegates

You ask whether a commissioner of a regional housing authority is prohibited by § 36-11 of the Code of Virginia from serving on the authority once elected to a town council within one of the counties participating in the authority.
1. Applicable Statutes

Chapter 1 of Title 36, §§ 36-1 through 36-55.6, contains the Housing Authorities Law. Section 36-11 details the requirements for the appointment and tenure of commissioners and provides, in part:

Except as may be otherwise expressly provided in the charter of a city or town specifically pertaining to such authority, no commissioner of any authority may be an officer or employee, of the city or county for which the authority is created.

Article 6 of Chapter 1 provides for regional and consolidated housing authorities. Section 36-40 authorizes the board of supervisors of each of two or more contiguous counties to establish a regional housing authority. Section 36-45 requires the board of supervisors of each county included in the regional housing authority to appoint one person as a commissioner of the authority.

The powers of regional housing authorities are contained in § 36-46, which states:

Except as otherwise provided herein, a regional housing authority and the commissioners thereof shall, within the area of operation of such regional housing authority, have the same functions, rights, powers, duties, privileges, immunities and limitations provided for housing authorities created for cities or counties and the commissioners of such housing authorities, and all the provisions of law applicable to housing authorities created for cities or counties and the commissioners of such authorities shall be applicable to regional housing authorities and the commissioners thereof.

II. Section 36-11 Does Not Prohibit Town Council Member from Serving on Regional Housing Authority

A prior Opinion of this Office concludes that the limitation imposed on commissioners by § 36-11 applies to commissioners of regional housing authorities as well as to commissioners of single jurisdiction housing authorities. See 1986-1987 Att'y Gen. Ann. Rep. 217. A commissioner of a regional housing authority, therefore, is prohibited from serving as an officer or employee of any city or county served by the regional housing authority.

The question presented, therefore, is whether a town council member is considered to be a county officer or employee for purposes of § 36-11. Prior Opinions of this Office conclude that a member of a town council is not a county or state officer and, therefore, is not disqualified from serving on a school board selection commission. See Att'y Gen. Ann. Rep.: 1982-1983 at 394, 395; 1986-1987 at 263. See also 1974-1975 Att'y Gen. Ann. Rep. 325, 326 (town manager of incorporated town in county is member of administrative branch of town and not of county).

Based on the above, it is my opinion that a member of a town council should not be considered a county officer for purposes of § 36-11. It is further my opinion, therefore, that § 36-11 does not prohibit a town council member from serving on a regional housing authority.

1 You state that there is no specific town charter provision applicable to the facts you present.
HOUSING: UNIFORM STATEWIDE BUILDING CODE.

CIVIL REMEDIES AND PROCEDURE: ACTIONS — VIRGINIA TORT CLAIMS ACT.

Enforcement of Building Code governmental, rather than proprietary, function; local building official, like local government employing official, immune from liability for negligent acts or omissions in enforcement, as well as inspections conducted incident to such enforcement, of Code. Immunity from tort liability for actions of building inspectors exercising discretion in granting modifications to facilitate conversion of existing buildings.

September 21, 1990

The Honorable Ed Eck
Member, House of Delegates

You ask whether a local government or an individual local building official may be found liable for the official's acts or omissions in the performance of his or her duties while enforcing the Uniform Statewide Building Code, §§ 36-97 through 36-119.1 of the Code of Virginia (the "USBC"). You ask particularly about potential liabilities that might arise in granting, under the USBC, modifications for older buildings.

I. Applicable Statutes

Section 36-98 authorizes the Board of Housing and Community Development (the "Board") to promulgate the USBC. Section 36-105 provides that "[e]nforcement of the [USBC] shall be the responsibility of the local building department." Section 36-105.1 provides that inspections and the review and approval of building plans "shall be the sole responsibility of the appropriate local building inspectors."

Immunity from personal liability is provided for local building officials, who shall not be personally liable for any damages sustained by any person in excess of the policy limits of errors and omissions insurance, or other equivalent insurance obtained by the locality.... The building official or subordinates shall not be personally liable for costs in any action... instituted in pursuance of the provisions of the USBC as a result of any act required or permitted in the discharge of official duties while assigned to the department as employees....

New Construction Code, infra note 1, § 102.4.

The USBC's application to alterations to existing buildings is limited in the following manner:

When reconstruction, renovation or repair of existing buildings is undertaken, existing materials and equipment may be replaced with... greater capacity equipment in the same location when not considered a hazard; however, when new systems, materials and equipment that were not part of the original existing building are added, the new systems, materials and equipment shall be subject to the edition of the USBC in effect at the time of their installation. Existing parts of such buildings not being reconstructed, renovated, or repaired need not be brought into compliance with the current edition of the USBC.

Id. § 118.1.
When a change is being made in the use of a building, in the absence of a modification granted by the building official, the building shall comply with the current edition of the USBC. See id. § 118.2.

II. Local Governments Are Immune from Liability for Enforcement of USBC


In contrast, Virginia cities and towns may be held liable for the actions of their officials, provided the official is acting within the scope of his or her duties and the duty in which the official is engaged relates to a proprietary, rather than a governmental, function. See Taylor v. Newport News, 214 Va. 9, 10, 197 S.E.2d 209, 210 (1973). I am not aware of any Virginia case specifically holding that the conduct of building inspections is a "governmental" function. The Supreme Court of Virginia has acknowledged, however, that "the dominant purpose of the [USBC] is to provide comprehensive protection of the public health and safety," both during construction and upon completion of the building, and that violations may result in criminal sanctions. VEPCO v. Savoy Const. Co., 224 Va. 36, 44, 294 S.E.2d 811, 817 (1982). The operation of a police force is, of course, purely governmental in nature. Bryant v. Mullins, 347 F. Supp. 1282 (W.D. Va. 1972). Other functions relating to health and safety have likewise been held to be governmental rather than proprietary. See Edwards v. City of Portsmouth, 237 Va. 167, 375 S.E.2d 747 (1989); Fenon v. City of Norfolk, 203 Va. 551, 125 S.E.2d 808 (1962); Ashbury v. Norfolk, 152 Va. 278, 147 S.E. 223 (1929). I conclude, therefore, that USBC enforcement is properly categorized as a governmental, rather than a proprietary, function.

Based on the above, it is my opinion that Virginia's local governments are immune from liability which may result from the acts or omissions of local building officials enforcing the USBC.

The Virginia Tort Claims Act is not "applicable to any county, city or town in the Commonwealth [nor shall it] be so construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth." Section 8.01-195; see also Op. to W. Carrington Thompson, Pittsylvania Co. Att'y (July 11, 1990).

The Tort Claims Act did not abolish or otherwise affect the immunity enjoyed by Virginia counties and municipalities. As the Supreme Court of Virginia has noted:

Had it so chosen, the legislature could have used [the Tort Claims Act] as a vehicle to abolish sovereign immunity. It did just the contrary. In a 1982 amendment to the Act the General Assembly provided as follows:

'N[or] shall any provision of this article . . . be so construed as to remove or in any way diminish the sovereign immunity of any county, city, or town in the Commonwealth.'

Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984) (quoting § 8.01-195.3) (emphasis in original). The Court further stated that the rationale underlying the doctrine of sovereign immunity includes the "public inconvenience and danger that might spring
from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation." Id. at 308, 321 S.E.2d at 660; see also Op. to W. Carrington Thompson, supra.

III. Local Building Officials Are Immune from Liability for Negligence in Enforcement of USBC

The General Assembly has vested local building departments with the authority to enforce the USBC. See §§ 36-97, 36-105. The USBC recognizes the immunity of local officials who are acting to enforce the Code. See New Construction Code, infra note 1, § 102.4. The courts have recognized that immunity is needed because a "government can function only through its servants, and certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the government enjoys." First Va. Bank-Colonial v. Baker, 225 Va. 72, 79, 301 S.E.2d 8, 12 (1983).

The test for whether an employee is entitled to the sovereign immunity available to the governmental unit involves an analysis of four factors: (1) the nature of the function performed by the employee; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion. See Lentz v. Morris, 236 Va. 78, 82, 372 S.E.2d 608, 610 (1988); James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

A building code inspector performs a vital public function in seeing to the proper and timely enforcement of a comprehensive state code designed to protect the public health. The governmental interest in this function is manifest in BOCA itself, which requires that buildings be so constructed as "to protect the health, safety and welfare of the residents of this Commonwealth." Section 36-99.

Both the Commonwealth and the local government employer of the building code official exercise substantial control and direction over the official. The official is enforcing a statewide code, and he "must complete an orientation course approved by the Department of Housing and Community Development within 90 days after appointment." New Construction Code, infra note 1, § 102.2.1. The building official is appointed by the local government; however, to ensure his freedom to act, he may only be removed "for cause." Id. This requirement that dismissal be only "for cause" allows the official the full exercise of his discretion in his inspection and approval of buildings. His decisions are subject to review by both the local and the state review boards. See §§ 36-105, 36-114; New Construction Code, infra note 1, § 116.

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.: 1989 at 277, 279; 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. Building officials are vested with the authority to make discretionary judgments in several areas, including: enforcement and modifications; construction permit applications; special architectural plans; materials and equipment approval; interagency coordination; inspections; stop work orders; use and occupancy determinations; and unsafe building determinations. See New Construction Code, infra note 1, §§ 103, 105, 107, 108, 110, 113, 115, 120.

Section 118.1 of the New Construction Code provides significant discretion to local building officials in their review of reconstruction, renovation or repair of existing buildings. It addresses the types of equipment to be used and the parts of the building that are
subject to the USBC during reconstruction. Id. Where there will be a change in use, the USBC explicitly directs the building official to consider issuing a modification to facilitate conversion. See id. § 118.2.

In Messina, the Supreme Court stated the applicable rule as follows: "If an individual works for an immune governmental entity then, in a proper case, that individual will be eligible for the protection afforded by the doctrine." 228 Va. at 312, 321 S.E.2d at 663. This doctrine is not without potentially harsh results. But it is deemed that "the government itself will suffer if its agents fail or refuse to act because they fear the consequences of acting in error." Burnham v. West, 681 F. Supp. 1169, 1172 (E.D. Va. 1988).

Based on the above, it is my opinion that local building officials, like the local governments that employ them, are immune from liability for their negligent acts or omissions in enforcing the USBC.4

1 The USBC consists of the statutory provisions found in Chapter 6 of Title 36, and the regulations promulgated thereunder. See Va. USBC, 1 New Construction Code, and 2 Building Maintenance Code (1987 ed.) [hereinafter New Construction Code and Building Maintenance Code, respectively].

2 Section 513.1 of the BOCA National Building Code/1987, incorporated by reference into the USBC, provides additional latitude for special historic buildings and districts.

3 Savoy was a suit between two private parties; thus, it did not address whether enforcement of the USBC was a "governmental" function.

4 Employees of immune local governments may be liable for intentional, wanton, culpable or grossly negligent conduct or for acts beyond the scope of their employment. James v. Jane, 221 Va. at 53, 282 S.E.2d at 869. See also Fox v. Deese, 234 Va. 412, 423-24, 362 S.E.2d 699, 706 (1987); Op. to W. Carrington Thompson, supra.

INSURANCE: PROVISIONS RELATING TO ACCIDENT AND SICKNESS INSURANCE — MANDATED BENEFITS — HEALTH SERVICES PLANS — HEALTH MAINTENANCE ORGANIZATIONS.

Self-insured employee benefit program, unless established as licensed health maintenance organization, does not offer health care plans. Statutorily mandated benefit provisions relating to child health supervision services not applicable to self-insured employee benefit plans.

December 11, 1990

Mr. David T. Stitt
County Attorney for Fairfax County

You ask whether the requirement that accident and sickness insurance policies and health services plans provide coverage for child health supervision services, pursuant to § 38.2-3411.1 of the Code of Virginia, applies to self-insured employee benefit plans.

I. Applicable Statutes

Section 38.2-3411.1(A) provides:

Every individual or group accident and sickness insurance policy, subscription contract providing coverage under a health services plan, or evidence of coverage of a health care plan delivered or issued for delivery in the Com-
monwealth or renewed, reissued, or extended if already issued, shall offer and make available coverage under such policy or plan for child health supervision services to provide for the periodic examination of children covered under such policy or plan.

Section 38.2-4214 also makes this requirement for child health supervision services specifically applicable to contracts offered by health services plans.

Section 38.2-100 defines "insurer" as "an insurance company," i.e., "any company engaged in the business of making contracts of insurance." A "health services plan" is defined as "any arrangement for offering or administering health services or similar or related services by a corporation licensed under Chapter 42 (§ 38.2-4200 et seq.) of [Title 38.2]." Id. Section 38.2-4300 defines a "health care plan" as "any arrangement in which any person undertakes to provide, arrange for, pay for, or reimburse any part of the cost of any health care services," a significant part of which consists of "arranging for or providing health care services, as distinguished from mere indemnification against the cost of the services, on a prepaid basis." A "health maintenance organization" is defined as "any person who undertakes to provide or arrange for one or more health care plans." Id.

II. Mandated Benefit Provisions Not Applicable to Self-insured Employee Benefit Plans

By its plain language, the requirement imposed by § 38.2-3411.1 applies to certain "insurance policy[ies]," "health services plan[s]" and "health care plan[s]." A self-insured employee benefit plan is neither an "insurance policy" issued by an "insurer" nor a "health services plan" within the statutory definitions cited above. When read together, the definitions in § 38.2-4300 indicate that a "health care plan" is a plan provided by a "health maintenance organization" that actually arranges for or provides health care services, as distinguished from merely indemnifying employees for the cost of such services. It is my opinion, therefore, that unless it is established as a licensed health maintenance organization, a self-insured employee benefit program does not offer "health care plan[s]" as contemplated in § 38.2-3411.1(A).

It is a basic principle of statutory construction that the mention of certain items in a statute implies the exclusion of all other items. See Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); 1989 Att'y Gen. Ann. Rep. 144, 147. If the General Assembly had intended § 38.2-3411.1(A) to apply to self-insured employee benefit plans, it could have so stated in that section.

The State Corporation Commission ("SCC") is the state agency charged with regulation of insurance companies. See § 38.2-200. The General Counsel's Office of the SCC, in a telephone conversation with a member of my staff, stated that the SCC does not exercise its regulatory authority over self-insured employee benefit plans, and takes the position that statutorily mandated benefit requirements, such as the requirement in § 38.2-3411.1(A), do not apply to such plans. Another recognized principle of statutory construction is that the interpretation given to a statutory provision by the state agency charged with its enforcement is entitled to great weight. Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); see also 1989 Att'y Gen. Ann. Rep. 354, 356.

I also note that the Supreme Court of the United States, in a recent decision, has held that the federal Employee Retirement Income Security Act of 1974 ("ERISA") pre-empts state laws that impose mandatory requirements on self-insured employee benefit plans. FMC Corp. v. Holliday, 498 U.S. __, 112 L. Ed. 2d 356, 111 S. Ct. 403 (1990). Interpreting § 38.2-3411.1(A) to make it applicable to self-insured employee benefit plans of private employees, when those plans are covered by ERISA, therefore, would place that section in direct conflict with federal law. The General Assembly cannot be presumed to have intended such a conflict. See Op. to Hon. George W. Grayson, H. Del. Mbr.
Self-insured benefit plans maintained by state and local government employers for their employees, however, are not covered by ERISA. See 29 U.S.C.A. § 1321(b)(2) (West 1985). While the General Assembly could, therefore, apply the mandated benefit provisions of § 38.2-3411.1(A) to self-insured benefit plans of public employers while exempting those of private employers, there is nothing in the language of § 38.2-3411.1 to indicate such an intent.

Based on the above, it is my opinion that the requirements of § 38.2-3411.1(A) for insurance policies and health services plans to cover child health supervision services do not apply to self-insured employee benefit plans.

1 Section 38.2-3411.1(F) exempts from the mandate in § 38.2-3411.1(A) "any insurer or health services plan having fewer than 1,000 covered individuals insured or covered in Virginia or less than $500,000 in premiums in Virginia."

LABOR AND EMPLOYMENT: CHILD LABOR.

Volunteers who work without compensation not "employees," not governed by Virginia's labor statutes; 15-, 16- or 17-year-old hospital volunteers not required to obtain employment certificate from division superintendent of schools in order to perform volunteer services.

May 7, 1990

The Honorable Joyce K. Crouch
Member, House of Delegates

You ask whether hospital volunteers who are 15, 16 or 17 years old are required to obtain an employment certificate from the division superintendent of schools in order to perform their volunteer services.

I. Applicable Statutes

Virginia's Child Labor Law is detailed in §§ 40.1-78 through 40.1-116 of the Code of Virginia. Section 40.1-78 provides, in part:

No child under sixteen years of age shall be employed, permitted or suffered to work in, about or in connection with any gainful occupation during school hours, unless he has completed high school, or unless he has reached the age of fourteen and a provisional employment certificate has been issued for his employment as provided in § 40.1-90 or unless he has reached the age of fourteen and is enrolled in a regular school work-training program and a work-training certificate has been issued for his employment as provided in § 40.1-88.

II. Child Labor Law Applies Only to Minors Employed in Gainful Occupations

The provisions of § 40.1-78, by their own terms, apply only to employment in "gainful" occupations. In Lovisi v. Commonwealth, 212 Va. 848, 851, 188 S.E.2d 206, 209
(1972), the Supreme Court of Virginia differentiated between "using" and "employing" a child for purposes of the Child Labor Law and held that the definitions "within the Child Labor Law are directed toward employment for compensation." If the term "employing," as it is used in Virginia's Child Labor Law, is not synonymous with the term "using," therefore, it is my opinion that the term "employing" likewise is not synonymous with the term "volunteering."

This construction of Virginia's Child Labor Law is consistent with the construction given to the substantively similar provisions of the federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §§ 201 through 219 (West 1978, 1965, 1985 & Supp. 1990), by the Supreme Court of the United States. In 29 U.S.C.A. § 203(l) (West 1978), the federal Act categorizes the occupations closed to minors in the same manner as Virginia's Child Labor Law. See § 40.1-79. The federal Act further defines the term "employ" by using the phrase "to suffer or permit to work." 29 U.S.C.A. § 203(g) (West 1978). Compare § 40.1-78 ("permitted or suffered to work"). The Supreme Court of the United States has held that the phrase 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. . . . [S]uch a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.

Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947). Just as the Supreme Court of Virginia has construed the Commonwealth's Child Labor Law in a manner that effectively excludes volunteer work, the Supreme Court of the United States has interpreted analogous statutes and held that volunteers who work without compensation for their own purpose or pleasure are not "employees."

Based on the above, it is my opinion that, without regard to age, volunteers offering their services without compensation to hospitals are not governed by Virginia's labor statutes. It is further my opinion, therefore, that hospital volunteers who are 15, 16 or 17 years old are not required to obtain an employment certificate from the division superintendent of schools in order to perform their volunteer services.1

1Two prior Opinions of this Office conclude that no one under the age of 16 may work or volunteer to work in a hospital as a laboratory helper, orderly or nurse's aide. See Att'y Gen. Ann. Rep.: 1963-1964 at 177; 1956-1957 at 154. To the extent that either of these Opinions conflicts with the conclusion in this Opinion and the express language of § 40.1-78, the prior Opinions are hereby overruled.

MENTAL HEALTH GENERALLY: COMMUNITY MENTAL HEALTH SERVICES.

Member of community services board appointed to fill vacancy, term of which expired June 1988, eligible for reappointment in July 1988 to full three-year term; eligibility to serve one additional successive full term. Member whose second successive term expires June 1990 not eligible for appointment for three-year term beginning July 1988; membership may not exceed two full successive terms until some intervening period of time has elapsed between terms.

June 28, 1990
You ask several questions concerning the status of appointments of two members of the Hampton-Newport News Community Services Board (the "Board").

I. Facts

You state that one member of the Board was appointed by the Hampton City Council in July 1987 to fill a vacancy, the term of which was scheduled to expire in June 1988. The member resigned this appointment in May 1988 and moved his residence to the City of Newport News. In July 1988, the member was appointed by the City of Newport News to a full three-year term which will expire in June 1991. You ask whether this member will be eligible pursuant to § 37.1-196 of the Code of Virginia for reappointment to a second full term at the expiration of his current term.

A second member of the Board was appointed by the Hampton City Council to serve a full term which expired in June 1987. This second member was reappointed by the Hampton City Council to serve a second full term from July 1987 to June 1990. In June 1989, this member moved her residence to the City of Newport News and was appointed to serve a full three-year term by Newport News City Council on July 11, 1989, which term would expire June 30, 1992. On July 14, 1989, this second Board member resigned her Hampton appointment. You ask whether this member's current appointment is in compliance with § 37.1-196, and, if so, whether she is eligible for reappointment in July 1992.

II. Applicable Statutes

The cities of Hampton and Newport News have established a single community services board pursuant to the provisions of § 37.1-195:

When any combination of counties or cities or counties and cities establishes a community services program, the board of supervisors of each county in the case of counties or the council in the case of cities shall establish the size of the board [and] shall elect and appoint the members of the board...

[Emphasis added.]

Section 37.1-195 further provides that the single board is responsible to the governing bodies of the cities which established the board, in this case the cities of Hampton and Newport News.

Section 37.1-196 governs the term of office of members of each board and provides, in part:

The term of office of each member of the community services boards shall be for three years from the first day of January of the year of appointment, or, at the option of the governing body of a county or city, from the first day of July of the year of appointment[1]... Vacancies shall be filled for unexpired terms in the same manner as original appointments. No person shall be eligible to serve more than two successive terms; provided that persons heretofore or hereafter appointed to fill vacancies may serve two additional successive terms. [Emphasis added.]
III. First Board Member Is Eligible for Reappointment to Full Three-Year Term at Expiration of Current Term

The first Board member in the facts you present was appointed to fill a vacancy, the term of which was scheduled to expire in June 1988. Section 37.1-196, quoted above, expressly provides that "persons heretofore or hereafter appointed to fill vacancies may serve two additional successive terms." This Board member's appointment in July 1988 to a full three-year term which expires in June 1991, therefore, would constitute his first full term. Based on the above, it is my opinion that the first Board member in the facts you present is eligible to serve one additional successive full term.

IV. Second Board Member in Facts Presented Is Not Eligible to Serve After June 1990 Until Some Intervening Period of Time Has Elapsed Between Terms

Although it is composed of members appointed by two jurisdictions, the Board constitutes a single entity, regardless of which locality appointed a particular member or where that member lives. See § 37.1-195. The second successive term of the second Board member you describe expires on June 30, 1990, although she resigned from that particular appointment on July 14, 1989. Section 37.1-196 provides that "[n]o person shall be eligible to serve more than two successive terms." The fact that the second Board member resigned prior to the expiration of her second successive term does not alter the fact that her second term expires on June 30, 1990. See 1982-1983 Att'y Gen. Ann. Rep. 340 (term begins on day set by statute, not day board member actually appointed). Because the second Board member served during two successive terms, it is my opinion that she was not eligible for appointment to the Board by the City of Newport News for a three-year term beginning July 11, 1989.

A prior Opinion of this Office, however, held that there is no bar to an individual's appointment to a community services board once any intervening period of time has elapsed subsequent to the end of his two successive terms. See 1975-1976 Att'y Gen. Ann. Rep. 222. It is my opinion, therefore, that the second Board member may be appointed to the Board once an intervening period of time has elapsed after her two successive terms. It is further my opinion that this second Board member is not eligible for reappointment to the Board for a term which begins immediately following the one during which she last served and that she may not be appointed to fill a vacancy in any term which began prior to the expiration of her last term.

1The cities of Hampton and Newport News both have selected this July option.

MOTOR VEHICLES: LICENSURE OF DRIVERS.

Valid non-Virginia driver's license may not be revoked by Virginia authorities or seized by Virginia court because court has evidence of pre-existing Virginia license suspension or revocation; court may require acknowledgment of suspension. Court may confiscate non-Virginia license suspended by issuing state; forwarding of license to Department of Motor Vehicles, then to licensing agency of issuing state.

April 24, 1990

The Honorable Franklin J. Jenkins
Judge, Goochland County General District Court
You ask several questions concerning the confiscation of the driver's license of an individual who personally appears in court when there is evidence before the court that the license or privilege to drive of such individual has been suspended or revoked. Specifically, you ask:

1. Whether a general district court has the authority to seize a "non-Virginia driver's license" from a Virginia resident who appears in court, forward this license to the Virginia Department of Motor Vehicles (the "Department"), and require the defendant to sign Form DC-220 if the court has before it evidence showing that the defendant's license, permit or privilege to drive has been suspended or revoked in the Commonwealth;

2. Whether my conclusion to your first question would be the same if the defendant was a nonresident of the Commonwealth; and

3. Whether my conclusion to your first question would be the same if the defendant only had a non-Virginia driver's license that was suspended in the foreign issuing state, even though this defendant was a Virginia resident who was never licensed to operate a motor vehicle in the Commonwealth.

I. Applicable Statutes

Section 46.2-398 of the Code of Virginia provides, in part:

In any case in which the accused is convicted of an offense, on the conviction of which the law requires or permits revocation or suspension of the driver's license of the person so convicted, the court shall order the surrender of such license, which shall remain in the custody of the court during the period of revocation or suspension if the period does not exceed thirty days, or (i) if the period exceeds thirty days, until the time allowed by law for appeal has elapsed, when it shall be forwarded to the Commissioner (of the Department), or (ii) until an appeal is effected and proper bond posted, at which time it shall be returned to the accused.

Section 46.2-346 further provides, in part:

A. No person shall:

* * *

5. Fail or refuse to surrender to the Department, on demand, any driver's license issued in the Commonwealth or any other state when the license has been suspended, cancelled, or revoked by proper authority in the Commonwealth, or any other state as provided by law, or to fail or refuse to surrender the suspended, cancelled, or revoked license to any court in which a driver has been tried and convicted for the violation of any law or ordinance of the Commonwealth or any county, city, or town thereof, regulating or affecting the operation of a motor vehicle.

Section 46.2-416 provides, in part:

Whenever it is provided in this title that a driver's license may or shall be suspended or revoked either by the Commissioner or by a court, notice of the 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 the
driver and on file at the Department. If the certificate of the Commissioner or someone designated by him for that purpose shows that the notice or copy has been so sent and received by the driver, it shall be deemed prima facie evidence that the notice or copy has been sent and delivered to the driver for all purposes involving the application of the provisions of this title. 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 sheriff in the county or city in which the address is located, who shall, as directed by the Commissioner, take possession of any suspended or revoked license, registration card, or set of license plates or decals and return them to the office of the Commissioner.

II. Valid Non-Virginia Driver's License May Not Be Seized for Pre-Existing Virginia License Suspension; Acknowledgment of Suspension May Be Required by Court

Prior Opinions of this Office consistently conclude that a Virginia driver's license suspension or revocation has effect only in Virginia and may not revoke or suspend a valid non-Virginia license. See Att'y Gen. Ann. Rep.: 1979-1980 at 244; 1964-1965 at 236. It is my opinion, therefore, that a Virginia court may not seize a valid, uncancelled, unre- voked driver's license issued by another state merely because the court has evidence that the individual's Virginia driving privilege has been suspended or revoked. As long as the non-Virginia license is valid and has not been cancelled, suspended or revoked by the state of issuance, it may not be revoked by Virginia authorities and, in my opinion, may not be seised by a Virginia court under the authority of the statutes cited above, or any other law.1

Even though I conclude that the foreign driver's license may not be revoked under the facts presented, it is my opinion that a court may require a defendant to sign an acknowledgment that his privilege to drive has been suspended in Virginia.2 A prior Opinion of this Office concludes that the notice of suspension procedures in § 46.2-416 (previous § 46.1-441.2) is not exclusive and that a court may provide actual notice in a more certain manner to satisfy due process notice requirements. See 1986-1987 Att'y Gen. Ann. Rep. 235, 236.

My conclusion to your first question is the same regardless of the defendant's residence. My conclusion to your second inquiry, therefore, is the same as my conclusion to your first inquiry.

III. Court May Confiscate Non-Virginia License Suspended by Issuing State

Your third inquiry involves a license suspension imposed by the state issuing the non-Virginia driver's license. It is my opinion that a Virginia court may confiscate the non-Virginia license in these facts, pursuant to § 46.2-346, provided that the court has tried and convicted the defendant of some offense related to operation of a motor vehicle. In the facts you present, the defendant may be convicted of operating without a valid driver's license pursuant to § 46.2-300; he may not be convicted of operating on a suspended license pursuant to § 46.2-301 or § 46.2-302. See 1979-1980 Att'y Gen. Ann. Rep. 244. If the court orders the surrender of this driver's license, it is further my opinion that the license should be forwarded to the Department pursuant to § 46.2-398. The Department will forward the license to the licensing agency of the issuing state.

1Form DC-220 5/86 (114:9-015 10/89), entitled "Acknowledgment of Suspension or Revocation of Driver's License," is distributed to general district courts by the Office of the Executive Secretary, Supreme Court of Virginia.
The facts you present involve a Virginia resident with a non-Virginia driver's license. Under the laws of many states, it is appropriate in some circumstances for an individual to have a driver's license from a state other than his home state. This Opinion does not address the appropriate approach for the courts to determine whether a particular Virginia resident validly holds a non-Virginia driver's license.

Your specific question involves the use of Form DC-220 for this purpose. See supra note 1. Form DC-220 appears to be designed for the court that is, itself, acting to suspend a defendant's license, and not the facts you present, in which the court merely is giving a defendant notice of a pre-existing suspension. Although some other form may be more appropriate for use in the circumstances you describe, the basis of my conclusion in Part II of this Opinion is the acknowledgment by the defendant that his driving privilege is suspended, not the form on which this acknowledgment is made.

MOTOR VEHICLES: LICENSURE OF DRIVERS.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY.

Offense not included with another offense unless all of its elements included in other offense. Driving without license not lesser-included offense of driving while license, permit, or privilege to drive suspended or revoked.

December 28, 1990

The Honorable William T. Burch
Commonwealth's Attorney for Loudoun County

You ask whether driving without a valid operator's license in violation of § 46.2-300 of the Code of Virginia is a lesser offense included within the offense of driving on a suspended operator's license in violation of § 46.2-301.

I. Applicable Statutes

Section 46.2-300 provides:

No person, except those expressly exempted in §§ 46.2-303 through 46.2-309, shall drive any motor vehicle on any highway in the Commonwealth until such person has applied for a driver's license, as provided in this article [Article 1, Chapter 3 of Title 46.2], satisfactorily passed the examination required by § 46.2-325, and obtained a driver's license, nor unless the license is valid.

A conviction of a violation of this section shall constitute a Class 2 misdemeanor.

Section 46.2-301 provides:

Except as provided in §§ 46.2-304 and 46.2-357, no resident or nonresident (i) whose driver's license, learner's permit, or privilege to drive a motor vehicle has been suspended or revoked or (ii) who has been directed not to drive by any court, by the Commissioner [of Motor Vehicles], or by operation of law pursuant to this title or § 18.2-271 or (iii) who has been forbidden, as prescribed by law, by the Commissioner, the State Corporation Commission, the Commonwealth Transportation Commissioner, any court, or the Superintendent of the State Police, to operate a motor vehicle in the Common-
wealth shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in the Commonwealth until the period of such suspension or revocation has terminated.

A first offense of violating this section shall constitute a Class 2 misdemeanor. A second or subsequent offense shall constitute a Class 1 misdemeanor. In addition, the court shall suspend the person's license, permit, or privilege to drive for the same period for which it had been previously suspended or revoked when the person violated this section.

In the event the person has violated this section by driving during a period of suspension or revocation which was not for a definite period of time, the court shall suspend the person's license, permit or privilege to drive for an additional period not to exceed ninety days. Any additional suspension ordered under the provisions of this section shall commence upon the expiration of the previous suspension or revocation unless the previous suspension or revocation has expired prior to the ordering of an additional suspension or revocation.

II. Not All Elements of Violation of § 46.2-300 Included Within Violation of § 46.2-301

Section 46.2-300 imposes a requirement that drivers apply for and obtain a license, after passing the required examination, and then includes a general prohibition on driving "unless the license is valid." Section 46.2-301 specifically prohibits anyone from driving after his license, permit or privilege to do so has been suspended or revoked. If an individual's privilege to drive has been suspended or revoked, his license is obviously not valid. An offense is not included within another offense, however, unless all of its elements are included in the other offense. See Roderick Cecil Jones v. Commonwealth, 218 Va. 757, 759, 240 S.E.2d 658, 660, cert. denied, 435 U.S. 909, 439 U.S. 892 (1978). The question raised by your inquiry, therefore, is whether all the elements of a violation of § 46.2-300 are included within the offense detailed in § 46.2-301.

The Supreme Court of Virginia has held that a violation of former § 46.1-349, the predecessor statute to § 46.2-300, is not a lesser offense included within the felony of driving after having been declared an habitual offender, prohibited by former § 46.1-387.8, now codified as § 46.2-357. Edenton v. Commonwealth, 227 Va. 413, 316 S.E.2d 736 (1984). In Edenton, the Court stated:

The act of operating a motor vehicle on the highways of this Commonwealth is a fact common to [both] offenses [but the character of the acts proscribed in those statutes is different. The gravamen of the misdemeanor--the crucial element—is the act of operating a motor vehicle by a driver who has not obtained a valid operator's license by making a lawful application and passing the required examination. The gravamen of the felony is the act of operating a motor vehicle by a driver who has been convicted of multiple violations of the traffic laws and formally adjudged to be a danger to other users of the highways.

Id. at 417, 316 S.E.2d at 738 (emphasis in original). 1

The offense set forth in § 46.2-301 is likewise of a different character than that prohibited by § 46.2-300. Both involve driving with an invalid license, but the failure to apply for and obtain a license, an element of the offense under § 46.2-300, is not a fact the Commonwealth must prove to establish a violation of § 46.2-301. Indeed, that fact would be inconsistent with a § 46.2-301 violation. If a driver had not applied for and obtained a valid license, revocation or suspension of his license would be impossible.
Penal statutes are strictly construed against the Commonwealth and in favor of the accused. *Martin v. Commonwealth*, 224 Va. 298, 300, 295 S.E.2d 890, 892 (1982). Such a statute may not be extended by implication; its application must be confined to cases clearly described by the language used. *Id.* If it is unclear whether a statute applies to the conduct of the accused in a particular case, the accused is entitled to any reasonable doubt about the construction of the statute. *Id.* at 300-01, 295 S.E.2d at 892.

In *Martin*, the defendant allegedly had broken into a private automobile and stolen a high school ring hanging on a chain from the rearview mirror. The trial court had convicted the defendant under § 18.2-147.1, which makes it a Class 4 felony to break into "any railroad car, vessel, aircraft, motortruck, wagon or other vehicle . . . containing shipments of freight or express or other property." The Supreme Court of Virginia rejected the argument that the private automobile was an "other vehicle" and the ring was "other property" within the meaning of § 18.2-147.1. Applying well-established principles of statutory construction, the Court stated:

Under the rule of *ejusdem generis*, when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words. Likewise, according to the maxim *noscitur a sociis* (associated words) when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.

224 Va. at 301-02, 295 S.E.2d at 892-93 (citations omitted).

Under the principles discussed in *Martin*, the general clause "nor unless the license is valid" in § 46.2-300 must be limited by the more specific language that precedes it, concerning application and examination for a license. There are other instances of driving with an invalid license that do relate to the application and examination process. For example, the driver could be driving a vehicle of a different type than the type he is licensed to drive (see § 46.2-328), or the driver's license could have expired (see § 46.2-330). Driving with a suspended or revoked license, however, is not such an instance.

Based on the above, it is my opinion that a violation of § 46.2-300 is not a lesser offense included within the offense prohibited by § 46.2-301.

1The Court in *Edenton* also noted that if the offense in § 46.2-300 were treated as a lesser-included offense under § 46.2-357, a district court might be unable to discover the existence of an habitual offender order before convicting a driver of violating § 46.2-300, and thereby be barred from prosecuting the driver on the greater offense on double jeopardy grounds. Such a result would violate public policy by allowing the driver to escape prosecution for the more serious offense. 227 Va. at 417-18, 316 S.E.2d at 738. Similar problems also could occur in identifying prior convictions and revocations or suspensions under § 46.2-301, if a § 46.2-300 violation is treated as a lesser offense under that section.

**MOTOR VEHICLES: LICENSURE OF DRIVERS.**

**CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.**
Adult holder of restricted license considered "licensed driver" only for limited statutory purposes; ineligible to serve as "licensed driver" accompanying driver with learner's permit.

November 20, 1990

The Honorable Dudley J. Emick Jr.
Member, Senate of Virginia

You ask whether it is permissible for a daughter to drive her father's car if the daughter has only a learner's permit and her father, the only other occupant of the car, has a restricted driver's license issued pursuant to § 18.2-271.1 of the Code of Virginia.

I. Applicable Statutes

Learner's permits are issued pursuant to § 46.2-335(A), which provides, in part:

The Department [of Motor Vehicles], on receiving from any person over the age of fifteen years eight months, an application for a learner's permit may, in its discretion, issue a permit entitling the applicant, while having the permit in his immediate possession, to drive a motor vehicle on the highways for a period of one year, when accompanied by a licensed driver eighteen years of age or older who is actually occupying a seat beside the driver. . . . It shall be unlawful for any person, after having received a learner's permit, to drive a motor vehicle without being accompanied by a licensed driver. Violation of this section shall constitute a Class 2 misdemeanor.

Restricted licenses are issued pursuant to § 18.2-271.1(E), which provides, in part:

Except as otherwise provided herein, whenever a person enters a certified [alcohol rehabilitation] program pursuant to this section, and such person's license to operate a motor vehicle, engine or train in the Commonwealth has been suspended or revoked, the court may, in its discretion and for good cause shown, provide that such person be issued a restricted permit to operate a motor vehicle for any or all of the following purposes: (i) travel to and from his place of employment; or (ii) travel to an alcohol rehabilitation program entered pursuant to this subsection; or (iii) travel during the hours of such person's employment if the operation of a motor vehicle is a necessary incident of such employment. . . . Any person who operates a motor vehicle in violation of any restrictions imposed pursuant to this section shall be guilty of a violation of § 46.2-301.

II. Adult Holder of Restricted License Under § 18.2-271.1(E) Not "Licensed Driver" for Purpose of Accompanying Holder of Learner's Permit Under § 46.2-335(A)

As the holder of a learner's permit issued pursuant to § 46.2-335(A), the daughter in the facts you present may drive a motor vehicle if she is accompanied by a licensed driver eighteen years of age or older who is actually occupying the seat beside her while she drives the vehicle. The legal question presented by your facts, therefore, is whether the father, as the holder of a restricted license issued pursuant to § 18.2-271.1(E), is a "licensed driver" within the meaning of § 46.2-335(A). I am not aware of any court decisions or prior Opinions of this Office that address who is considered to be a "licensed" driver for purposes of the latter section.

The primary object in the interpretation of a statute, however, is to ascertain and give effect to the legislative intent underlying the statute. 1989 Att'y Gen. Ann. Rep.
128, 131. The legislative purpose of the restricted license provision in § 18.2-271.1(E) is to permit a person whose regular motor vehicle operator's license has been suspended or revoked for driving while intoxicated to drive for certain strictly limited purposes related to employment or for attendance at an alcohol rehabilitation program. There is no provision in § 18.2-271.1(E) for the holder of a restricted license to instruct the holder of a learner's permit in the operation of a motor vehicle.

The Department of Motor Vehicles has advised a member of my staff that it considers the holder of a restricted license to be a "licensed driver" only for the limited purposes provided in § 18.2-271.1(E) and, therefore, to be ineligible to serve as the "licensed driver" accompanying a driver with a learner's permit, as required by § 46.2-335(A). The interpretation given to a statute by a state agency charged with its administration is entitled to great weight. Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981). See also 1989 Att'y Gen. Ann. Rep. 354, 356.

Based on the above, I am of the opinion that it would be incompatible with the legislative purpose of § 18.2-271.1(E) to conclude that the holder of a restricted license under that section is a "licensed driver" within the meaning of § 46.2-335(A). In the facts you present, therefore, the father would not be eligible to act as the licensed driver accompanying his daughter when she drives pursuant to her learner's permit.

MOTOR VEHICLES: LICENSURE OF DRIVERS - DRIVER LICENSE COMPACT.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

No statutory distinction between Virginia and out-of-state driver's license for purposes of court's ordering nonresident defendant to surrender driver's license or ordering restricted driving privileges upon conviction of driving under influence in Virginia; 1990 legislation may delay issuance of restricted license in some cases.

April 24, 1990

The Honorable J. Allen Walker
Judge, Loudoun County General District Court

You ask several questions concerning the appropriate procedures for the surrender of the driver's license of, and the issuance of a restricted permit to, defendants convicted of driving under the influence who are not residents of Virginia. Specifically, you ask:

(1) Whether a court may require a nonresident of Virginia who holds a valid license from his state of residence to surrender such license pursuant to §§ 18.2-271.1(E) and 46.2-398 of the Code of Virginia;

(2) Whether a court, after suspending such person's privilege to operate a motor vehicle in Virginia, may issue a restricted driving permit, and order the Department of Motor Vehicles to issue a restricted license, to that person pursuant to § 18.2-271.1(E);

(3) If not, whether the denial of such a restricted permit and license unlawfully discriminates against this nonresident; and

(4) Whether my conclusions to any of your previous questions are affected by legislation enacted by the 1990 Session of the General Assembly.
I. Applicable Statutes

Section 46.2-398 provides:

In any case in which the accused is convicted of an offense, on the conviction of which the law requires or permits revocation or suspension of the driver's license of the person so convicted, the court shall order the surrender of such license, which shall remain in the custody of the court during the period of revocation or suspension if the period does not exceed thirty days, or (i) if the period exceeds thirty days, until the time allowed by law for appeal has elapsed, when it shall be forwarded to the Commissioner, or (ii) until an appeal is effected and proper bond posted, at which time it shall be returned to the accused.

However, when the time of suspension or revocation coincides or approximately coincides with the appeal time, the court may retain the license and return it to the accused on the expiration of the suspension or revocation.

Section 18.2-271.1(E) provides:

Whenever a person enters a certified [alcohol rehabilitation] program pursuant to this section, and such person's license to operate a motor vehicle, engine or train in the Commonwealth has been suspended or revoked, the court may, in its discretion and for good cause shown, provide that such person be issued a restricted permit to operate a motor vehicle for any or all of the following purposes: (i) travel to and from his place of employment; or (ii) travel to an alcohol rehabilitation program entered pursuant to this subsection; or (iii) travel during the hours of such person's employment if the operation of a motor vehicle is a necessary incident of such employment. No restricted license issued pursuant to this subsection shall permit any person to operate a commercial motor vehicle as defined in the Virginia Commercial Driver's License Act (§ 46.2-341.1 et seq.). The court shall order the surrender of such person's license to operate a motor vehicle to be disposed of in accordance with the provisions of § 46.2-398 and shall forward to the Commissioner of the Department of Motor Vehicles a copy of its order entered pursuant to this subsection, which shall specifically enumerate the restrictions imposed and contain such information regarding the person to whom such a permit is issued as is reasonably necessary to identify such person. The court shall also provide a copy of its order to the person so convicted who may operate a motor vehicle on the order until receipt from the Commissioner of the Department of Motor Vehicles of a restricted license. A copy of such order and, after receipt thereof, the restricted license shall be carried at all times while operating a motor vehicle. Any person who operates a motor vehicle in violation of any restrictions imposed pursuant to this section shall be guilty of a violation of § 46.2-301. A restricted license shall not be provided during any period for which the revocation or suspension of the person's license has been suspended pursuant to § 18.2-271 or this section.

The Commonwealth is a member jurisdiction of the Driver License Compact, §§ 46.2-483 through 46.2-488,¹ which provides in § 46.2-483:

Article I

Findings and Declaration of Policy
(b) It is the policy of each of the party states to:

(1) Promote compliance with the laws, ordinances, and administrative rules and regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where such operators drive motor vehicles.

(2) Make the reciprocal recognition of licenses to drive and eligibility therefor more just and equitable by considering the overall compliance with motor vehicle laws, ordinances and administrative rules and regulations as a condition precedent to the continuance or issuance of any license by reason of which the licensee is authorized or permitted to operate a motor vehicle in any of the party states.

Article III

Reports of Conviction

The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. Such report shall clearly identify the person convicted; describe the violation specifying the section of the statute, code or ordinance violated; identify the court in which action was taken; indicate whether a plea of guilty or not guilty was entered, or the conviction was a result of the forfeiture of bail, bond or other security; and shall include any special findings made in connection therewith.

Article IV

Effect of Conviction

(a) The licensing authority in the home state, for the purposes of suspension, revocation or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to Article III of this compact, as it would if such conduct had occurred in the home state, in the case of convictions for:

(2) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle ....

II. Court May Require Surrender of Out-of-State Driver's License from Nonresident Convicted in Virginia of Driving Under Influence

Both §§ 18.2-271.1(E) and 46.2-398 require a court to order a defendant to surrender his driver's license following a conviction for driving under the influence, and neither statute distinguishes between a Virginia and an out-of-state driver's license. It appears that the General Assembly intended to require nonresidents of the Commonwealth, as well as Virginia residents, to surrender their licenses upon conviction of driving under the influence in Virginia.
An argument can be made that Virginia courts have authority only to affect a defendant's Virginia driving privilege, and may not revoke his privilege to drive in other jurisdictions. Prior Opinions of this Office conclude that a defendant may not be convicted in Virginia of driving on a suspended license when his license has been suspended in another state but not in Virginia. See Att'y Gen. Ann. Rep.: 1979-1980 at 244; 1964-1965 at 236. These prior Opinions rely on the assumption that a license suspension in one state has no effect on an individual's driving privileges in another state.

It is clear from the language of the Driver License Compact, however, that the legislatures of Virginia and 41 other states have rejected a completely parochial view of driver's license sanctions in favor of reciprocity in suspending a defendant's driver's license when he has been convicted of driving under the influence in another compact state. Because of the expression of reciprocal intent in the Driver License Compact, and because the states which are not members of the compact also have enacted statutes that give drunk driving convictions from other states the same effect compact states do, it is my opinion that Virginia courts may require the surrender of out-of-state drivers' licenses from nonresidents who are convicted of driving under the influence in Virginia. This surrender does not constitute a revocation of the out-of-state license, but merely the confiscation of the license document pending suspension or revocation by the issuing state. Refusal of the defendant to surrender the driver's license would constitute a separate violation pursuant to § 46.2-346.

III. Virginia Courts May Issue Restricted Permit and Order Department of Motor Vehicles to Issue Restricted License to Nonresident

Nothing in § 18.2-271.1(E) limits the issuance of a restricted permit or a restricted driver's license to a Virginia resident. It is my opinion, therefore, that a court may treat nonresidents in the same manner it treats Virginia residents for purposes of ordering restricted driving privileges.

It is not at all clear, however, what effect other jurisdictions would give to such a restricted permit or license. The defendant clearly could operate a motor vehicle in Virginia within the restrictions noted on the permit or license, but his treatment in other jurisdictions, including his home state, would depend on the laws of those jurisdictions. In addition, the effect of a restricted permit or license issued by a Virginia court or agency is even more problematic once the nonresident has had his license revoked by his home state. If his home state, acting under the Driver License Compact or otherwise, suspends or revokes the defendant's license because of the Virginia conviction of driving under the influence, it is that state's laws which will determine whether the defendant is entitled to a restricted license. As a result, the restricted license issued by Virginia would not necessarily be considered valid in the individual's home state, and may not be accepted as valid by other states.

Since I conclude that a restricted permit may be ordered in the facts you present, a response to your third question is unnecessary.

IV. Newly Enacted Legislation Will Have Little Effect on Answers

The only legislation enacted by the 1990 Session of the General Assembly which affects § 18.2-271.1(E) or § 46.2-398 is House Bill No. 678, which amends § 18.2-271.1(E) to provide, in part, that

[no restricted license shall be issued until enrollment in, and unless conditioned upon the successful completion of, the Virginia Alcohol Safety Action Program ('VASAP')] as described in subsection A of this section. [Amendatory language italicized in original.]
Ch. 949, 1990 Va. Acts 1808, 1811 (Reg. Sess.). This amendment will not alter my conclusions to your previous questions, except to the extent that the new requirement that no restricted license may be issued until the individual has enrolled in VASAP may delay the issuance of a restricted license in some cases.

There are presently 42 states that are member jurisdictions of the Driver License Compact. Only Connecticut, Georgia, Kentucky, Massachusetts, Michigan, North Carolina, Pennsylvania and Wisconsin have not joined. Each of these eight jurisdictions, however, has statutory provisions which provide that driving under the influence convictions from another state will result in license suspension for their residents. See, e.g., Mich. Comp. Laws Ann. § 257.319(2) (West Cum. Supp. 1989).

It is my understanding that the Department of Motor Vehicles, upon receiving an out-of-state license forwarded to it pursuant to § 46.2-398, forwards that license to the licensing agency which issued it, which agency then, pursuant to either the Driver License Compact or other provisions of that state's laws, suspends or revokes the defendant's license because of the Virginia conviction of driving under the influence. All states provide for license suspension or revocation of some duration for such a conviction.

NOTARIES AND OUT-OF-STATE COMMISSIONERS: CIVIL AND CRIMINAL LIABILITY.

CORPORATIONS: PROFESSIONAL CORPORATIONS.

CIVIL REMEDIES AND PROCEDURE: PROCESS — COMMENCEMENT, PLEADINGS AND MOTIONS.

Attorney acting in representative capacity not party to legal action; notarization of documents by employee-spouse. Professional corporation considered party to writings signed by notary public's attorney-spouse; notarization of documents signed by attorney acting as agent of professional corporation. Intent of General Assembly to prevent notary from taking acknowledgment when direct beneficial interest exists.

June 1, 1990

The Honorable M. Kirkland Cox
Member, House of Delegates

You ask whether § 47.1-30 of the Code of Virginia prohibits a notary public, who is the spouse and employee of an attorney, from taking acknowledgments of documents signed by clients of the attorney-spouse. You also ask whether § 47.1-30 prohibits the notary public from notarizing documents signed by the attorney-spouse in the course of his law practice.

I. Applicable Statute

Section 47.1-30 provides, in part, that "[n]o notary shall perform any notarial act with respect to any document or writing to which the notary or his spouse shall be a party, or in which either of them shall have a direct beneficial interest." A "notarial act" includes such things as the taking of acknowledgments, administering oaths and certifying true copies of documents, affidavits and depositions. Compare § 47.1-2 ("notarial act") with § 47.1-12 (powers of notary) and § 47.1-13 (jurisdiction of notary).
II. Attorney Acting in Representative Capacity Not "Party" Within Meaning of Statute

Section 47.1-30, by its terms, prohibits a notary public from performing a notarial act when either the notary public or the spouse of the notary public is a party to the document or has a direct beneficial interest in the document.

In other contexts, the General Assembly has distinguished a party to a lawsuit from an attorney acting in a representative capacity. See, e.g., §§ 8.01-271.1, 8.01-314. A "party" to a legal action is a person whose name is designated on the record as a plaintiff or a defendant. See Downey v. United Weatherproofing, 241 S.W.2d 1007 (Mo. 1951), rev'd on other grounds and remanded per curiam, 363 Mo. 852, 253 S.W.2d 976 (1953).

In the initial facts you present, therefore, it is my opinion that an attorney acting in a representative capacity is not a "party," as that term is used in § 47.1-30. It is further my opinion that § 47.1-30 does not prohibit a notary public from taking acknowledgments of, or certifying, documents such as answers to interrogatories, deeds or affidavits prepared by the notary public's attorney-spouse in the course of his law practice. A notary public would be prohibited, in my opinion, however, from taking acknowledgments of, or certifying, a document when the notary public or the notary public's attorney-spouse is a plaintiff or a defendant in the lawsuit about which the document pertains, a party to the document itself, or when the notary public or the notary public's attorney-spouse has a direct beneficial interest in the document or writing.

III. Professional Corporation Is "Party" Within Meaning of § 47.1-30; Attorney Is Agent of Professional Corporation

In the second set of facts you present, the notary public's attorney-spouse is the sole stockholder in a professional law corporation. A prior Opinion of this Office concludes that

[o]rdinarily, the president of a corporation is not personally bound by any writing he signs in his representative capacity. The corporation is bound by any such writing executed within the authority of the president. The corporation would have to sue in its corporate name to enforce any rights derived from such a writing. Therefore, the 'party' to any writing, as contemplated by § 47.1-30, would be the corporation of which the husband is president. The president signs the writing as the agent through which the corporation is acting; I am of the opinion that the 'party' to writings within the ambit of § 47.1-30 is the signatory which is bound by the writing, not the agent.


This rationale is supported by Chapter 7 of Title 13.1, §§ 13.1-542 through 13.1-556, which pertains to professional corporations. Section 13.1-542 provides:

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization from the Commonwealth of Virginia.

Section 13.1-543 provides that attorneys-at-law render a "professional service" within the meaning of Chapter 7. Section 13.1-544 further authorizes individuals licensed to render professional services in the Commonwealth to organize and become shareholders of a professional corporation. Section 13.1-547 provides, in part:
A director, officer, agent or employee of a professional corporation shall not, by reason of being any director, officer, agent or employee of such corporation, be personally liable for any debts or claims against, or the acts or omissions of the corporation or of another director, officer, agent or employee of the corporation, but the corporation shall be liable for the acts or omissions of its directors, officers, agents, employees and servants to the same extent to which any other corporation would be liable for the acts or omissions of its directors, officers, agents, employees and servants while they are engaged in carrying on the corporate business. [Emphasis added.]

It is clear that the General Assembly intended for professional corporations to be liable to the same extent that other corporations are liable for the acts of their directors, officers, agents, employees or servants. Based on the above, it is my opinion that the "party" to writings signed by the notary public's attorney-spouse, even in his official capacity as the sole stockholder of the professional corporation, is the professional corporation; the notary public's attorney-spouse merely is acting as the agent of the professional corporation. It is further my opinion, therefore, that the notary public may take acknowledgments of, or certify, documents signed by the notary public's attorney-spouse in his capacity as agent of the professional corporation as long as the notary public is not a party to the document and neither the notary public nor her attorney-spouse has a "direct beneficial interest" in the document or writing.

IV. Determination Whether "Direct Beneficial Interest" Exists Depends upon Particular Facts That Are Not Provided

The term "direct beneficial interest" is not defined in Title 47.1. A prior Opinion of this Office concludes that the intent of the General Assembly in enacting § 47.1-30 was to prevent a notary public from taking an acknowledgment when the notary public has an interest in the document or its operation. See 1984-1985 Att'y Gen. Ann. Rep., supra, at 229.

The legislature intended a 'direct beneficial interest,' as used in § 47.1-30, to be profit, value, worth, advantage or use resulting from a transaction or derived from a writing that is certain. This construction excludes the indirect interest of employees, corporate officers and stockholders when the primary beneficiary of the transaction is the employer or corporation.

In the situation posited by you, both the notary and her husband are employees of the corporation, the husband being a corporate officer. While both may benefit from the documents or writings to which the company is a party, their interests are not a 'direct beneficial interest,' as contemplated by § 47.1-30. The notary or her husband, however, may have a 'direct beneficial interest' in any documents directly related to either's employment status, compensation or working conditions. For example, the husband's salary may be dependent upon achievement of certain factors of which the document is evidence. In those circumstances, the notary would be disqualified under § 47.1-30.

Id. (footnotes omitted).

The language of this prior Opinion demonstrates that any determination whether a "direct beneficial interest" exists pursuant to § 47.1-30 necessarily will be determined by the facts of each particular case. Since you do not provide any particular facts with your inquiry, a response to this portion of your request is not possible.
The Honorable A. Victor Thomas  
The Honorable Clifton A. Woodrum  
Members, House of Delegates

You ask two questions concerning the impact of Chapter 894, 1990 Va. Acts 1617 (Reg. Sess.), on game wardens under § 65.1-47.1 of the Code of Virginia, as well as on other law-enforcement officers under the State Police Officers' Retirement System ("SPORS"), Chapter 2 of Title 51.1, §§ 51.1-200 through 51.1-209. Chapter 894 would amend the Code of Virginia by enacting § 51-111.60:5, relating to retirement benefits payable to game wardens of the Department of Game and Inland Fisheries. The 1990 Session of the General Assembly repealed Title 51, recodified the pension and retirement laws of Virginia under Title 51.1 and incorporated § 51-111.60:5 into Title 51.1 as § 51.1-169. Ch. 832, 1990 Va. Acts, supra, at 1369. Section 51.1-169 also provides that it will not become effective unless it is re-enacted by the 1991 Session of the General Assembly after the completion of a study conducted by the Senate Committee on Finance and the House Committee on Appropriations to determine its financial impact.

I. Applicable Statutes

Section 51.1-169, as part of Chapter 1 of Title 51.1, §§ 51.1-100 through 51.1-169, entitled the "Virginia Retirement System," provides, in part:

Notwithstanding the benefits payable to other members of the Virginia Retirement System, game wardens shall receive benefits equivalent to benefits provided for state police officers of the Department of State Police, pursuant to Chapter 2 of this title in lieu of the benefits that would otherwise be provided. [Emphasis added.]

SPORS provides retirement benefits for state police officers that are different from the retirement benefits most other state employees receive under the Virginia Retirement System. Pursuant to SPORS, state police generally are eligible for retirement at an earlier age and after fewer years of service than other state employees would be pursuant to the Virginia Retirement System. See 1987-1988 Att'y Gen. Ann. Rep. 455, 455-56 (review of legislative history of SPORS and rationale for separate retirement system for state police officers).

Under SPORS, § 51.1-201 defines an "employee" as "a state police officer." Section 51.1-138, however, mandates that sheriffs of political subdivisions that participate in the Virginia Retirement System must receive retirement benefits equivalent to those received by state police officers, and also authorizes local political subdivisions, with the approval of the Board of Trustees of the Virginia Retirement System, to provide similar benefits to employees in "law-enforcement positions comparably hazardous to that of a state police officer" and in full-time, salaried fire-fighting positions.
Section 65.1-47.1, a portion of the Virginia Workers' Compensation Act, concerns occupational diseases and establishes a rebuttable presumption that the death or disability of certain workers is caused by an occupational disease:

The death of, or any condition or impairment of health of, salaried or volunteer fire fighters caused by respiratory diseases, and the death of, or any condition or impairment of health of, salaried or volunteer fire fighters, or of any member of the State Police Officers Retirement System, or of any member of a county, city or town police department, or of a sheriff, or of a deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond, caused by hypertension or heart disease, resulting in total or partial disability shall be presumed to be an occupational disease suffered in the line of duty that is covered by this Act unless the contrary be shown by a preponderance of competent evidence.

II. Factual Differences May Constitute Rational Basis for Provision of Retirement Benefits to Game Wardens That Are Equivalent to Those Given State Police Officers but Different from Benefits for Other State Law-Enforcement Groups

You first ask whether the final enactment of § 51.1-169 would require that similar benefits be given to other law-enforcement groups not presently covered by SPORS to satisfy the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

In distinguishing in § 51.1-169 between game wardens and state police on the one hand and other law-enforcement officials on the other, the General Assembly has neither denied any class of persons a "fundamental right" nor involved a "suspect classification," either of which would require the application of a "strict scrutiny" test to § 51.1-169 under a traditional equal protection analysis. See generally Hernandez v. Texas, 347 U.S. 475 (1954) (jury exclusion of persons with Mexican ancestry constitutes denial of equal protection based on suspect classification). The standard of review, therefore, for an equal protection challenge to § 51.1-169 is a "rational basis" test.

The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them.


Decisions of the Supreme Court of the United States involving equal protection challenges to economic legislation, such as § 51.1-169, also demonstrate a strong presumption in favor of constitutionality, coupled with a deference to the judgment of state legislatures. See, e.g., Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Nebbia v. New York, 291 U.S. 502, 537 (1934) ("state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.")
In 1988, the Joint Legislative Audit and Review Commission presented a report to the Governor and General Assembly which assessed the eligibility of other state law-enforcement groups for SPORS benefits. 1 H. & S. Docs., An Assessment of Eligibility for State Police Officers Retirement System Benefits, H. Doc. No. 2 (1988 Sess.) ("1988 JLARC Report" or the "Report"). After comparing the state police with 14 other state law-enforcement groups that have sworn personnel, the 1988 JLARC Report concludes:

The conclusion drawn from the analysis of law enforcement officers' duties and hazards is that the Department of State Police has a unique responsibility to the citizens of the State. This responsibility results in the State Police facing a greater number and degree of hazards and risks than the other law enforcement groups.

Id. at 45.

The 1988 JLARC Report clearly provides a "rational basis" for different retirement benefits being made available to state police officers than to other state law-enforcement groups. The Report, however, does not specifically address the question you present, namely, whether there is a rational basis for providing SPORS benefits to some additional law-enforcement groups but not others. It is my opinion, therefore, that the 1988 JLARC Report does not, by itself, either preclude or require a determination by the General Assembly that some additional law-enforcement groups, but not others, should be made eligible for SPORS benefits.

The 1988 JLARC Report notes that state police officers, game wardens and Department of Alcoholic Beverage Control ("ABC") enforcement officers are the only three groups studied to have "full and unrestricted police powers," in the sense that they are "sworn law enforcement officers with general police powers who have primary responsibility for statewide law enforcement." Id. at 12. They are the only three groups to have "unlimited statewide authority." Id. at 15. The Report also notes that "[t]he enforcement officers within the Commission of Game and Inland Fisheries and the Department of Alcoholic Beverage Control face some of the same hazards as the State Police." Id. at 17. The Report includes the results of a survey of retirement age classifications of law-enforcement officers in the 48 contiguous states. Of the 48 states surveyed, 47 provide early retirement for state police (98%), 22 do so for game wardens (46%), and 16 do so for alcoholic beverage enforcement personnel (33%). Id. at 35.

Even between game warden and ABC officers, the 1988 JLARC Report found some factual differences. For example, game wardens, on the average, wrote many more citations during the study year (an average of 76 per game warden vs. 9 per ABC officer) and made more custodial arrests (20 per game warden vs. 2 per ABC officer). Id. at 21. See generally id., App. B., Tables B-1 to B-7, at 68-78.

Any court analysis of a legislative decision to extend SPORS benefits to state law-enforcement groups other than the state police necessarily would depend on the specific facts on which the General Assembly has based that decision. For me to render an Opinion at this point that a particular set of facts definitely supports or does not support the extension of benefits to a particular group would, in my view, improperly intrude upon the legislature's prerogatives. Because of the inherently fact-specific nature of this equal protection analysis, however, the General Assembly may wish to gather additional data, beyond those facts in the 1988 JLARC Report, before taking final action on this matter.

III. No Statutory or Constitutional Requirement That Game Wardens Be Covered by Occupational Disease Presumption

You also ask whether § 65.1-47.1 would require that game wardens be given the benefit of the occupational disease presumption afforded to certain other law-
enforcement and fire-fighting employees if the 1991 General Assembly re-enacts § 51.1-169 to extend SPORS benefits to game wardens.

As discussed above, § 51.1-169 provides only that game wardens shall receive retirement benefits equivalent to those provided for police officers under SPORS. Section 51.1-169 does not mention workers’ compensation benefits, nor does it provide that game wardens shall be deemed to be state police officers or "members of" SPORS.1

It is a recognized principle of statutory construction that a statute which specifies or includes a certain item implies the exclusion of another. See 1984-1985 Att'y Gen. Ann. Rep. 439, 440. Since game wardens are not members of SPORS or of any county, city or town law-enforcement department described in § 65.1-47.1, it is my opinion that game wardens are not entitled to the occupational disease presumption provided by this statute. Prior Opinions of this Office consistently have reached similar conclusions concerning classifications of other law-enforcement personnel. See Att'y Gen. Ann. Rep.: 1984-1985 at 439 (Chief of Police of Virginia Western Community College); 1983-1984 at 462 (law-enforcement officers employed by Chesapeake Bay Bridge and Tunnel Commission). It is my opinion, therefore, that there is no statutory requirement for game wardens to be included in the occupational disease presumption of § 65.1-47.1.

Although the Constitution of Virginia does not contain an equal protection clause similar to that found in the Constitution of the United States, the antidiscrimination clause of Va. Const. Art. I, § 11 (1971), and the prohibition against special legislation in Art. IV, § 14 provide analogous limitations upon the General Assembly's legislative authority. Neither of these Virginia constitutional provisions, however, provides broader rights than those guaranteed by the Fourteenth Amendment to the Constitution of the United States. See Boyd v. Bulata, 647 F. Supp. 781 (W.D. Va. 1986); Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973).

See generally Watkins v. Cantrell, 736 F.2d 933 (4th Cir. 1984) (when state's unemployment insurance compensation statute neither involves discernible fundamental interest nor affects any protected class with particularity, "rational basis" standard should be applied); Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Cir. 1969) (state is not forbidden by equal protection clause from allowing privileges to one group of persons while declining them to others, if segregation of benefit has reasonable purpose and embodies reasonable means of achievement); Ballard v. Commonwealth, 228 Va. 213, 321 S.E.2d 324 (1984) ("rational basis" standard applies to review of General Assembly's decision to provide jury sentencing for adult defendants but not for juveniles).

Some of the other state law-enforcement groups included in the 1988 JLARC Report analysis were game wardens, Alcoholic Beverage Control officers, investigative officers of the Department of Corrections, Capitol Police, campus police, park rangers and institutional police for the Department of Mental Health, Mental Retardation and Substance Abuse Services.

Section 65.1-47.1 applies to "any member of the State Police Officers Retirement System, or any member of a county, city or town police department, or ... a deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond." (Emphasis added.)

Chapter 2 of Title 51.1 sets forth the SPORS program. Section 51.1-202 provides that membership in SPORS "shall be compulsory for all state police officers." Section 51.1-202 defines the term "member" as "any person included in the membership of the retirement system as provided in this chapter." Chapter 2 of Title 51.1 was not amended by § 51.1-169. Game wardens, therefore, are not "members of" SPORS.
PRISONS AND OTHER METHODS OF CORRECTION: COMMENCEMENT OF TERMS; CREDITS AND ALLOWANCES — LOCAL CORRECTIONAL FACILITIES.

Time spent in jail by defendant after arrest pursuant to capias may not be credited against sentence imposed by court for criminal charge conviction.

January 4, 1990

The Honorable John A. Garrett
Commonwealth's Attorney for Louisa County

You ask whether a criminal defendant is entitled to credit for time spent in jail awaiting disposition of a capias for his failure to appear at a criminal trial, when the capias later is dismissed but the defendant is convicted of the criminal charge.

I. Facts

You describe a defendant who was arrested on a warrant charging a second offense of driving while under the influence of alcohol and who was released on bond pending trial. When the defendant failed to appear for trial, he was arrested pursuant to a capias and also was served with a summons to show cause why his bond should not be revoked. You state that the defendant spent 13 days in jail before the show cause summons, the capias or the criminal warrant was heard. At trial, the capias and show cause summons were dismissed, but the defendant was convicted on the charge of driving under the influence and was sentenced to serve 90 days in jail, 80 days of which were suspended.

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 that the jailer "keep a record describing each person committed to jail ... for what offense or cause he was committed, and when received into jail."

III. Credit Given Only for Time Spent in Jail Awaiting Trial for Identical Offense; No Credit Is Appropriate for Jail Time Served on Capias

Prior Opinions of this Office conclude that § 53.1-187 and its predecessor (former § 53-208) require that a defendant sentenced to a term of confinement in a jail be credited with all time spent in pretrial confinement for that particular offense. See Op. to Hon. Gary W. Waters, Sheriff, City of Portsmouth (Mar. 24, 1989) (time spent in jail awaiting preliminary hearing, when charge is dismissed, must be credited against sentence returned on subsequent direct indictment for same offense); Att'y Gen. Ann. Rep.: 1982-1983 at 197 (§ 53.1-187 requires credit for time spent in pretrial confinement for the same offense only; credit is not due when charges differ); 1977-1978 at 160 (no entitlement to credit for time spent in jail in another state awaiting extradition after escape from Virginia State Penitentiary); 1974-1975 at 129 (credit to be awarded for pretrial confinement by jurisdiction other than where pretrial confinement served); 1972-1973 at 313 (credit may be given for confinement while awaiting trial in two jurisdictions).
In the facts you present, the defendant was held in jail pursuant to the capias and not on the underlying charge of driving under the influence. It is my opinion, therefore, that the defendant is not entitled to have the 13 days he spent in jail after his arrest pursuant to the capias credited against the sentence imposed by the court for driving under the influence of alcohol.

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES - PRISONER PROGRAMS AND TREATMENT.

Statutory authority for participation in work programs limited to convicted and sentenced prisoners; pretrial detainees may not be assigned to work forces on state or local government property, even if detainees volunteer for such assignments.

August 22, 1990

The Honorable James A. Gondles Jr.
Sheriff for Arlington County

You ask whether pretrial detainees may participate voluntarily in programs for local jail inmates to work on state or local government property pursuant to the provisions of §§ 53.1-128 and 53.1-129 of the Code of Virginia.

I. Applicable Statutes

Article 7, Chapter 3 of Title 53.1 provides for certain treatment and work programs for local jail inmates. Among other such matters, § 53.1-128 provides:

The local governing body of any county, city or town may establish work forces in the county, city or town under such conditions as it may prescribe. Such work forces are authorized to work on public property or works owned, leased or operated by the county, city or town, whether the same be located within such county, city or town, or elsewhere. Every person eighteen years of age or older who is convicted and imprisoned for any violation of a local ordinance and who is imprisoned as a punishment or for failure to pay a required fine, shall be liable to work in such work force.

Section 53.1-129 also provides, in part:

The judge of the circuit court of any county or city may, by order entered of record, allow persons confined in the jail of such county or city who are serving sentences imposed for misdemeanors or felonies to work on state, county or city property on a voluntary basis with the consent of the county, city or state agency involved. The judge of the district court of any county or city may allow persons confined in the jail of such county or city who are serving sentences imposed for misdemeanors to work on state, county or city property on a voluntary basis with consent of the county, city or state agency involved.

II. Authority for Participation in Work Programs
Limited to Convicted and Sentenced Prisoners

For many years, Virginia has adhered to the Dillon Rule of strict construction of the powers of local governing bodies, limiting such powers to those conferred expressly by state statute, or by necessary implication from such expressed powers. 1989 Att'y Gen. Ann. Rep. 135, 136.
By the express terms of § 53.1-128, local governing bodies are authorized to create a work force for "[e]very person eighteen years of age or older who is convicted and imprisoned for any violation of a local ordinance." (Emphasis added.) 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. Att'y Gen. Ann. Rep.: 1989, supra, at 137; 1985-1986 at 19, 20; 1976-1977 at 199, 201.

Based on these principles, it is my opinion that local governing bodies may create work forces pursuant to § 53.1-128 only for convicted and sentenced prisoners and not for pretrial detainees.

The same rule of statutory construction applies with equal force to courts' assignment of prisoners to work voluntarily on public property pursuant to § 53.1-129. The plain language of that section grants judges authority for such assignments of prisoners "who are serving sentences." (Emphasis added.) "[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 (1924) (quoting Lake County v. Rollins, 130 U.S. 662, 670-71 (1889)).

The General Assembly could, of course, amend §§ 53.1-128 and 53.1-129 to permit pretrial detainees to participate in work programs authorized by those sections. In the absence of such an amendment, however, it is my opinion that neither § 53.1-128 nor § 53.1-129 provides authority for detainees who have not yet been convicted of and sentenced for an offense to be assigned to work forces on state, county or city property, even if the detainees volunteer for such assignments.

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PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES - REGIONAL JAILS AND JAIL FARMS.

CONSTITUTION OF VIRGINIA: LEGISLATURE - EFFECTIVE DATE OF LAWS.

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

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

1990 amendment requires local jurisdiction that appoints more than one representative to regional jail or jail farm board to appoint sheriff of jurisdiction as member of board on July 1, 1990, without waiting for vacancy to occur; removal of existing representative or enlargement of membership on board to accommodate sheriff's appointment.

May 15, 1990

The Honorable Charles J. Colgan
Member, Senate of Virginia

You ask whether the amendment made to § 53.1-106(A) of the Code of Virginia by the 1990 Session of the General Assembly requires a local jurisdiction that appoints more than one representative to a regional jail or jail farm board to appoint the sheriff of that jurisdiction as a member of the board on July 1, 1990, or whether the local jurisdiction may wait until a vacancy occurs before appointing the sheriff.
I. Applicable Statutes

Regional jails and jail farms are provided for in Article 5, Chapter 3 of Title 53.1, §§ 53.1-105 through 53.1-115.1. Section 53.1-105 authorizes "[a]ny combination of two or more counties or cities [to] establish, maintain and operate a regional jail or jail farm." Section 53.1-106(A) vests the supervision and management of a regional jail to a board consisting "of at least one representative from each political subdivision participating therein who shall be appointed by the local governing body." Present § 53.1-106(A) provides that "[t]he sheriff of each participating political subdivision shall be eligible for appointment to the jail or jail farm board." The 1990 amendment to § 53.1-106(A) adds the following language: "However, when a participating political subdivision appoints more than one representative to a regional jail or jail farm board, the sheriff shall be appointed." Ch. 185, 1990 Va. Acts 259 (Reg. Sess.) ("Chapter 185") (amendatory language italicized in original).

II. Statutory Language Is Clear; Appointment of Sheriff in Facts Presented Required on July 1

The 1990 amendment to § 53.1-106(A), quoted above, in clear, unmistakable language, requires that the sheriff of a local jurisdiction participating in a regional jail or jail farm be appointed to the board if the jurisdiction has more than one representative on that board. This 1990 amendment becomes effective on July 1, 1990. See Va. Const. Art. IV, § 13 (1971); § 1-12(A). When the language of a statute is clear and unambiguous, effect must be given to the plain and ordinary meaning of the provision. Harward v. Commonwealth, 229 Va. 363, 330 S.E.2d 89 (1985), aff'd on remand, 5 Va. App. 468 (1988).

'We have many times said that where the language of a statute is free from ambiguity, its plain meaning is to be accepted without resort to the rules of interpretation. In that situation, we take the words as written and a resort to the extrinsic facts to determine their meaning is not permitted.' Id. at 368, 330 S.E.2d at 92 (quoting Portsmouth v. Chesapeake, 205 Va. 259, 269, 136 S.E.2d 817, 825 (1964) (emphasis added in Harward)).

The General Assembly did not attempt to grandfather present jail board members, although grandfather provisions have been enacted in similar situations. See § 2.1-639.9(B) (grandfathering otherwise prohibited interagency employment of spouses in certain circumstances). A prior Opinion of this Office concludes that "[p]ublic offices are not held by grant or contract ... and no person has a vested right in them." Op. to Douglas W. Napier, Warren Co. Att'y (May 1, 1990) (quoting Walker v. Massie, 202 Va. 886, 889, 121 S.E.2d 448, 450 (1961)).

Based on the above, it is my opinion that Chapter 185 requires a local jurisdiction that appoints more than one representative to a regional jail or jail farm board to appoint the sheriff of that jurisdiction as a member of the board without waiting for a vacancy to occur. I am aware that the terms of many regional jail board members, including those from the jurisdictions you represent, are appointed to serve at the pleasure of the local governing body. To wait until a vacancy occurs on the regional jail board before the sheriff from a particular jurisdiction is appointed, however, would thwart the obvious intent of the General Assembly in enacting Chapter 185. The practical effect of Chapter 185 is that an existing representative on the board will have to be removed or membership on the board enlarged to accommodate the sheriff's appointment.
1 Your inquiry assumes that the sheriff of the jurisdiction in question does not presently sit on the regional jail or jail farm board.

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES - REGIONAL JAILS AND JAIL FARMS.

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

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - MULTIPLE OFFICES.

Member of county board of supervisors prohibited from serving as member of regional jail board.

July 3, 1990

Mr. W. Wayne Heslep
County Attorney for Alleghany County

You ask whether a member of a county board of supervisors also may serve on a regional jail board.

I. Applicable Constitutional and Statutory Provisions

Article VII, § 6 of the Constitution of Virginia (1971) provides:

[N]o person shall at the same time hold more than one office mentioned in this Article. No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law ....

The eligibility of constitutional officers and certain other public officials to hold multiple offices is restricted by § 15.1-50(A) of the Code of Virginia, which provides:

No person holding the office of treasurer, sheriff, attorney for the Commonwealth, clerk of the court in the office of which deeds are recorded, commissioner of the revenue, or supervisor or councilman shall hold any other office mentioned in Article VII of the Constitution at the same time ....


The creation of regional jails is provided for in Article 5, Chapter 3 of Title 53.1, §§ 53.1-105 through 53.1-115.1. Section 53.1-106(A) provides:

Each regional jail or jail farm shall be supervised and managed by a board to consist of at least one representative from each political subdivision participating therein who shall be appointed by the local governing body thereof. The sheriff of each participating political subdivision shall be eligible for appointment to the jail or jail farm board. However, when a participating political subdivision appoints more than one representative to a regional jail or jail farm board, the sheriff shall be appointed.
II. Constitutional Provision, but Not Statute, Prohibits Member of County Board of Supervisors from Serving on Regional Jail Board

Section 15.1-50(A), quoted above, prohibits a member of a board of supervisors from holding any other office mentioned in Article VII, § 6. Membership on a regional jail board is not an office mentioned in Article VII. See 1986-1987 Att'y Gen. Ann. Rep. 258, 259. It is my opinion, therefore, that § 15.1-50(A) does not prohibit a member of a county board of supervisors from serving on a regional jail board.

The constitutional mandate in Article VII, § 6, however, "provides that the only way in which a member of a governing body (i.e., a member of a board of supervisors) may serve as a member of a board appointed by the governing body is if such is permitted by general law," 1984-1985 Att'y Gen. Ann. Rep. 20, 21. The General Assembly expressly has permitted members of local boards of supervisors to serve as members of certain local boards appointed by the governing body. See, e.g., § 2.1-591(A)(1) (local community action board); § 37.1-195 (local community services board).

Although § 53.1-106(A) requires that a sheriff be a member of a regional jail board in certain circumstances, neither this statute nor any other statute of which I am aware requires, or permits, a member of a local board of supervisors to be appointed as a member of a regional jail board. The General Assembly could, of course, enact a statute authorizing such appointment. Absent this legislative authority, however, it is my opinion that a member of a county board of supervisors is prohibited by Article VII, § 6 from serving as a member of a regional jail board.


PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS.

CRIMES AND OFFENSES GENERALLY: MISCELLANEOUS.

Administration of over-the-counter pregnancy test, which does not require exercise of independent medical judgment but only differentiation of colors on test strip or in vial, does not constitute practice of medicine; no violation of other statutes.

May 15, 1990

The Honorable Phoebe M. Orebaugh
Member, House of Delegates

You ask whether the administration of an over-the-counter pregnancy test (1) by a volunteer of a not-for-profit charitable organization that provides counseling and other services for women concerning pregnancy and abortion or (2) by a woman utilizing the services of this organization constitutes the practice of medicine, as that phrase is defined in § 54.1-2900 of the Code of Virginia, or violates § 54.1-2902 or § 54.1-2903, or any other statute.

I. Facts

In the facts you present, an organization that provides counseling and other services concerning pregnancy and abortion, and is not a licensed medical facility, also provides free nonprescription pregnancy tests, and provides the results of those tests, to women utilizing its services. You state that the test is administered on the organization's prem-
ises, either (1) by a volunteer of the organization who is neither trained in medicine or nursing nor supervised by medical personnel, or (2) by the woman utilizing the test herself. The pregnancy test used does not require a prescription for purchase.

II. Applicable Statutes

Section 54.1-2900 defines the "practice of medicine" as "the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method."

Section 54.1-2902 provides, in part, that "[i]t shall be unlawful for any person to practice medicine ... in the Commonwealth without a valid unrevoked license issued by the Board of Medicine."

Section 54.1-2903, which defines the practice of the healing arts, including medicine, provides that "[a]ny person shall be regarded as practicing the healing arts who actually engages in such practice as defined in this chapter [Chapter 29 of Title 54.1], or who opens an office for such purpose, or who advertises or announces to the public in any manner a readiness to practice ...."

III. Administration of Test in Facts Presented Does Not Constitute Practice of Medicine or Violate Other Statutes

In the over-the-counter pregnancy test kits you describe, the results typically are demonstrated by a change in color of the test stick, paper or liquid in a vial. Two prior Opinions of this Office discuss the definition of the "practice of medicine," as that phrase is used both in § 54.1-2900 and in former § 54-273(3), and conclude that the requirement in these statutes for a diagnosis requires "the exercise of independent medical judgment." Att'y Gen. Ann. Rep.: 1989 at 281, 282; 1984-1985 at 172, 173. The pregnancy tests you describe require no more than the differentiation of colors on a test strip or in a vial; they do not require the "exercise of independent medical judgment."

Based on the above, it is my opinion that the administration of the over-the-counter pregnancy tests described above (1) by a volunteer of a not-for-profit charitable organization providing pregnancy and abortion counseling for women or (2) by a woman using this organization's services does not constitute the "practice of medicine," as that phrase is defined in § 54.1-2900, or violate § 54.1-2902 or § 54.1-2903. Any effort to do more than differentiate the colors on a test strip or in a vial, however, may require the "exercise of independent medical judgment" and, therefore, could constitute the practice of medicine. Such factual situations would, of course, have to be evaluated on a case-by-case basis by the appropriate regulatory authority or a Commonwealth's attorney. See § 54.1-111(B) (Department of Health Professions has authority to seek equitable relief to enjoin such conduct).

Although your inquiry is not specific concerning other statutes, I am aware of none that is violated by the facts you present. 1

See § 18.2-502.2 (requiring a warning on commercial medical testing kits that erroneous results may occur and that medical testing is more accurate when performed by professionals in a laboratory; professional medical consultation recommended).

PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS - NATURAL DEATH ACT.
MENTAL HEALTH GENERALLY: COMMITTEES AND TRUSTEES.

Artificial hydration and nutrition constitute medical treatment or medical procedures. Written declaration permits withholding or withdrawal of nasogastric tube, or hydration or nutrition through artificial means, only if individual who previously executed declaration when competent, certified in writing by his/her physician to be in terminal condition. Surrogate medical treatment decision-maker properly designated by written declaration or under other "substituted consent" statutory provisions authorized to consent to withholding or withdrawal of medical treatment from individual in persistent vegetative state or irreversible coma, provided statutory requirements met.

September 18, 1990

The Honorable G. Steven Agee
Member, House of Delegates

You ask whether a competent adult person can execute a document, under the Natural Death Act of Virginia, §§54.1-2981 through 54.1-2992 of the Code of Virginia (the "Act" or the "Natural Death Act"), or other applicable state law, that will authorize the withholding or withdrawal of medical treatment—specifically hydration and nutrition—if that person later enters a persistent vegetative state or becomes incurably comatose but does not have a terminal condition.

I. Applicable Statutes

The Act provides in § 54.1-2983 that

[a]ny competent adult may, at any time, make a written declaration directing the withholding or withdrawal of life-prolonging procedures in the event such person should have a terminal condition. A written declaration shall be signed by the declarant in the presence of two subscribing witnesses. An oral declaration may be made by a competent adult in the presence of a physician and two witnesses by any nonwritten means of communication at any time subsequent to the diagnosis of a terminal condition. [Emphasis added.]

In order for this declaration to be effective, § 54.1-2991 requires the declarant to be a "qualified patient." Section 54.1-2982 defines a "qualified patient" as one who has made a declaration in accordance with the Act and has been diagnosed and certified in writing by his attending physician (and, in the event the patient is physically or mentally incapable of communication, by a second physician) to be afflicted with a terminal condition.

Section 54.1-2982 also defines "life-prolonging procedure" as

any medical procedure, treatment or intervention which (i) utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function or is otherwise of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition and (ii) when applied to a patient in a terminal condition, would serve only to prolong the dying process; however, nothing in this act shall prohibit the administration of medication or the performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain.

In 1989, the General Assembly expressly revised the suggested written declaration in § 54.1-2984 to permit the designation of a person to make treatment decisions if the declarant is diagnosed as suffering from a terminal condition and is unable to make or communicate a decision. Ch. 592, 1989 Va. Acts 892, 893 (Reg. Sess.).
Also in 1989, the General Assembly enacted a "substituted consent" statute, in § 37.1-134.4, which is not limited to persons in a terminal condition, and which provides:

B. Whenever a licensed physician determines after personal examination that an adult person, because of mental illness, mental retardation, or any other mental disorder, or a physical disorder which precludes communication or impairs judgment, is incapable of making an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment, the physician may, upon compliance with the provisions of this section, provide to, withhold, or withdraw from the person that treatment upon the authorization of any of the following persons, in the specified order of priority, if the physician is not aware of any available person in a higher class: (i) a person designated in writing executed pursuant to § 54.1-2984 [the Natural Death Act's declaration], if given such authority in the writing; (ii) a guardian or committee currently authorized to make such decisions; (iii) an attorney-in-fact appointed under a durable power of attorney, to the extent the power grants the authority to make such a decision, provided that the attorney-in-fact is not employed by the physician or the organization employing the physician; (iv) the spouse; (v) an adult son or daughter; (vi) a parent; (vii) an adult brother or sister; or (viii) any other relative of the person in the descending order of blood relationship.

Section 37.1-134.4(F) further details stringent requirements governing the application of such "substituted consent," and, unlike the Natural Death Act, provides that such a "substituted consent" decision may be challenged as follows:

On petition of any person to the circuit court of the county or city in which resides or is located any person for whom treatment will be or is currently being provided, withheld or withdrawn under the purported authority of this section, the court may enjoin such action upon finding by a preponderance of the evidence that the action is not lawfully authorized by this section and that the action is not otherwise authorized by state or federal law.

II. Artificial Hydration and Nutrition Constitute Medical Treatment for Purposes of Natural Death Act and § 37.1-134.4

Since In re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976), termination of artificial respiration or ventilation for individuals in a persistent vegetative state or irreversible coma generally has been deemed an acceptable medical practice. The termination of artificial nutrition and hydration for incompetent individuals with a terminal condition or in irreversible coma has, however, remained a focus of lawsuits, even after Quinlan.

The Supreme Court of New Jersey, in deciding In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985), reviewed whether artificial feeding constituted "medical treatment," and concluded that feeding by implanted tubes is a "medical procedure[] with inherent risks and possible side effects, instituted by skilled health-care providers to compensate for impaired physical functioning." In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

Since the Conroy decision, other courts throughout the United States have permitted the withholding or withdrawing of nutrition and hydration. Each of these decisions has been predicated on reasonably documented oral or written expressions of the patient-declarant. Gray by Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988); McConnell v. Beverly Enterprises-Conn., 209 Conn. 692, 553 A.2d 596 (1989); In re Estate of Longeway, 133 Ill. 2d 33, 549 N.E.2d 292 (1989); Conservatorship of Drabick, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, cert. denied, 488 U.S. 958 (1988); In re Westchester County Med.
In a recent decision, the Supreme Court of the United States has held that the right to consent to or refuse such medical treatment implicates a constitutionally protected liberty interest under the Fourteenth Amendment, and "that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan v. Director, Mo. Health Dept.*, 497 U.S. _, _, 111 L.Ed. 2d 224, 242, 110 S. Ct. 2841, 2852 (1990). The Court further assumed that gastrostomy tube feeding and hydration constituted "medical treatment," noting that the Illinois Supreme Court had adopted "'the consensus opinion'[5] [that] treats artificial nutrition and hydration as medical treatment.'" *Id.* at _, 111 L.Ed. 2d at 240, 110 S.Ct. at 2850 (citation omitted). In *Cruzan*, all agreed the patient would die if the tube were removed. *Id.* at _, 111 L.Ed. 2d at 235, 110 S.Ct. at 2846.

Based on the above, I am of the opinion that artificial hydration and nutrition constitute medical treatment or medical procedures for purposes of the Natural Death Act and of § 37.1-134.4.

III. Designation of Decision-Maker Pursuant to Natural Death Act Does Not Authorize Withholding or Withdrawing Treatment of Person in Persistent Vegetative State

In a 1986 decision, the Circuit Court of Fairfax County permitted the removal of a nasogastric tube from a terminally ill comatose patient. *Hazelton v. Powhatan Nursing Home, Inc.*, 6 Va. Cir. 414 (Cir. Ct. Fairfax Co. 1986). The *Hazelton* court, in a case of first impression in Virginia, reviewed cases from other jurisdictions and interpreted the Natural Death Act to require that the patient's condition must be terminal, that the procedures employed must merely prolong a life where death was "imminent," and that the term "imminent" death does not imply "immediate" but simply means that death must be inevitable within a reasonable time, regardless of the procedures employed. The court, therefore, held that a nasogastric tube was an artificial "life-prolonging procedure" under the Act, and could be removed under the circumstances.

The *Hazelton* court discussed a prior Opinion of this Office and observed that, when that Opinion was rendered, the definition of "'life-prolonging procedure'" expressly excluded medical treatment "'deemed necessary to provide comfort care or to alleviate pain.'" 1983-1984 Att'y Gen. Ann. Rep. 184, 185 (quoting former § 54-325.8:2). The Opinion had, therefore, concluded that intravenous feeding was not a necessary means to prevent starvation, but was a means of providing comfort and hydration. Observing that the General Assembly intended the statute to apply to "extraordinary life-prolonging procedures," the Opinion concluded that "intravenous feeding" could not be terminated under the Act unless it "was mainly for the purpose of supplanting the spontaneous functions of receiving necessary nourishment into the body in amounts adequate to maintain life." 1983-1984 Att'y Gen. Rep., supra, at 185. As the *Hazelton* court observed, the Act, as amended in 1984 after the prior Opinion was rendered, no longer expressly forbids the withdrawal of comfort care. *Id.* at 421.

Under the Natural Death Act, as amended, the declarant must be in a terminal condition, as certified in writing by his or her physician. The Act permits the declaration of either (1) a request to have treatment withheld or withdrawn or (2) the appointment of a surrogate medical treatment decision-maker. A request to withhold or withdraw medical treatment by such declaration or by the designated surrogate may not be implemented unless the patient's condition is terminal.
The Act does not permit removal of a nasogastric or gastrostomy tube from a patient who, like Ms. Cruzan, is not terminally ill. In other words, death is not imminent in such a case.

Based on the above, it is my opinion that a declaration pursuant to the Natural Death Act permits withholding or withdrawing of a nasogastric tube, or nutrition or hydration through other artificial means, only if the individual who previously executed the declaration when competent, has been certified in writing by his or her physician to be in a terminal condition.

IV. Designation of Decision-Maker or Surrogate Pursuant to §§ 54.1-2984 and 37.1-134.4 Satisfies Standard of Proof for Withholding or Withdrawing Treatment of Persons in Persistent Vegetative State

The "substituted consent" statute, § 37.1-134.4, now specifically permits surrogate medical treatment decision-making whenever a licensed physician determines that a person is "incapable of making an informed decision," for the reasons set forth in that section. Section 37.1-134.4 contains no requirement that a terminal condition be certified or that death must be "imminent," as required under the Natural Death Act. An oral declaration designating a medical treatment decision-maker under the Natural Death Act, however, does not, by itself, fulfill the requirements of § 37.1-134.4 to authorize surrogate consent for a nonterminally ill patient. Under § 37.1-134.4(B), a written directive specifically conferring surrogate consent status upon the person designated in the written declaration of § 54.1-2984 will permit surrogate decision-making for nonterminally ill patients. Alternatively, § 37.1-134.4(B) allows other individuals, by priority, to serve as surrogates, including an attorney-in-fact for medical treatment decisions provided by a durable power of attorney. Certain legally challengeable obligations are placed upon the decision-maker or surrogate and the physician, respectively, to assure that the religious beliefs or basic values of the declarant are upheld and to review and certify the continuing incompetence of the declarant. See § 37.1-134.4(D)-(E).

When a court reviews the decision of the § 37.1-134.4 surrogate, the applicable standard of proof of the declarant's wishes or intentions is a "preponderance of the evidence." Section 37.1-134.4(F). Under Virginia's statutory law, written documentation consistent with the provisions of both the Act and § 37.1-134.4 should constitute a "preponderance of the evidence" and, in all probability, "clear and convincing" evidence sufficient to withstand challenge under a Cruzan analysis.

It is my opinion, therefore, that, pursuant to § 37.1-134.4, a surrogate medical treatment decision-maker properly designated either by a written declaration under the Act or under the other "substituted consent" provisions of § 37.1-134.4 is authorized to consent to the withholding or withdrawal of medical treatment, including nutrition and hydration, from an individual in a persistent vegetative state or irreversible coma, provided all statutory requirements of § 37.1-134.4 are met.

Although § 37.1-134.4(B) incorporates the Natural Death Act by reference, the converse is not true. A declaration under the Act does not, by itself, confer upon the designee the powers of substitute decision-making provided in § 37.1-134.4.

On March 15, 1986, the American Medical Association issued an ethical opinion concerning the procedures and treatments that constitute life-prolonging procedures, stating that it is ethically permissible for physicians to withhold all such treatment, including artificial nutrition and hydration, from patients in irreversible coma and from dying patients. The Council on Ethical and Judicial Affairs of the American Medical Association stated:
"In deciding whether the administration of potentially life-prolonging medical treatment is in the best interest of the patient who is incompetent to act in his own behalf, the physician should determine what the possibility is for extending life under humane and comfortable conditions and what are the prior expressed wishes of the patient and attitudes of the family or those who have responsibility for the custody of the patient.

"... [It] is not unethical to discontinue all means of life-prolonging medical treatment.

"Life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition, or hydration. In treating a terminally ill or irreversibly comatose patient, the physician should determine whether the benefits of treatment outweigh its burdens. At all times, the dignity of the patient should be maintained."


3 The medical community appears to find no relevant distinction between withholding or withdrawing artificial feeding and withholding or withdrawing artificial ventilation, which results in death by suffocation. See, e.g., Angell, "Prisoners of Technology: The Case of Nancy Cruzan," *322 New Eng. J. Med.* 1226, 1227 (Apr. 26, 1990).

4 The circuit court's opinion, issued on August 29, 1986, was reviewed on an emergency basis by a panel of the Virginia Supreme Court on September 2, 1986, which, without opinion, concluded that the lower court's decision did not constitute reversible error.

5 Since § 37.1-134.4 gives first priority for surrogate consent to the decision-maker named in a declaration pursuant to the Natural Death Act, a written document conferring surrogate consent status pursuant to § 37.1-134.4 upon that same individual would constitute the preferred authorization for surrogate consent to withhold or withdraw medical treatment of an individual whose condition is not terminal but who is incompetent to make or communicate medical decisions.

6 In *Cruzan*, the Court reviewed the constitutionality of the Missouri Supreme Court's requirement for "clear and convincing" proof of an incompetent's wishes, while competent, as to the withdrawal of life-sustaining treatment. However, *Cruzan* did not establish this standard as a constitutional requirement, but merely affirmed the right of any sovereign state to require such proof as it deems appropriate to ensure its unqualified interest in protecting life. *Id.* at __, 111 L. Ed. 2d at 243-47, 110 S. Ct. at 2852-56.

PROPERTY AND CONVEYANCES: LANDLORD AND TENANT.

Landlord's statutory right of re-entry in case of any leasehold property, located in city or town, regardless of whether property used for residential or commercial purposes, as long as property not used for farming or agricultural purposes; statutory right of re-entry applies to unimproved land, located in residential subdivision of city or town, not used for farming or agricultural purposes, and unimproved land, located in residential subdivision not within city or town, not used for farming or agricultural purposes. Statutory right of re-entry not applicable to land, used for farming or agricultural purposes, whether located in city, town or elsewhere.

February 14, 1990

The Honorable J. Allen Walker
Judge, Loudoun County General District Court

You ask whether the right of re-entry provided by § 55-225 of the Code of Virginia applies to landlords of the following types of property:

(1) nonresidential property, located in a city or town, that is not used for farming or agricultural purposes;
(2) nonresidential property, located in a city or town, that is used for farming or agricultural purposes;

(3) unimproved land, located in a residential subdivision of a city or town, that is not used for farming or agricultural purposes; and

(4) unimproved land, located in a residential subdivision not within a city or town, that is not used for farming or agricultural purposes.

I. Applicable Statutes

Section 55-225 provides, in part:

If any tenant or lessee of premises in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming or agriculture, being in default in the payment of rent, shall so continue for five days after notice, in writing, requiring possession of the premises or the payment of rent, such tenant or lessee shall thereby forfeit his right to the possession.

II. Statutory History of Statute Demonstrates Independent Construction of Phrases; Agricultural, Farming Exclusion Applies to All Categories of Property

The legislative history of present § 55-225 is instructive in the context of your questions. The original predecessor statute to present § 55-225 was Chapter 134, § 4 of the Code of 1870-71, which contained only the first phrase of limitation in the present statute, "if any tenant or lessee of premises in a city or town being in default." Chapter 130, 1870-71 Va. Acts 173, 174. This statute was first amended by the 1903 Extra Session of the General Assembly by adding the phrase "or in any subdivision of suburban and other lands divided into building lots for residential purposes." Ch. 439, 1902-3-4 Va. Acts 675, 676 (Ex. Sess.). The landlord's right of re-entry, therefore, originally was limited to leaseholds in cities and towns and included no further limitation. In 1903, this right was expanded to include land divided into building lots for residential purposes.

The 1910 Session of the General Assembly again amended this statute to add the additional phrases, "or of premises anywhere used for residential purposes, and not for farming or agriculture," Ch. 134, 1910 Va. Acts 203. As a result of the 1910 amendment, this statute was both expanded to include any land used for residential purposes and, at the same time, restricted by excluding any lands used for farming or agriculture from the provisions of the statute.

With its amendments to the predecessor statutes to present § 55-225, the General Assembly has joined each phrase with the word "or," signifying an alternative. Black's Law Dictionary 987 (5th ed. 1979). The last phrase most recently added to this statute by the General Assembly, "and not for farming or agriculture," uses the conjunction "and," meaning "added to or taken along with." Id. at 79. Each amendment, or phrase, in the statute is separated from each other by a comma, indicating that the phrases separated are independent. The last phrase of this statute, therefore, excluding farming or agricultural land, does not pose an alternative situation in which the statute applies, but demonstrates that the phrase applies along with each of the other independent alternatives detailed.

Based on the above, it is my opinion that a landlord has a statutory right of re-entry in the case of any leasehold property located in a city or town, regardless of whether the property is used for residential or commercial purposes, as long as the property is not
used for farming or agricultural purposes (the first factual situation you present). This conclusion is supported by a decision of the Supreme Court of Virginia in which the Court assumed, without discussion, that the 1919 version of § 55-225, Sec. 5448 of the 1919 Code of Virginia, applied to a commercial transaction. See Moskin Stores v. Nichols, 163 Va. 702, 705, 177 S.E. 109, 110 (1934) (decided on other grounds).

Using the same rationale, it is further my opinion that the right of re-entry provided by § 55-225 applies to unimproved land, located in a residential subdivision of a city or town, that is not used for farming or agricultural purposes (the third factual situation you present), and also to unimproved land, located in a residential subdivision not within a city or town, that is not used for farming or agricultural purposes (the fourth factual situation you present). The statute does not apply, however, to any land, used for farming or agricultural purposes, regardless of whether the land is located in a city or town or elsewhere (the second factual situation you present).

1Ch. 130, § 4 was recodified as Sec. 2719 of the Code of 1887.

Former Sec. 2719 of the Code of 1887 was recodified in 1919 as Sec. 5448 and again in 1950 as present § 55-225. Compare Sec. 5448, Ch. 223 of Tit. 52 of the Code of Virginia of 1919 with present § 55-225.

PROPERTY AND CONVEYANCES: THE VIRGINIA REAL ESTATE TIME-SHARE ACT.

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

Act does not limit time-shares to residential use; Real Estate Board regulations implementing Act contemplate nonresidential uses.

April 6, 1990

The Honorable Stanley C. Walker
Member, Senate of Virginia

You ask "whether the Virginia Real Estate Time-Share Act and its regulations limit the treatment of time-share projects to residential use under local zoning ordinances."

I. Applicable Statutes and Regulations

The Virginia Real Estate Time-Share Act, §§ 55-360 through 55-400 of the Code of Virginia (the "Time-Share Act" or the "Act"), is a comprehensive statutory scheme designed to manage the creation, termination and regulation of the sale, recordation and transfer of time-shares. Section 55-364 of the Act provides that "[a] zoning, subdivision, or other ordinance or regulation may not impose any requirement upon a time-share project which it would not otherwise impose upon a similar project under a different form of ownership."

The Commonwealth's Real Estate Board (the "Board") regulates some aspects of time-share ownership under the Act's authority. See, e.g., § 55-390 (requiring presale registration); § 55-391.1 (authorizing regulations that prescribe the form and content of registration); § 55-392.1 (registration fees); §§ 55-395 to 55-400 (describing the Board's administration of this program). Section 55-374 requires time-share developers to furnish prospective purchasers with a public offering statement (the "POS") describing in detail the time-share project's characteristics. Section 55-374(A)(20) authorizes the Board to require the developer's POS to disclose, "[a]ny other information . . . to assure full and
fair disclosure to prospective purchasers." In accordance with § 55-396(A), the Board has adopted regulations to implement this program. See Dep't Com., Va. Real Est. Bd., Virginia Real Estate Time-Share Regulations Pt. 5 (effective July 15, 1987) ("Board Regulations").

The most recent edition of these Board Regulations includes § 5.5(D)(12) and (E)(10), which deals with time-share estates and time-share uses and requires the developer's POS to disclose that "time-shares are [not] restricted to residential use" (bracketed language in regulation). Section 5.9 of these regulations requires that every time-share POS have a section captioned "Description of the Time-Share Program" which contains, among other specified matters, a statement "[w]hether or not the units are restricted solely to residential use."

Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498, authorizes localities to adopt zoning ordinances and details the scope of a locality's zoning power. Section 15.1-486 contains the general grant of zoning authority to local governments and provides:

The governing body of any county or municipality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, business, residential, flood plain and other specific uses .... [Emphasis added.]

Section 15.1-489 provides that "[z]oning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public ...."

II. No Provision of Act Addresses Use of Time-Shares; Board Regulations Contemplate Nonresidential Uses

It is a recognized rule of statutory construction that words in a statute are to be given their usual, commonly understood meaning. See Att'y Gen. Ann. Rep.: 1985-1986 at 65, 66; 1984-1985 at 14, 15; id. at 449, 450. No provision of the Time-Share Act limits time-shares solely to residential uses. The Board Regulations promulgated pursuant to the Time-Share Act contemplate nonresidential uses by requiring an affirmative statement of such nonresidential uses in all public offering statements. Id. VR-581-01-3, § 5.5(D)(12), (E)(10). "[T]he interpretation which an administrative agency gives its regulations must be accorded great deference and will not be set aside unless arbitrary and capricious ...." Virginia Real Estate Board v. Clay, 9 Va. App. 152, 159, 384 S.E.2d 622, 626 (1989). A prior Opinion of this Office also has contemplated nonresidential time-shares, such as a campground. See 1983-1984 Att'y Gen. Ann. Rep. 295.

III. Absent Virginia Case Authority, Cases in Other Jurisdictions Do Not Limit Time-Shares to Residential Uses

The zoning power is a legislative power invested in the Commonwealth and delegated to local governments, authorizing them to enact zoning ordinances. Byrum v. Orange County, 217 Va. 37, 225 S.E.2d 369 (1976). As a delegation of the Commonwealth's police power, the zoning power authorized by these enabling statutes may only be exercised by an express grant of power. See 1983-1984 Att'y Gen. Ann. Rep., supra, at 296. In its zoning enabling legislation, the General Assembly has undertaken to achieve "a delicate balance between the individual property rights of its citizens and the health,

The Supreme Court of Virginia has not decided a case interpreting § 55-364 of the Time-Share Act. In other jurisdictions, however, the general focus of court decisions on zoning ordinances affecting time-shares has been on the use of the property itself rather than on the type of ownership.

For example, in State v. Door County Bd. of Adjustment, 125 Wis. 2d 269, 371 N.W.2d 403 (1985), the Wisconsin Supreme Court held that a proposal to sell a single-family dwelling to 13 families for four weeks each during a year was a use which fell within the definition of a single-family dwelling specified in a local ordinance.

The Supreme Judicial Court of Massachusetts also addressed time-shares in a use context when it considered and voided a Nantucket zoning ordinance because, among other things, the ordinance seemed to regulate ownership, not use. Madaket Realty v. Nantucket Bd. of App., 402 Mass. 137, 521 N.E.2d 723 (1988).

Based on the above, it is my opinion that the Act does not limit time-shares to residential use. The Board Regulations implementing the Time-Share Act contemplate uses other than residential use.

1 The operation of a particular local zoning ordinance on a time-share project obviously would require review of the ordinance in question, as well as the project.

RELIGIOUS AND CHARITABLE MATTERS; CEMETERIES; RELIGIOUS FREEDOM.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

COUNTIES, CITIES AND TOWNS: GENERAL.

EDUCATION: POWERS AND DUTIES OF SCHOOL BOARDS.

Local regulation narrowly drawn to strike constitutionally required balance between allowing free exercise of religion and avoiding establishment or public support thereof; regulation valid exercise of local school board's powers under applicable federal and state constitutional and statutory provisions.

August 10, 1990

The Honorable Jane H. Woods
Member, House of Delegates

You ask whether the Fairfax County School Board (the "School Board"), in regulating the use of school facilities by nonschool-related community groups, may impose an increased rental charge on churches or other religious groups that have used a school building continuously for more than five years, while not applying a similar increase to nonreligious groups after the same length of time.
I. Applicable Regulation

Fairfax County School Board Regulation 8420 ("Regulation 8420"), dated July 1, 1986, which provides for community use of school facilities, provides, in part:

Churches/religious organizations servicing Fairfax County citizens may be granted use of a school for as many as five years. Those desiring to establish a long-term use (other than one-time use) for church/religious organizations shall set up an appointment with the coordinator, community use of school facilities, for an orientation on procedures. Church/religious groups may be authorized usage after five years of use at increasing rental rates until the full commercial rates become effective in the ninth year of use. Only one church may have a contract for continuing use of a single school during any school year.

Id. § II(G), at 3.

Regulation 8420 does not provide for a similar increase in rental rates for nonreligious community organizations after five years of continuous use of school facilities.

II. Applicable Constitutional and Statutory Provisions

The Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Id. amend. I.

Article I, § 16 of the Constitution of Virginia (1971) provides, in part:

And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.

The Virginia Act for Religious Freedom, adopted in 1786, is set forth in § 57-1 of the Code of Virginia and provides, in part:

'That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burdened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or believes; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.'

Id. (quoting Ch. XXXV, 12 Hening's Statutes at Large 84, 86 (1785-1788)).

Section 15.1-24 authorizes counties, cities and towns to "make appropriations of public funds, of personal property or of any real estate to any charitable institution or association, located within their respective limits; provided, such institution or association is not controlled in whole or in part by any church or sectarian society."
III. Regulation 8420 Must Strike Balance Between Allowing Free Exercise of Religion and Avoiding Establishment or Support of Particular Religious Group

A local school board may exercise those powers and functions granted to it expressly or by necessary implication. Commonwealth v. Arlington County Bd., 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977). A school board has the power, consistent with state statutes and regulations of the State Board of Education, to operate and maintain its public school buildings and to regulate their use by non-school-related groups. Section 22.1-79. In so doing, a local school board may not, of course, violate the Constitution of the United States or the Constitution of Virginia.

The First Amendment to the Constitution of the United States prohibits Congress from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause and the free exercise clause are made applicable to the states and their localities by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940). Read together, the establishment clause and the free exercise clause stand for the principle that neither governmentally established religion nor governmental interference with religion will be tolerated. Walz v. Tax Commission, 397 U.S. 664, 669 (1970).

Court decisions applying the free exercise clause make it clear that public education officials may not deny religious groups access to public facilities merely because they are religious. The modern landmark case dealing with religious groups' access to public education facilities is Widmar v. Vincent, 454 U.S. 263 (1981). There the Supreme Court of the United States held that, by making facilities available for use by student groups, a state supported university creates a limited public forum, and thereby assumes an obligation to justify exclusion of other groups under applicable constitutional norms. Id. at 267. Finding that a state university's policy of excluding religious organizations from the use of university property violated the fundamental principle that a state regulation of First Amendment-protected activity should be content-neutral, the Court held that,

In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the state university must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id. at 269-70. In Westside Community Schools v. Mergens, 495 U.S. ___, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990), the principles established in Widmar were held applicable to state secondary schools.

Under the free exercise clause of the First Amendment, therefore, the School Board obviously could not exclude churches and other religious groups from its facilities, as long as it allowed other groups the same privilege. The inquiry does not end there, however, because the establishment clause also prohibits the School Board from supporting any particular religious group. The increased rental rate imposed by Regulation 8420 is the School Board's method of attempting to avoid a level of continuing support that would violate the establishment clause, or, in the Constitution of Virginia's terms, "confer any peculiar privileges or advantages on any sect or denomination." Art. I, § 16.

I am not aware of any federal or Virginia case specifically addressing whether an increase in the rental rate charged to religious groups for use of school facilities after a certain period of use, when a similar increase is not charged to other organizations, strikes the appropriate balance between the free exercise and establishment clauses. A prior Opinion of this Office, however, concludes that a board of supervisors could not
lease a surplus county school to a local church, because such an arrangement would place the county in a position of providing aid to religion in violation of the establishment clause. 1982-1983 Att'y Gen. Ann. Rep. 34.


As discussed above, the holdings in Widmar and Mergens obligate the School Board to base any treatment of religious groups that differs from its treatment of nonreligious groups on a compelling state interest, and to draw its regulation narrowly to serve that interest. In the case of the provision of Regulation 8420 you question, the compelling state interest is the need to abide by the requirements of the First Amendment establishment clause and Article I, § 16 of the Constitution of Virginia to avoid public support for a particular religious group.

I note that Regulation 8420 does not eliminate a church group's use of school facilities after five years. It merely increases the rental rate progressively, until it equals the commercial rate in the ninth year. While Regulation 8420 admittedly does not impose a similar increase on nonreligious community organizations that have met in school buildings for five years, such as scout troops or neighborhood civic associations, the use by such nonreligious groups poses no danger of an establishment clause violation. I note further that if Regulation 8420 induces a particular religious group to move out of a school, the result is not to eliminate religious use of that school, but only to make the school available to other religious groups.

Based on the above, it is my opinion that the questioned portion of Regulation 8420 is narrowly drawn to strike the constitutionally required balance between allowing the free exercise of religion and avoiding the establishment or public support thereof, and that the Regulation is, therefore, a valid exercise of the School Board's powers under applicable federal and state constitutional and statutory provisions.

1The principles of both the free exercise clause and the establishment clause of the First Amendment are embodied in the provisions of the Constitution of Virginia and the Virginia Act for Religious Freedom, quoted in Part II of this Opinion. See Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946). Even if the First Amendment were not applicable to the states and localities, therefore, Virginia governmental entities still would be obligated to seek the same neutrality in their dealings with religious groups.

"In Westside, the Supreme Court of the United States was actually applying the requirements of The Equal Access Act, 20 U.S.C.S. SS 4071-4074 (Law. Co-op. Supp. 1990), which oblige federally assisted secondary schools to permit student religious groups equal access to the schools' "limited open forums" during noninstructional time. The Court found that the Equal Access Act did not violate the establishment clause, and was, in effect, a statutory extension of Widmar's principles to the secondary school level. The United States Court of Appeals for the Third Circuit has concluded that, "[i]n light of the Supreme Court's decision in [Westside] it is now clear that a secondary school may, by its acts, create a public forum implicating the same constitutional rules set forth in Widmar." Gregoire v. Centennial School Dist., 907 F.2d 1366, 1378 (3rd Cir. 1990).
TAXATION: INCOME TAX - ACCOUNTING, RETURNS, PROCEDURES FOR CORPORATIONS.

Incorporated homeowners' associations that elect to be taxed for federal income tax purposes must file Virginia corporate income tax returns.

January 2, 1990

The Honorable Glenn R. Croshaw
Member, House of Delegates

You ask whether a corporation that has elected to be taxed for federal income tax purposes as a homeowners' association pursuant to Internal Revenue Code ("I.R.C.") § 528 (1988) is required to file a Virginia corporate income tax return.

I. Applicable Statutes and Regulations

The Virginia income tax filing requirements for corporations are detailed in § 58.1-441 of the Code of Virginia, and provide that "[e]very corporation organized under the laws of the Commonwealth, or having income from Virginia sources, shall make [an annual] report to the Department of Taxation." Although exempt from Virginia income tax, a corporation, nevertheless, may be required to file an income tax return. See Va. Dep't Tax'n, Corporation Income Tax Regulations § 630-3-401(A) (Jan. 1, 1985) ("Va. Tax Reg.").

II. Homeowners' Association Required to File Virginia Income Tax Return

Section 58.1-441 requires that every corporation organized under the laws of the Commonwealth of Virginia, or having income from a Virginia source, file annually a Virginia income tax return. There are no statutory exceptions to this filing requirement. Election by a homeowners' association to be taxed for federal income tax purposes pursuant to I.R.C. § 528, therefore, would not affect the Virginia income tax filing requirement for that association.

Based on the above, it is my opinion that a homeowners' association that has elected to be taxed under I.R.C. § 528, if that homeowners' association is organized pursuant to Virginia law or has income from a Virginia source, must file a Virginia corporate income tax return.

1 I.R.C. § 528 imposes a 30% tax upon the taxable income of homeowners' associations, as defined in that statute. Taxable income is computed without regard to membership dues, fees or assessments from owners of condominium housing units or real property owners within the association. See I.R.C. § 528(d)(3); Treas. Reg. § 1.528-9 (1980).

2 Likewise, filing for Virginia corporate income tax purposes does not depend upon whether a homeowners' association otherwise may be exempt from federal or Virginia income taxes. See Va. Tax Reg. § 630-3-401(A).

TAXATION: LICENSE TAXES.

City may impose local tax on profit and nonprofit private educational institutions that regularly provide services for compensation; city council may choose to exempt nonprofit institutions from tax; donations made gratuitously not "gross receipts" for purposes of tax.
July 18, 1990

The Honorable Joyce K. Crouch
Member, House of Delegates

You ask whether the City of Lynchburg may impose the business license tax authorized by § 58.1-3703 of the Code of Virginia upon private colleges and universities. If so, you also ask (1) whether such institutions qualifying as nonprofit nevertheless may be subject to the license tax, and (2) what receipts of such a private college or university should be taken into account in computing the amount of the business license tax.

I. Applicable Statutes

Section 58.1-3703(A) authorizes localities to levy a license tax on certain activities:

The governing body of any county, city or town may levy and provide for the assessment and collection of ... 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 58.1-3703(B) details certain businesses, trades and occupations that are not subject to the license tax authorized under § 58.1-3703(A).

II. Localities Not Prohibited from Imposing Local License Tax on Private Colleges and Universities, Regardless of Nonprofit Status

As noted above, § 58.1-3703(A) authorizes the governing body of any county, city or town to impose license taxes on businesses, trades, professions, occupations and callings. In order for a private college or university to be subject to a local license tax, the institution must be engaged in a business, trade, profession, occupation or calling. There is no definition of these activities in the Commonwealth's license tax statutes.

A. Judicial Construction Provides Definition of Terms

In the absence of a statutory definition, nontechnical words in statutes are to be given their ordinary meaning. Board of Supervisors v. Boaz, 176 Va. 126, 130, 10 S.E.2d 498, 499 (1940). In Boaz, the Supreme Court of Virginia applied this rule to define the words at issue here:

The word 'trade' signifies barter and exchange, not restricted to commodities, but including transactions involving the medium of money. 'Occupation' is that activity in which a person, natural or artificial, is engaged with the element of a degree of permanency attached. 'Profession' is the method or means pursued by persons of technical or scientific training. The word 'business' implies some constant and connected employment as distinguished from 'an isolated act or two.'

Id. The Supreme Court of Virginia also has held that, for license tax purposes, "the word 'business' has a meaning broad enough to cover everything about which a person can be employed." Portsmouth v. Citizens Trust, 216 Va. 695, 697, 222 S.E.2d 532, 534 (1976)."  

In construing the meaning of "engaged in the business of a retail merchant" in former §§ 58-320 and 58-321, the Court has held that a nonprofit employee association selling food and beverage items to its members was engaged in such a licensable business, regardless of whether the association intended to make a profit or actually realized a profit. The Court noted further that there was no statutory exclusion based on profit
motive but that, instead, the volume of business activity determined whether an organization was engaged in a business. Commonwealth v. Employees Assoc., 195 Va. 663, 668-69, 79 S.E.2d 621, 624 (1954).

B. Related Statutory Provisions Provide No General Exception for Nonprofit Status

Similarly, no general exception for nonprofit status exists in § 58.1-3703; the tax is measured by gross receipts, regardless of profit or loss. See § 58.1-3706.1

In one instance, the General Assembly expressly has limited the authority of localities to impose local license taxes on a nonprofit activity. Section 58.1-3703(B)(8) prohibits the imposition of the local license tax on a "wholesaler or retailer" for "selling bicentennial medals on a nonprofit basis for the benefit of the Virginia Independence Bicentennial Commission or any local bicentennial commission." (Emphasis added.) This specific prohibition reflects a legislative realization that no general exemption from local license taxes exists for nonprofit activities.

Private educational institutions generally engage in a continuous and regular course of dealing, in which they provide educational services for compensation. Based on the above, it is my opinion that the City of Lynchburg may impose a local license tax, pursuant to § 58.1-3703, upon both profit and nonprofit private colleges and universities that regularly provide their services for compensation. However, because § 58.1-3703 is permissive rather than mandatory, the city council may exempt nonprofit institutions from such license tax if it chooses to do so.

III. Tuition Payments or Other Consideration for Services, but Not Gratuitous Transfers, Constitute Gross Receipts

Business license taxes are calculated on the gross receipts of the business to be taxed. See § 58.1-3706. The term "gross receipts" likewise is not defined in the Code of Virginia. The term "gross receipts" generally refers to the total amount of money or other consideration received from selling property or from performing services. New Mexico Enterprises, Inc. v. Bureau of Revenue, 86 N.M. 799, 528 P.2d 212 (1974). Any "donation or gift, on the other hand, is '[a] voluntary transfer of property to another made gratuitously and without consideration." 1989 Att’y Gen. Ann. Rep. 311, 312 (quoting Black’s Law Dictionary 619 (5th ed. 1979)) (emphasis omitted).

None of the exemptions to local business license taxation in § 58.1-3703(B) applies to a private college or university. It is my opinion, therefore, that revenues realized by a private college or university in payment for property provided (e.g., income from the sale of books) and services rendered (e.g., tuition payments) may be included as gross receipts for local business license tax purposes. Donations received, however, are not part of gross receipts subject to the business license tax, when they are made gratuitously, and not in payment for goods or services.

1 A prior Opinion of this Office concludes that if a nonprofit organization is operating a licensable business for profit, a locality may impose a local business license tax. 1983-1984 Att’y Gen. Ann. Rep. 371. That Opinion does not address whether the same rule would apply if the organization did not intend to make a profit, or failed actually to do so.

2 See also, Portsmouth v. Citizens Trust Co., 219 Va. 903, 905-06, 252 S.E.2d 339, 341 (1979) (defining phrase "engaged in business" in city's license tax ordinance 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 [and] implies a continuous and regular course of dealing, rather than an irregular or isolated transaction' " (quoting Young v. Town of Vienna, 203 Va. 265, 267, 123 S.E.2d 388, 390 (1962)).
TAXATION: LICENSE TAXES.

Corporation which operates business within jurisdiction and conducts only sales activities within locality, but manufactures computers and computer equipment outside Commonwealth, not entitled to manufacturers' exemption from license tax. Determination whether manufacturer "wholesale merchant" made by commissioner of revenue. License tax on wholesale merchants based on purchases rather than on gross receipts; tax on wholesaler who sells to commercial users based on actual sales.

December 14, 1990

The Honorable Ray A. Conner
Commissioner of the Revenue for the City of Chesapeake

Based upon particular facts, you ask whether a corporation is subject to the imposition of a local business license tax as a wholesale merchant pursuant to § 58.1-3703 of the Code of Virginia. If the corporation may be licensed as a wholesale merchant, you ask what constitutes "purchases" in determining the amount of the business license tax to be imposed.

I. Facts

A corporation that manufactures and sells computers and computer equipment maintains an office in the City of Chesapeake out of which several salesmen, who are employees of the corporation, operate. The salesmen solicit sales directly from potential customers, presenting catalogs and brochures and assisting customers in selecting products. If a customer purchases a computer, an order form is sent to the Chesapeake office, which sends the form to an Henrico County office for approval. The manufacturing plant, which is located outside the Commonwealth, delivers the product and an invoice directly to the customer. After delivery, the salesmen operating out of the Chesapeake office may visit the purchaser to assist in the installation and operation of the computer. The salesmen receive a regular salary and a commission on all sales originating from their solicitations.

II. Applicable Statutes

Section 58.1-3703(A) authorizes the governing body of a city to levy 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." Among the limitations provided, § 58.1-3703(B)(4) prohibits the imposition of a license tax "[o]n a manufacturer for the privilege of manufacturing and selling goods, wares and merchandise at wholesale at the place of manufacture." Situs for the taxation of businesses is the locality where the person or corporation "has a definite place of business or maintains his office." Section 58.1-3708(A).

The Chesapeake, Virginia, Code (1989) defines a "wholesale merchant" as "[a]ny person who sells goods, wares and merchandise to others for resale only or who sells to institutional, commercial or industrial users." Id. ch. 15, art. II, div. 2, § 15-21, at 187.
The local license taxes authorized by § 58.1-3703 constitute excise taxes imposed on the privilege of engaging in business within the jurisdiction. See 1974-1975 Att'y Gen. Ann. Rep. 459. It is clear from the facts you present that the corporation is engaged in business within your jurisdiction. As a result, unless one of the exemptions in § 58.1-3703(B) applies, the corporation is subject to the local license tax.

You state that the corporation operating the business in your jurisdiction is a manufacturer, although the corporation conducts only sales activities within your locality. The exemption for manufacturers in § 58.1-3703(B)(4), by clear and unambiguous language, extends only to the manufacturers' sales of goods at wholesale at the place of manufacture. Sales made at other locations and sales made at retail are not included within the manufacturers' exemption. See 1985-1986 Att'y Gen. Ann. Rep. 287. To construe the statute, despite this specific language, to include all sales made by manufacturers that are shipped directly from the manufacturing plant to the purchaser would violate the established principle that exemptions from license taxes are to be narrowly construed. See Solite Corp. v. King George Co., 220 Va. 661, 662-63, 261 S.E.2d 535, 536 (1980). It is my opinion, therefore, that the business you describe is not entitled to the manufacturers' exemption in § 58.1-3703(B)(4), because the sales are not made at the place of manufacture.

IV. In Facts Presented, Manufacturer Also May Be "Wholesale Merchant" for License Tax Purposes

If the business is not exempt pursuant to the manufacturers' exemption, you ask whether the corporation may be licensed as a wholesale merchant. If the business is taxed in Chesapeake as a wholesale merchant, the rate of tax is governed by § 58.1-3716. "No county, city or town shall impose a license tax on wholesale merchants at an aggregate rate in excess of 5¢ per $100 of purchases ..." Id. If the sales are made at retail, the rate of tax is "twenty cents per $100 of gross receipts." Section 58.1-3706(A)(2).

The Supreme Court of Virginia has recognized that a manufacturer may be subject to a license tax as a retail merchant and, to the extent that the manufacturer's sales are made other than at the place of manufacture, as a wholesale merchant. Caffee v. City of Portsmouth, 203 Va. 928, 930-31, 128 S.E.2d 421, 422-23 (1962). See also County of Chesterfield v. BBC Brown Boveri, 238 Va. 64, 380 S.E.2d 890 (1989).

The question whether sales are made at retail or at wholesale is a factual issue to be determined by the commissioner of the revenue. The term "wholesale" is not currently defined in the Code of Virginia. Under a former Virginia license tax statute, the term "wholesale merchant" was defined as "every merchant who sells to other persons for resale only or who sells at wholesale to institutional, commercial or industrial users." Section 58-304 (Repl. Vol. 1959). The definition of "wholesaler" in the present administration of the local license taxes is based on this earlier definition. See Dept' Tax'n, Guidelines for Local Bus., Prof. & Occ. License Taxes, at 3 n.2 (Jan. 1, 1984) ("BPOL Guidelines").

This definition recognizes the basic historical distinction between retail sales and wholesale sales. In retail sales, the purchaser buys to satisfy his personal wants and needs. In wholesale sales, the purchaser buys to make a profit, either by reselling the goods or by using them in his business as supplies or equipment. See Roland Co. v. Walling, 326 U.S. 657, 673-78 (1946).
The definition also recognizes that, while sales to institutional, commercial or industrial users generally are considered sales at wholesale, there may be circumstances in which such sales constitute retail sales. As noted in the BPOL Guidelines, "[t]he term 'wholesale' or 'sells at wholesale' is not susceptible to a general definition which will cover all possible situations." Id. at 3 n.2.

It is my opinion that § 15-21 of the Chesapeake, Virginia, Code may be read in conformity with this accepted standard. Despite the fact that the sales are made to commercial or industrial users, if you determine that the goods are sold at a price or for a purpose that does not constitute a wholesale sale, the sales would constitute retail sales.5

IV. License Tax on Wholesaler Who Sells to Commercial Users May Be Based on Actual Sales

You also ask the proper method for determining the basis for the tax, in the event you determine that the business is subject to the wholesale license tax. Section 58.1-3716 provides that the license tax on wholesale merchants is based on "purchases" rather than on gross receipts. In the facts you present, the business arguably does not make "purchases" since the computers are shipped directly from the factory pursuant to purchaser invoices.

In the absence of a present statutory definition of "purchases," a former Virginia license tax statute again may provide guidance. Former § 58-304 provided the following definition of "purchases":

The word 'purchases', as used in this article shall be construed to include all goods, wares and merchandise received for sale at each definite place of business of every wholesale merchant. The word as so used shall not be construed to exclude any goods, wares and merchandise otherwise coming within the meaning of the word. All goods, wares and merchandise manufactured by any wholesale merchant and sold or offered for sale, in this State, as merchandise, shall be considered as purchases within the meaning of this article. But this article shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them. [Emphasis added.]

Because a license tax is based on the privilege of doing business within the jurisdiction, the amount of the tax imposed must bear a rational relationship to the type and amount of business conducted within that jurisdiction. Standard Steel, infra note 1, 419 U.S. at 563-64. Based on the facts you present, it is my opinion that the proper basis for the wholesale license tax is the sales price of the merchandise sold by the salesmen in the Chesapeake office and delivered to a purchaser in Chesapeake or in Virginia, depending on the circumstances. In interstate sales transactions, when the various components of a transaction occur in different states, the state of destination of the property sold has the authority to impose a tax on revenues generated from that transaction. See Standard Steel, infra note 1, 419 U.S. at 560; GM, infra note 1, 377 U.S. at 436; Norton, infra note 1, 340 U.S. at 534. Whether only the sales destined for Chesapeake or the sales destined for all of Virginia may form the basis for the tax depends on whether the company has a definite place of business in another Virginia locality with a sufficient nexus to impose the tax on sales destined for that locality. See § 58.1-3708; 1987-1988 Att'y Gen. Ann. Rep. 512, 513. While the license tax under these circumstances may be less than the tax that would be imposed on a wholesaler who maintains a stock of merchandise, it is my opinion that a license tax based on actual sales is within the meaning of "purchases" in § 58.1-3716, and accurately reflects the type of business conducted in the facts you present.

Localities with a higher rate in effect on January 1, 1964, may continue to tax at such higher rate. Section 58.1-3716.

An argument can be made that, under the facts you present in which the business purchases no products and maintains no stock of merchandise on hand, the business is not a "merchant" within the ordinary definition of the word as "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit." Commonwealth v. Meyer, 180 Va. 466, 472-73, 23 S.E.2d 353, 356 (1942) (quoting Century Dictionary (case citation not provided)). It does not follow from this argument, however, that the sales business conducted in your locality is not subject to the imposition of a local license tax. To the contrary, § 58.1-3703(B)(4) is clear that sales of a manufacturer are exempt only to the extent that the sales are "at wholesale at the place of manufacture." Section 58.1-3706(A)(4) further provides that the rate of "thirty-six cents per $100 of gross receipts" for "all other businesses and occupations not specifically listed or excepted in this section" shall not be applicable to license taxes on "wholesalers, which shall be governed by § 58.1-3716." Section 58.1-3706(A)(4) evidences a legislative intent that sales made at wholesale are to be taxed at the rate established in § 58.1-3716, regardless of whether the sales are by a wholesale merchant or by a manufacturer at a place other than the place of manufacture.

In BBC Brown Boveri, the Supreme Court of Virginia determined that Brown Boveri was a manufacturer for purposes of personal property taxes under § 58.1-3507(A). The Court also held that the company was not subject to the local license tax because its "non-manufacturing activities [were] ancillary to its primary business of manufacturing." 238 Va. at 72, 380 S.E.2d at 894. The facts in BBC Brown Boveri are distinguishable from the facts you present in that BBC Brown Boveri was conducting all of its business at a plant located in the County of Chesterfield. The question of sales at wholesale at a place other than the place of manufacture was not presented.

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, homogenous system, or a single and complete statutory arrangement." Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957); 1989 Att'y Gen. Ann. Rep. 315, 316-17.

See also BPOL Guidelines § 2-3: "When a merchant conducts both a wholesale and a retail business, the merchant is subject to the retail license tax on the retail portion of the business and subject to the wholesale license tax on the wholesale portion of the business. However, the locality may permit but not require the merchant to pay the license tax as a retailer on both the retail and wholesale portions of the business."

**TAXATION: LICENSE TAXES.**

Fair market value of exported coal for purposes of determining taxable gross receipts based on value at time coal placed in shipment from Virginia locality; excludes value added by processing of coal in another jurisdiction.

September 21, 1990

The Honorable Ford C. Quillen
Member, House of Delegates
You state that a coal mine operator in Wise County severs coal in that county and transports it underground to the State of Kentucky, where the coal is processed and sold. You ask whether the coal mine operator's gross receipts subject to the Wise County coal severance tax authorized by § 58.1-3712 of the Code of Virginia should exclude the value added to the coal by the processing in Kentucky.

I. Applicable Statute

Section 58.1-3712 authorizes a city or county 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 on a percentage of gross receipts from the sale of coal or gases severed within the locality. Section 58.1-3712 provides that "[s]uch gross receipts shall be the fair market value measured at the time such coal or gases are utilized or sold for utilization in such county or city or at the time they are placed in transit for shipment therefrom."

II. Fair Market Value of Exported Coal Excludes Value Added in Another Jurisdiction

Section 58.1-3712 uses the disjunctive to describe two distinct times at which the fair market value used to determine gross receipts may be measured: (1) when the coal is used or sold for use in the taxing locality; or (2) when the coal is placed in transit for shipment from the taxing locality. The use of the disjunctive indicates that two separate alternatives were intended. See 1A N. Singer, Sutherland Stat. Const. § 21.14, at 129-30 n.2 (4th ed. 1985). Section 58.1-3712 thus contemplates that coal will be either used or sold for use in the taxing locality or exported for sale in another jurisdiction. In the latter event, the fair market value for purposes of determining gross receipts is measured at the time the coal is placed in shipment.

I am of the opinion, therefore, that in the circumstances you present, § 58.1-3712 requires that the fair market value of the coal for purposes of determining taxable gross receipts is the value at the time the coal is placed in shipment from Wise County, and should not include value added by the processing of the coal in Kentucky. 1

1 Kentucky recently adopted legislation authorizing the taxation of businesses that sever coal in another state and process it in Kentucky. See Ky. Rev. Stat. Ann. § 143.025 (Michie Supp. 1990). The General Assembly may wish to consider similar legislation that would permit the Commonwealth to tax severed in another state and processed in Virginia. Although the constitutionality of the Kentucky legislation has not yet been tested, the Supreme Court of the United States, in upholding a Montana coal severance tax, held that "a state tax does not offend the Commerce Clause if it 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.' " Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 (1981) (citation omitted).

TAXATION: LICENSE TAXES.

Motor vehicle dealer may not deduct expenses for labor or materials used to recondition trade-in vehicle for resale when computing gross receipts for local business license tax purposes.

July 3, 1990

The Honorable J. Ronnie Minter
Commissioner of the Revenue for the City of Martinsville
You ask whether a motor vehicle dealer may deduct the cost of labor and materials used to recondition a "trade-in" vehicle for resale in determining gross receipts for purposes of local business license taxation. You also ask whether generally accepted accounting principles would permit the deduction of such items from a dealer's business records.

I. Applicable Statutes

Section 58.1-3701 of the Code of Virginia authorizes the Department of Taxation (the "Department") to promulgate guidelines that define and explain the categories for local business license taxes. The Department's guidelines promulgated pursuant to this statute are silent with respect to the facts you present. See Dept Tax'n, Guidelines for Loc. Bus., Prof. & Occ. 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(A)(2) establishes the limitation for retail sales at "twenty cents per $100 of gross receipts." (Emphasis added.)

II. No Deduction from Gross Receipts Is Permitted for Expenses of Preparing Inventory for Resale

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.

The term "gross receipts" is not defined in the applicable license tax statutes. The Supreme Court of Virginia has determined that "gross receipts" means "whole, entire, total receipts." Savage v. Commonwealth, 186 Va. 1012, 1018, 45 S.E.2d 313, 317 (1947). Although the facts in Savage deal with the application of the gross receipts tax to motor vehicle carriers, the Court has adopted the same definition of the term "gross receipts" in the context of local license taxes. See Alexandria v. Morrison-Williams, 223 Va. 349, 288 S.E.2d 482 (1982).

A prior Opinion of this Office concludes that the term "gross receipts" for business license tax purposes typically refers to the total amount of money or the value or other consideration received from selling property or performing services. 1989 Att'y Gen. Ann. Rep. 310. The 1990 Session of the General Assembly enacted § 58.1-3734.1 to provide that the gross receipts of a motor vehicle dealer shall not include the amount of any trade-in allowance. Ch. 870, 1990 Va. Acts 1002 (Reg. Sess.). I am unaware, however, of any other deductions allowable to motor vehicle dealers in computing gross receipts for local business license tax purposes.

Based on the above, it is my opinion that a motor vehicle dealer may not deduct expenses for labor or materials used to recondition a "trade-in" vehicle for resale when computing gross receipts for purposes of the local business license tax.

Since your second question does not involve a matter of law, but one of accounting, it is not an appropriate subject upon which to render an Opinion of the Attorney General. 1986-1987 Att'y Gen. Ann. Rep. 252.
In your inquiry, you describe these labor and materials expenses as "internal sales." For purposes of this Opinion, I assume that you are referring to an interdepartmental accounting practice at the motor vehicle dealership, and not "sales" in the ordinary sense.

Sales 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").

TAXATION: LICENSE TAXES.

Proration of taxes when business ceases to conduct its activities based on number of months taxpayer conducted business during final license tax year of operation.

November 1, 1990

The Honorable John H. Smedley Sr.
Commissioner of the Revenue for Warren County

You ask how the refund of local license taxes required by § 58.1-3710 of the Code of Virginia must be calculated when a "realtor who has been in business for many years" permanently ceases doing business before December 31. Specifically, you ask if the license tax paid is prorated based on the number of months the business operated during the license tax year, or if the license tax is recalculated based on the current year's receipts to the date of termination. In the former case, the refund equals the product of the license tax paid and the fraction whose numerator is the number of full months remaining in the license tax year after termination, and whose denominator is 12. In the latter case, the refund equals the excess of the license tax paid over the "recalculated" license tax.

I. Applicable Statutes and Ordinances

Section 58.1-3703(A) authorizes the governing body of any county to levy and provide for the assessment and collection of county license taxes on businesses. Section 58.1-3710 requires refunds of such license taxes when a business permanently ceases to conduct its activities and provides, in part:

In the event a person, firm or corporation ceases to engage in a business, trade, profession or calling within a county ... during a year for which a license tax based on gross receipts has already been paid, the taxpayer shall be entitled upon application to a refund for that portion of the license tax already paid, prorated on a monthly basis so as to ensure that the licensed privilege is taxed only for that fraction of the year during which it is exercised within the county ....

You state that the Warren County Code ("County Code") imposes various license taxes for the privilege of conducting businesses in the County. Warren County, Va., Code ch. 117, art. I, §§ 117-1 to 117-16 (1990). Section 117-2 of the County Code defines "gross receipts" as

[the] gross sales of merchandise and the gross receipts of the business ... from all earnings, fees, commissions, brokerage charges and rentals and from all income whatsoever arising from and growing out of the conduct of the business ... licensed in this chapter during the license tax year immediately
preceding the license tax year for which the tax is being computed, without any deduction unless otherwise expressly provided; except that the gross receipts for license tax purposes shall not include any amount paid to the state or county for the Virginia retail sales and use tax.

II. Current Year's Receipts Are Irrelevant When Calculating License Tax and Applicable Refund

Section 58.1-3703 gives localities the authority to impose a license tax on the privilege of doing business within its boundaries. One express limitation on that authority, found in § 58.1-3710, provides that if a taxpayer permanently stops doing business during a license tax year for which a license tax already has been paid, the locality shall prorate the tax "on a monthly basis" and refund that portion of the tax attributable to any month after the business ceased.

Warren County has imposed a business license tax assessed on the "gross receipts" and has defined "gross receipts" by reference to specified receipts realized during the immediately preceding license tax year. For an established business, therefore, the license tax for any year is not calculated on that year's receipts. As a result, for such a business, the license tax which must be prorated and proportionately refunded under § 58.1-3710 has no relation to the current year's receipts.

Neither § 58.1-3710 nor Chapter 117 of the County Code authorizes recalculating the license tax of an established business based on its actual receipts to the date it permanently ceases operations. It is my opinion, therefore, that the license tax paid in the facts you present should be prorated on the number of months the taxpayer conducted the business during the final license tax year of operation.

TAXATION: LICENSE TAXES — BANK FRANCHISE TAX.

Sale of repossessed automobiles by bank constitutes sale of tangible personal property, subject to local business license tax.

May 9, 1990

The Honorable Arthur L. Shoemake
Commissioner of the Revenue for the City of Manassas

You ask whether a bank which sells repossessed automobiles from a lot it owns in the City of Manassas is subject to the local business license tax for this activity.

I. Applicable Statutes

Section 58.1-3703 of the Code of Virginia authorizes the governing body of a county, city or town to assess and collect license taxes on businesses within the locality. Subsection B of that statute limits this authority by detailing specific exemptions to this tax. One of these exemptions provides that no county, city or town shall levy any license tax "[o]n any bank or trust company subject to taxation in Chapter 12 (§ 58.1-1200 et seq.) of [Title 58.1]." Section 58.1-3703(B)(12).

Section 58.1-1202 provides:

Every bank ... shall pay an annual franchise tax measured by its net capital .... Such tax shall be in lieu of all other taxes whatsoever for state, county
or local purposes except ... local license taxes in connection with the sale of tangible personal property sold by banks in connection with promotions or otherwise.

II. When Two Statutes Are in Apparent Conflict, More Specific Statute Controls; Exemptions Are Strictly Construed Against Taxpayer

Localities are authorized by § 58.1-3703 to assess license taxes on businesses operating within their jurisdiction, but this authority is limited by the exceptions detailed in § 58.1-3703(B). Section 58.1-3703(B)(12) provides that a locality shall not levy a license tax on any bank that is subject to taxation in Chapter 12. Pursuant to § 58.1-1202 of that chapter, however, a franchise tax is imposed upon banks in lieu of all other taxes except for those specifically enumerated.

Among the exceptions enumerated in § 58.1-1202 is the local license tax in connection with the sale of tangible personal property sold by banks "in connection with promotions or otherwise." This exception is more specific than the general exemption of § 58.1-3703(B)(12). When one statute deals with a particular subject in a general way and another statute deals with that subject in a more specific manner, the two statutes should be harmonized, if possible, and when they conflict, the more specific statute prevails. See Va. National Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979). See also 2 H. & S. Docs., Report of the Virginia Code Commission on the Revision of Title 58 of the Code of Virginia, H. Doc. No. 16, at 423, 425 (1984 Sess.) (§ 58.1-3703(B)(12) was added to serve as a reference to § 58.1-1202).

In addition, the rule of strict construction of tax exemption statutes is entrenched in Virginia law. Taxation is the rule and not the exception, and exemptions are strictly construed against the taxpayer. See Commonwealth v. Wellmore Coal, 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984).

III. Bank Is Subject to Local License Tax for Sale of Repossessed Automobiles

Section 58.1-1202 permits local license taxes to be imposed on banks in connection with the sale of tangible personal property for promotion or otherwise. The transaction you describe, the sale of repossessed automobiles, constitutes the sale of tangible personal property. See 1974-1975 Att'y Gen. Ann. Rep. 459. It is my opinion, therefore, that the bank in the facts you present is subject to the local business license tax for the sale of repossessed automobiles.

TAXATION: MISCELLANEOUS TAXES - CONSUMER UTILITY TAXES.

"Recurring maintenance costs" include cost of personnel hired to repair and service E-911 system equipment; cost may be recovered through special tax levy on telephone consumers. Cost of personnel necessary to operate E-911 system, or other operating costs generally, may not be paid with special tax revenue.

December 14, 1990

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

You ask whether § 58.1-3813(D) of the Code of Virginia authorizes the recovery of personnel costs necessary to operate an enhanced 911 emergency telephone service ("E-911 system").
I. Applicable Statute

Section 58.1-3813 authorizes the levy of a local tax on consumers of telephone service for an E-911 service. The use and level of the special tax revenues collected are limited by § 58.1-3813(D), which 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 emergency telephone 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.

II. Recovery of Operating Costs for Personnel Not Authorized

Section 58.1-3813(D) limits the ongoing costs which may be recovered through the special tax on telephone consumers to "recurring maintenance costs." 1989 Att'y Gen. Ann. Rep. 317, 318. Because there is no statutory definition of this phrase, its ordinary meaning must be used. Id. In the context of utility service, recurring maintenance costs ordinarily refer to costs incurred to keep system equipment in a state of good repair. Such maintenance costs, including the cost of personnel hired to repair and service system equipment, are but one of many expenses that properly may be incurred in providing utility service. See 1 A. Priest, Principles of Public Utility Regulation 45, 59, 112, 113 (1969); 64 Am. Jur. 2d Public Utilities §§ 173, 176 (1972).

The cost of personnel hired to repair and service E-911 system equipment is one example of a recurring maintenance cost that the General Assembly specifically has authorized localities to recover through the special tax levy on telephone consumers pursuant to § 58.1-3813. That section has no similar authorization, however, for the cost of personnel hired to operate the E-911 system or for other operating costs generally. Virginia law adopts a rule of strict construction concerning the authority granted to local governments by statute. 1989 Att'y Gen. Ann. Rep. 120, 124 n.2. Based on the above, it is my opinion that the cost of personnel necessary to operate the E-911 system may not be paid with special tax revenue generated pursuant to § 58.1-3813(D).

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1 Cf. Ga. Code Ann. § 46-5-134(e)(3) (1990) (authorizing payment of "[t]he actual cost of salaries of employees hired by the local government solely for the operation and maintenance of the emergency '911' system"). 2 The General Assembly could, of course, amend § 58.1-3813(D) to authorize recovery of operating costs, including the cost of personnel necessary to operate the E-911 system. See supra note 1.

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TAXATION: MISCELLANEOUS TAXES - CONSUMER UTILITY TAXES.

Subscriber line, or end user, charge within scope of local telephone service subject to tax.

March 7, 1990

Mr. John M. Lohr
County Attorney for Highland County

You ask whether the consumer utility tax that a locality is authorized to impose on telephone services pursuant to § 58.1-3812 of the Code of Virginia applies to an "end user
charge," commonly referred to as a "subscriber line charge" ("SLC"), which you describe as a fee charged to the local consumer to reimburse local telephone companies for the loss of long-distance charges received by these companies prior to the breakup of the American Telegraph and Telephone Company.

I. Applicable Statutes

Section 58.1-3812 authorizes the imposition of a local tax upon the consumers of utility services provided by telegraph and telephone companies. Section 58.1-3812(E) defines "utility service or services" as "any service taxable as local telephone service under the provisions of the Internal Revenue Code of 1954, as amended, relating to federal communications taxes, as such provisions were in force and effect on December 31, 1971."

Section 4251 of the Internal Revenue Code ("I.R.C.") (West 1989) imposes a federal excise tax on "communications services," which includes local telephone service, toll telephone service and teletypewriter exchange service. Section 4251(b)(1).

The term "local telephone service" is defined in the I.R.C. as

(1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and

(2) any facility or service provided in connection with a service described in paragraph (1).

Id. § 4252(a) (West 1989).

II. End User Charge Within Scope of Local Telephone Service Subject to Utility Tax

Utility services upon which a consumer may be taxed pursuant to § 58.1-3812 are limited to those services taxable as "local telephone service" under I.R.C. § 4251(b)(1)(A). Whether the "end user charge" is subject to the consumer utility tax, therefore, depends upon whether this charge represents a "local telephone service," as that term is used in I.R.C. § 4251(b)(1)(A). A similar issue has been addressed by the Internal Revenue Service. See Rev. Rul. 87-108, 1987-2 C.B. 260.

Revenue Ruling 87-108 describes SLCs as flat-rate monthly charges to subscribers to compensate local telephone companies for the availability of their local exchange facilities for interstate use by long-distance carriers and subscribers. Id. Although the SLC recovers a portion of the fixed costs that the Federal Communications Commission allocates to its interstate jurisdiction, the essence of "local telephone service" in I.R.C. § 4252(a) is access to a local telephone system. Rev. Rul., supra, at 261. This revenue ruling concludes that the SLC, even though separately stated, is a charge that must be paid in order to obtain access to the local telephone system and, therefore, is included in the definition of "local telephone service" in § 4252(a). Rev. Rul., supra.

Based on the above, it is my opinion that the SLC, or "end user charge," is within the scope of "local telephone service" as that term is construed for federal communication tax purposes in the I.R.C. It is further my opinion, therefore, that this charge is subject to the tax imposed by § 58.1-3812.
The "end user charge," or SLC, also is described as a charge all telephone subscribers are required to pay, on a per line basis, for that portion of their necessarily incurred local telephone plant costs. National Ass'n of Reg. Util. Com'rs v. F.C.C., 737 F.2d 1095, 1115 (D.C. Cir. 1984).

TAXATION: MISCELLANEOUS TAXES - FOOD AND BEVERAGE TAX.

HOTELS, RESTAURANTS, SUMMER CAMPS, ETC.: LICENSES, INSPECTIONS.

County may not impose food and beverage tax on bakery performing only manufacturing of packaged products for wholesale distribution. Bakery or donut shop conducting retail sales must offer sit-down service to be considered restaurant for licensing purposes; sales taxable. Bakeries and donut shops without seating areas not restaurants; sales not taxable.

December 11, 1990

Mr. Frank M. Morton III
County Attorney for James City County

You ask whether the county food and beverage tax authorized by § 58.1-3833 of the Code of Virginia may be imposed upon sales by bakeries and donut shops.

I. Applicable Statutes

Section 58.1-3833(A) provides:

Any county is hereby authorized to levy a tax on food and beverages sold, for human consumption, by a restaurant, as such term is defined in subdivision 9 of § 35.1-1 of this Code . . . . [2]

Section 35.1-1(9)(a) defines "restaurant," for purposes of licensing and inspection by the State Board of Health, as

[a]ny place where food is prepared for service to the public on or off the premises, or any place where food is served. Examples of such places include . . . lunchrooms, short order places, cafeterias [and] coffee shops . . . . Excluded from the definition are places manufacturing packaged or canned goods which are distributed to grocery stores or other similar food retailers for sale to the public.

Under § 35.1-18, a license issued by the State Health Commissioner is required to operate a restaurant. Grocery stores, including their delicatessens selling exclusively for off-premises consumption, and places manufacturing or selling packaged or canned goods are expressly excluded from this licensing requirement. Section 35.1-25(4).

II. Bakery Manufacturer of Packaged Food, Sold to Retailer, Not Subject to Food and Beverage Tax

As amended in 1990, § 58.1-3833(A) authorizes counties to tax food and beverages sold for human consumption by restaurants. The General Assembly adopted the regulatory definition of restaurant in § 35.1-1(9) for purposes of the food and beverage tax. This definition includes places where food is prepared for service to the public on or off premises, or places where food is served. Section 35.1-1(9)(a).
The general definition of restaurant in § 35.1-1(9)(a) is followed by a list of examples. Neither "bakery" nor "donut shop" is listed specifically as an example. I am unaware of any statutory definition of either of these terms. The Supreme Court of Virginia, however, has held that a bakery simultaneously may be a manufacturer (one who produces a new or substantially different product from new or basic materials), a wholesaler (one who sells and delivers to retailers but not to consumers), and a retailer (one who sells to consumers). Caffee v. City of Portsmouth, 203 Va. 928, 930-32, 128 S.E.2d 421, 422-24 (1962).

Places that manufacture packaged foods for wholesale distribution are expressly excluded from the definition of a restaurant under § 35.1-1(9)(a). It is my opinion, therefore, that a county may not impose a food and beverage tax on a bakery performing only manufacturing of packaged products for wholesale distribution.

III. Bakeries and Donut Shops Subject to Licensing and Required to Collect Food and Beverage Tax Only if They Make Seating Available

The question remains whether other bakeries or donut shops conducting retail sales constitute restaurants whose sales are taxable under § 58.1-3833. These businesses all prepare food on the premises and sell it to consumers; some have seating available while others do not. Each of these businesses arguably meets the test of § 35.1-1(9)(a), by being a "place where food is prepared for service to the public on or off the premises, or any place where food is served."

I am advised, however, that the State Board of Health does not consider such bakeries or donut shops to be restaurants for licensing purposes under §§ 35.1-18 through 35.1-24, unless they offer "sit-down" service. See Food Service Memorandum of Understanding Between Va. Dep't Health & Va. Dep't Agric. & Consumer Serv. (Mar. 1989). This distinction reflects the fact that a bakery is principally a retail, rather than a food service, business. Because the General Assembly has adopted the regulatory definition of a restaurant in § 35.1-1(9) in the authorizing tax statute (§ 58.1-3833), a reasonable criterion for applying the food and beverage tax is whether the bakery or donut shop has a license to operate a restaurant as required by § 35.1-18. Under § 35.1-21, a restaurant license must be prominently displayed, making this an easy rule for local tax officials to administer and enforce.

The interpretation given to a statute by the state agency charged with its administration is entitled, moreover, to great weight. Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981). See also 1989 Att'y Gen. Ann. Rep. 354, 356. Furthermore, the General Assembly is presumed to be cognizant of the agency's construction of a particular statute, and, when such construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it. Peyton v. Williams, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965).

Based on the foregoing, it is my opinion that a bakery or donut shop offering sit-down service clearly constitutes a restaurant whose sales are taxable under § 58.1-3833. In accord with the administrative interpretation of the State Board of Health, however, it is further my opinion that bakeries and donut shops without seating areas are not restaurants, and that their sales are not subject to taxation under § 58.1-3833.

1Section 58.1-3833(A) was amended in 1990 to extend the county food and beverage tax to meals sold by restaurants for off-premises consumption and to certain prepared foods sold by delicatessens in grocery and convenience stores. Ch. 846, 1990 Va. Acts Reg. Sess. 1454; Ch. 862, id. at 1495. Previously, the food and beverage tax was restricted to items sold for consumption on the premises. See 1989 Att'y Gen. Ann. Rep. 318 (applying former limitation).
Section 58.1-3833 provides certain other exemptions to the food and beverage tax not relevant to your inquiry. See Continental Baking Co. v. Campbell, 176 Okla. 218, 220, 55 P.2d 114, 116-17 (1936) (defining bakery as any place used for purpose of mixing, compounding, or baking for sale or for purposes of restaurant, bakery, or hotel, any food products of which flour or meal is principal ingredient). See also State v. Lanasu, 151 La. 706, 92 So. 306 (1922) (mechanical processing of ingredients in making of bread on commercial scale constitutes manufacturing).

In the event preparation does not take place at the sales location, a business may still be deemed a restaurant under § 35.1-1(9)(b) (restaurant includes place which prepares or stores food for distribution to persons of same business or related business for service to public).

TAXATION: MISCELLANEOUS TAXES - FOOD AND BEVERAGE TAX - RETAIL SALES AND USE TAX.

County may not tax food items sold at delicatessen counters operated by grocery or convenience store unless part of prepared sandwich or platter; may not tax food and beverage purchases made with food stamps or WIC coupons.

September 28, 1990

The Honorable George W. Grayson
Member, House of Delegates

You ask whether § 58.1-3833 of the Code of Virginia authorizes a county to apply its food and beverage tax to various items sold at a delicatessen counter operated by a grocery or convenience store. The items in question are: (1) whole barbecued chickens; (2) hot entrees sold in bulk by the pound, such as macaroni and cheese or baked beans; (3) salads sold from bulk containers in portions of less than a pound; (4) luncheon meats sold from bulk in portions less than a pound; (5) prepackaged breads and rolls; (6) cookies sold prepackaged and loose; (7) prepackaged luncheon meats; (8) fountain drinks; (9) any item purchased by a consumer through the federal Food Stamp Program; and (10) any item purchased by a consumer through the Virginia Special Supplemental Food Program for Women, Infants and Children (the "WIC Program").

II. Applicable Statutes

Section 58.1-3833(A) was amended in 1990 to extend the county food and beverage tax to meals sold by restaurants for off-premises consumption, and to certain prepared foods sold by grocery and convenience stores operating delicatessen counters. Chs. 846, 862, 1990 Va. Acts 1454, 1495 (Reg. Sess.). Previously, the food and beverage tax was restricted to items sold for consumption on the premises. See 1989 Att'y Gen. Ann. Rep. 318 (applying former limitation).

Section 58.1-3833(A) provides, in part:

Any county is hereby authorized to levy a tax on food and beverages sold, for human consumption, by a restaurant, as such term is defined in subdivision 9 of § 35.1-1 of this Code, not to exceed eight and one half percent, when added to the state and local general sales and use tax, of the amount charged for such food and beverages... Grocery stores and convenience stores selling prepared foods ready for human consumption at a delicatessen counter shall be subject to the tax, for that portion of the grocery store or con-
venience store selling such items. The food and beverage tax levied on meals sold by grocery store delicatessens and convenience stores shall be limited to prepared sandwiches and single-meal platters.

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The term 'beverage' as set forth herein shall mean alcoholic beverages as defined in § 4-2 and nonalcoholic beverages served as part of a meal.

The term "food," for purposes of the federal Food Stamp Program, is defined to exclude "hot foods or hot food products ready for immediate consumption," with exceptions not here relevant. 7 U.S.C.A. § 2012(g) (West 1988). The term "supplemental foods," for purposes of the WIC Program, is defined to include foods determined by the Secretary of Agriculture to contain nutrients needed by mothers and children. 42 U.S.C.A. § 1786(b)(14) (West Supp. 1990). A state's eligibility to participate in federal Food Stamp and WIC Programs may be terminated if the Secretary of Agriculture determines that state or local sales taxes are collected on purchases made with food stamps or WIC coupons. See 7 U.S.C.A. § 2013(a) (West 1988); 42 U.S.C.A. § 1786(c)(4) (West Supp. 1990).

III. Food Items Sold at Delicatessen Counters Not Taxable Unless Part of Prepared Sandwich or Platter

As amended in 1990, § 58.1-3833(A) authorizes counties to tax that portion of the business of grocery and convenience stores consisting of "selling prepared foods ready for human consumption at a delicatessen counter," but restricts the application of the tax only to "prepared sandwiches and single-meal platters." The mention of particular items in a statute implies the exclusion of all other items. 1989 Att'y Gen. Ann. Rep. 40, 42. Section 58.1-3833 does not define "prepared sandwiches" or "single-meal platters." However, whole chickens, bulk containers of macaroni and cheese or baked beans, luncheon meats or salad sold from bulk or prepackaged, and prepackaged breads, and cookies, when purchased separately, do not fall within the commonly accepted meaning of the term "platter"12 and do not constitute a "prepared" sandwich without further preparation on the part of the customer. It is a basic principle of statutory construction that words in a statute are to be given their common, ordinary and accepted meanings unless a contrary legislative intent is manifest. 1989 Att'y Gen. Ann. Rep. 155.

It is my opinion, therefore, that delicatessen counter purchases of fountain drinks, whole chickens, bulk containers of salad or hot foods such as macaroni and cheese or baked beans sold by the pound, luncheon meats sold from bulk or prepackaged, prepackaged breads, and cookies (whether prepackaged or loose) may not be taxed by counties under § 58.1-3833 when sold by themselves and not as part of a prepared sandwich or platter.

IV. Items Purchased with Food Stamps or WIC Coupons

Federal law excludes hot food items sold for immediate consumption from being eligible, in most instances, for purchase with food stamps or WIC coupons. See 42 U.S.C.A. § 2012(g). If counties were permitted by § 58.1-3833 to tax food stamp or WIC coupon purchases of delicatessen counter purchases of any of the other items listed in your inquiry, the Commonwealth could be disqualified from participation in federal programs. See 7 U.S.C.A. § 2013(a); 42 U.S.C.A. § 1786(c). Section 58.1-3840, which deals with food and beverage taxes imposed by cities and towns, expressly prohibits the application of such taxes to purchases made with food stamps and WIC coupons. Such purchases also are exempted from the retail sales and use tax. Section 58.1-608(10)(f). Statutes dealing with the same subject matter should, to the extent possible, be read to-
together, the object being to give effect to the legislative intent of each statute. See Vol-
the Food Stamp and WIC Programs in §§ 58.1-608(10)(f) and 58.1-3840, logically would
not then authorize counties to void that eligibility with taxes imposed under § 58.1-3833.
It must be presumed that the General Assembly did not intend the application of these

Based on the above, I am of the opinion that § 58.1-3833 does not authorize coun-
ties to tax food and beverage purchases made with federal food stamps or WIC coupons.

1The WIC Program is a federal nutrition program for indigent women and children
which operates as a supplement to the federal Food Stamp Program. See 42 U.S.C.A.
2"Platter" is defined as "[a] large, shallow dish or plate, used esp. for serving food [or
a] meal or course served on a platter." The American Heritage Dictionary 950 (2d c. ed.
1985).

TAXATION: MISCELLANEOUS TAXES - TAXES ON SUITS OR OTHER JUDICIAL
PROCEEDINGS.

CIVIL REMEDIES AND PROCEDURE: ACTIONS - CHANGE OF NAME — EXTRAORDI-
NARY WRITS - HABEAS CORPUS.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY -
OTHER ILLEGAL WEAPONS.

CRIMINAL PROCEDURE: EXPUNGEMENT OF CRIMINAL RECORDS.

MOTOR VEHICLES: LICENSURE OF DRIVERS - HABITUAL OFFENDERS.

PROPERTY AND CONVEYANCES: FORM AND EFFECT OF DEEDS AND COVENANTS.

RELIGIOUS AND CHARITABLE MATTERS; CEMETERIES: CHURCH PROPERTY;
BENEVOLENT ASSOCIATIONS AND OBJECTS.

WELFARE (SOCIAL SERVICES): ADOPTION.

Writ tax not applicable to nonadversarial proceedings in circuit court; determination of
adversarial vs. nonadversarial law and chancery proceedings.

January 18, 1990

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

You ask whether a circuit court clerk is required to collect the writ tax imposed by
§ 58.1-1727 of the Code of Virginia when the action at law or chancery case filed is non-
adversarial in nature. If the writ tax should not be collected in nonadversarial actions,
you also give examples of certain types of law and chancery cases and ask which of these
examples is a nonadversarial action that would not require payment of the writ tax.
I. Applicable Statutes

Section 58.1-1727 imposes a writ tax upon "the commencement of every action, in law or chancery, in a court of record," as well as upon certain other proceedings that are not relevant to your inquiry. Section 58.1-1728 requires that "the taxes on suits or other judicial proceedings shall be paid to the clerk of court wherein the suit or other judicial proceeding is commenced."

II. Writ Tax Not Applicable to Nonadversarial Actions


III. Adversarial Proceeding Is One That Accommodates Assertion of Opposing Interests

Whether a particular matter is adversarial in nature and, therefore, subject to the writ tax described in § 58.1-1727 depends upon whether the particular action is structured to accommodate the assertion of opposing interests inherent in the term "adversarial." See The Webster Encyclopedic Dictionary of the English Language 14-15 (1967). The essential components of any adversarial action are notice and an opportunity for opposing interests to be heard. See E.P. Heacock v. Commonwealth 228 Va. 235, 241-42, 321 S.E.2d 645, 649 (1984). The determination of the adversarial nature of a particular proceeding, in this context, necessarily must be made at the time of the filing of the initial pleading with a review of the statutes authorizing the particular action itself, since the facts of these cases, once filed, will vary and convert many that typically would be nonadversarial in nature to adversarial proceedings.

As noted above, you give examples of the following law and chancery cases and ask whether each requires payment of a writ tax: adoptions; gun permit applications; appointments of church trustees; habeas corpus petitions; petitions for restoration of driving privileges; petitions to encumber church property; change of name petitions; expungement petitions; and petitions to release deeds of trust.

IV. Determination of Adversarial vs. Nonadversarial Nature of Various Law and Chancery Proceedings

A. Adoption Proceedings Are Nonadversarial; No Writ Tax Required

The relevant statutes concerning petitions for adoption are detailed in §§ 63.1-220 through 63.1-238.02. While these statutes provide for a thorough investigation and a report to be made to the court concerning the proposed adoption, an adoption proceeding itself is not adversarial in nature. The primary purpose of the agency conducting the
investigation—the welfare of the child—is not unlike the interest of the petitioner. Despite the possibility of an adoption proceeding becoming adversarial under the procedure detailed in § 63.1-227 for revoking an interlocutory order of adoption, it is my opinion that an adoption proceeding is not, by its nature, an adversarial action. It is my opinion, therefore, that no writ tax should be collected by the clerk in an adoption proceeding.

B. Gun Permit Application Is Nonadversarial

Section 18.2-308(D) permits a person to apply in writing to the clerk of the circuit court for a two-year permit to carry a specific type of concealed weapon. The procedure requires that the court receive a report on the applicant from the Central Criminal Records Exchange. If the circuit court denies the written application, the applicant may obtain an ex parte hearing to argue his application to the court.

Based on the above, it is my opinion that a gun permit application is nonadversarial in nature. An applicant's argument to the court on his own behalf differs from the typical adversarial proceeding in which one party's interests are in conflict with the interests of another party. Potentially opposing views between a circuit court and an applicant for a gun permit, in my opinion, do not establish an adversarial proceeding. As a result, it is further my opinion that no writ tax should be collected when a gun permit application is filed.

C. Appointment of Church Trustees Is Nonadversarial

A prior Opinion of this Office concludes that an application for the appointment of a church trustee pursuant to § 57-8 is nonadversarial in nature and, therefore, no writ tax is due. See 1984-1985 Att'y Gen. Ann. Rep. 408, 409.

D. Habeas Corpus Petition Is Adversarial; Collection of Writ Tax Required

The procedure for obtaining a writ of habeas corpus in the circuit court is detailed in §§ 8.01-654 through 8.01-668. The procedure clearly contemplates an adversarial action; the circuit court is required to give findings of fact and conclusions of law "following a determination on the record or after a hearing." Section 8.01-654(B)(5). It is my opinion, therefore, that a habeas corpus petition is adversarial and subject to the writ tax. This conclusion also is in agreement with prior Opinions of this Office. See Att'y Gen. Ann. Rep.: 1984-1985 at 408; 1972-1973 at 141.

E. Petition for Restoration of Driving Privileges Is Nonadversarial in Nature

Sections 46.2-358 through 46.2-361 authorize a person who has been adjudicated an habitual offender pursuant to § 46.2-351 to petition the circuit court for restoration of his privilege to drive a motor vehicle in the Commonwealth. These statutes do not provide for the participation of any other party in interest but, rather, allow the court to restore or refuse to restore the privilege and to place conditions on the restoration of the privilege. It is my opinion that such proceedings are not adversarial in nature and, therefore, do not warrant the collection of a writ tax.

F. Petition to Encumber Church Property Is Nonadversarial; Writ Tax Not Authorized

A prior Opinion of this Office concludes, and I agree, that no writ tax should be collected on a petition filed pursuant to § 57-15 to encumber church property and that such a petition is ex parte and, therefore, nonadversarial. See 1970-1971 Att'y Gen. Ann. Rep., supra.
G. Change of Name Petition Is Nonadversarial

The procedure for application to the circuit court for a change of name is detailed in § 8.01-217, which provides for notice and a hearing only in cases of a minor with both parents living, one of which does not join in the application. In such instance, the parent who does not join in the application is served with notice. A hearing is held if the parent objects to the name change. The court otherwise is to grant the petition unless it finds that the change of name is sought for fraudulent purposes or otherwise infringes on the rights of others. It is my opinion that a petition for a change of name is, by its nature, a nonadversarial proceeding and, therefore, is exempt from payment of the writ tax. This conclusion is supported by two prior Opinions of this Office. See Att'y Gen. Ann. Rep.: 1984-1985, supra; 1969-1970 at 296.

H. Expungement of Criminal Records Is Adversarial Proceeding

Section 19.2-392.2 details the procedure for the expungement of certain police and court records. A copy of the petition for expungement is to be served on the Commonwealth's attorney for the city or county in which the petition is filed. The Commonwealth's attorney may file an objection or answer to the petition. The circuit court in which the petition is filed must conduct a hearing on the petition, and the Commonwealth is to be made party defendant to this proceeding. It is my opinion that this procedure for the expungement of certain police and court records is adversarial in nature and that the writ tax is payable when the petition is filed.

I. Petition to Release Deed of Trust Is Adversarial Proceeding

Section 55-66.5 permits a person who owns or has an interest in real estate to petition the circuit court to have a deed of trust released. It is my opinion that § 55-66.5, by providing for notice to the person entitled to the encumbrance and a court hearing on the petition, contemplates that this proceeding is an adversarial one. It is further my opinion, therefore, that the writ tax is payable when the petition to release the deed of trust is filed.

V. Conclusion

In summary, it is my opinion that the writ tax imposed by § 58.1-1727 is required to be paid only when an adversarial action is filed. I have concluded that the following examples of law and chancery cases you have given are nonadversarial in nature and, therefore, do not require the payment of a writ tax: a petition for adoption; a gun permit application; a petition for the appointment of church trustees; a petition for the restoration of driving privileges; a petition to encumber church property; and a change of name petition. I further have concluded that the following examples of law and chancery cases you have given are adversarial in nature and require the payment of a writ tax: a habeas corpus petition; a petition for the expungement of criminal records; and a petition to release a deed of trust. This list obviously is not intended to be inclusive. The statutes authorizing various proceedings must be reviewed on a case-by-case basis, using the factors discussed in Part III above, to determine whether a particular action is adversarial or nonadversarial in nature.

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1Section 58.1-1727 is the successor statute to former § 58.1-3809, which was repealed by the 1985 Session of the General Assembly. See Ch. 221, 1985 Va. Acts 261. The language of present § 58.1-1727 is identical to the language of former § 58.1-3809. The predecessor statutes to § 58.1-3809 were §§ 58-71 to 58-73.

2Certain actions are exempted by statute from the payment of the writ tax. See, e.g., § 24.1-67 (appeal of person denied voter registration); § 31-10 (petition to expend principal funds of infant); § 37.1-67.6 (appeal of commitment or certification order);
S 53.1-40.4 (appeal of order authorizing involuntary admission of mentally ill prisoner to hospital or mental health facility); S 58.1-3959 (petition to ascertain delinquent real estate taxes).

The fact that I conclude that a petition to encumber church property is nonadversarial in nature under the procedure detailed in § 57-15 does not mean that this proceeding may not become adversarial depending upon particular factual situations. See Presbyterian v. Grace Covenant Church, 214 Va. 500, 201 S.E.2d 752 (1974) (trial court erred in denying petition to intervene in proceeding brought pursuant to § 57-15).

Even in this circumstance, the court may determine, after an ex parte hearing, that the notice should be waived if it presents a threat to the health and safety of the applicant. See § 8.01-217.

TAXATION: REAL PROPERTY TAX.
CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE - ASSESSMENTS.

Board of supervisors' directive to officer assessing real estate in county for tax purposes to be dictated by constitutional and statutory requirement for uniform assessments at 100 percent fair market value, not current use. Board may make agricultural property eligible for use value assessment; adherence to statutory requirements. Board may not adopt ordinance classifying all private residences in designated area as real estate devoted to agricultural use in order to make properties eligible for use value assessment.

September 21, 1990

Mr. James W. Hopper
County Attorney for Powhatan County

You ask whether the board of supervisors of a county may direct the officer assessing real estate in the county for tax purposes to assess according to the property's existing use, rather than its highest and best use. You also ask whether a board of supervisors may enact an ordinance designating all private residences in a certain part of the county as "real estate devoted to agricultural use" in order to make those residential properties eligible for use value assessment and taxation under a county ordinance adopted pursuant to §§ 58.1-3229 through 58.1-3244 of the Code of Virginia.


Article X, § 2 of the Constitution of Virginia (1971) establishes a general requirement that "[a]ll assessments of real estate and tangible personal property shall be at their fair market value." The same section of the Constitution further permits the General Assembly to "define and classify real estate devoted to agricultural, horticultural, forest or open space uses," to declare that the public interest requires preservation of those uses and to authorize local governments, within prescribed limits, to allow relief from, or deferral of, portions of the tax that would be payable on such real estate if it were not classified and valued on the basis of such use.

Section 58.1-3201 provides that "[a]ll real estate, except that exempted by law, shall be subject to annual taxation," and requires that all assessments of real estate be at "100 percent fair market value."

Acting pursuant to Article X, § 2, the General Assembly has adopted §§ 58.1-3229 through 58.1-3244, authorizing and detailing procedures for local use value assessment and taxation of the constitutionally permitted classes of property.
Section 58.1-3230 specifies that

'real estate devoted to agricultural use' shall mean real estate devoted to the bona fide production for sale of plants and animals useful to man under uniform standards prescribed by the Commissioner of Agriculture and Consumer Services or devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with an agency of the federal government.

II. Board of Supervisors May Not Order Assessments of Real Estate at Less than Fair Market Value

The answer to your first inquiry is dictated by the constitutional and statutory requirement for uniform assessments at 100 percent fair market value. Va. Const. Art. X, § 2; Va. Code Ann. § 58.1-3201. Fair market value is the price a property will bring when it is offered for sale by a willing seller who is under no compulsion to sell, and is bought by a willing buyer who is under no necessity of having the property. Woman's Club v. City of Richmond, 199 Va. 734, 737, 101 S.E.2d 571, 574 (1958). All uses to which the property may be adapted are to be considered in determining the value, not only the current use. Id. at 738, 101 S.E.2d at 574. The taxing authority must assess in a manner that avoids "all disuniformity reasonably avoidable." Perkins v. Albemarle, 214 Va. 416, 418, 200 S.E.2d 566, 568 (1973). Fair market value, not current use, is the constitutionally mandated criterion. See City of Waynesboro v. Keiser, 213 Va. 229, 234, 191 S.E.2d 196, 199 (1972); see also 1987-1988 Att'y Gen. Ann. Rep. 534.

Any directive by a board of supervisors that certain property should be assessed only on the basis of its existing use manifestly would result in the assessing officer's having to disregard the higher values that some properties would bring if sold by a willing seller and bought by a willing buyer for some higher category of lawfully permitted use. Based on the cases discussed above, I am of the opinion that Article X, § 2 and § 58.1-3201 prohibit a board of supervisors from enacting such a directive, except as provided for agricultural, horticultural, forestal and open space value assessments under §§ 58.1-3229 through 58.1-3244.

III. Board of Supervisors May Not Classify All Residential Property in Designated Area as Agricultural to Make Property Eligible for Use Value Assessments

As discussed above, a board of supervisors may make agricultural property eligible for use value assessment. In doing so, however, the board must adhere to the requirements set forth in §§ 58.1-3229 through 58.1-3244.

The definition contained in § 58.1-3230 makes it clear that, to be eligible for assessment based on agricultural use value, a property must actually be in use for the bona fide production of agricultural products for sale, or be withheld from productive use under a federal soil conservation program. To be deemed agricultural, the use of the property must meet uniform standards adopted by the Commissioner of Agriculture and Consumer Services. A board of supervisors obviously may not ignore the plain language of this statutory definition and adopt its own inconsistent definition that includes properties not actually being put to agricultural use. See 1989 Att'y Gen. Ann. Rep. 113, 115.

Any such designation of residential properties that was limited solely to a particular area of the county would, moreover, violate the requirement that assessments be uniform on all property of the same classification within the county. See Perkins v. Albemarle, 214 Va. at 418-19, 200 S.E.2d at 568-69.
It is my opinion, therefore, that a board of supervisors may not adopt an ordinance of the nature described in your second inquiry.

TAXATION: REAL PROPERTY TAX.

PROPERTY AND CONVEYANCES: FORM AND EFFECT OF DEEDS AND COVENANTS.

FIDUCIARIES GENERALLY: INVENTORIES AND ACCOUNTS.

Trustee required to pay portion of delinquent real estate taxes from proceeds of foreclosure sale, provided proceeds sufficient first to pay expenses of sale and trustee's statutory commission; statutory provision for payment of proratable portion due of real estate taxes for current year from proceeds. Commissioner of accounts should reject accounting not showing compliance by trustee with statutory duty to pay real estate taxes from proceeds of foreclosure sale.

November 16, 1990

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

You ask several questions concerning a trustee's liability for the payment of real estate taxes following a foreclosure sale. You ask whether the trustee must pay delinquent real estate taxes on the foreclosed property from the proceeds of a foreclosure sale and whether real estate taxes must be prorated when the successful bidder at the foreclosure sale is the noteholder. You also ask whether the commissioner of accounts is required to reject a trustee's accounting if it does not show that real estate taxes were paid from the proceeds of the foreclosure sale.

I. Applicable Statutes

Section 55-59.4(A)(3) of the Code of Virginia establishes the order of priority in which a trustee is to apply the proceeds of a foreclosure sale and provides:

The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same, first, to discharge the expenses of executing the trust, including a commission to the trustee of five per centum of the gross proceeds of sale; secondly, to discharge all taxes, levies, and assessment, with costs and interest if they have priority over the lien of the deed of trust, including the due pro rata thereof for the current year.... [Emphasis added.]

Section 58.1-3340 provides that "[t]here shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance.... The seller's liability for taxes and levies shall be effectively prorated contractually."

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 shall be assessed for the taxes for the year beginning on that day."

Section 26-15 requires a trustee to submit an account of sale to the commissioner of accounts within four months after a sale is made pursuant to a recorded deed of trust, mortgage or assignment for the benefit of creditors.
II. Trustee Is Required to Pay Real Estate Taxes, Which Must Be Prorated

Section 58.1-3340 establishes a lien upon real estate for the payment of taxes and levies assessed against that real estate. Section 55-59.4(A)(3) directs the trustee at a foreclosure sale to discharge all taxes and levies that constitute a prior lien over the lien of the deed of trust. No exception to this requirement exists simply because the note-holder is the purchaser at the foreclosure sale. It is my opinion, therefore, that when the note-holder is the successful bidder at the foreclosure sale, the trustee is required to pay delinquent real estate taxes from the proceeds of the sale, provided the proceeds are sufficient first to pay the expenses of sale and the statutory commission to the trustee, as detailed in § 55-59.4(A)(3).

Section 55-59.4(A)(3) expressly provides for payment of the proratable portion due of real estate taxes for the current year from the proceeds of a foreclosure sale. Section 58.1-3340 also provides that the seller's liability for taxes and levies shall be prorated at a sale of real estate. Again, no exception to the proration requirement exists simply because the note-holder is the purchaser. It is my opinion, therefore, that real estate taxes must be prorated when the successful bidder at a foreclosure sale is the note-holder.

III. Commissioner of Accounts Should Reject Accounting Not Showing Compliance by Trustee with Duty to Discharge Delinquent Real Estate Taxes

A trustee who fails to discharge real estate taxes and levies in accordance with § 55-59.4(A)(3), when proceeds are available to do so, has not fulfilled his statutory duty. A commissioner of accounts is an officer of the court charged with the supervision of trustees who are required by § 26-15 to file reports with the commissioner. See 1981-1982 Atty Gen. Ann. Rep. 297, 298. The purpose of the requirement that reports of fiduciaries be filed with the commissioner is to provide a prompt, certain and efficient method for examination and settlement of a trustee's accounts on a foreclosure sale. Carter v. Skillman, 108 Va. 204, 207, 60 S.E. 775, 776 (1908). Where the commissioner's examination reveals a failure by the trustee to comply with a statutory duty, the commissioner should reject the accounting. See Deep v. Rose, 234 Va. 631, 634, 364 S.E.2d 228, 230 (1988).

Based on the above, it is my opinion that a commissioner of accounts should reject an accounting which does not show compliance by the trustee with the statutory duty to pay real estate taxes from the proceeds of a foreclosure sale.

November 14, 1990

The Honorable Charles B. Whitehurst Sr.
Treasurer for the City of Portsmouth
You ask whether certain delinquent personal property taxes due the City of Portsmouth (the "City") may be collected from a substitute trustee pursuant to a foreclosure sale of real property owned by the taxpayer.

I. Facts

You state that, on September 15, 1989, the Portsmouth General District Court granted judgment in favor of the City and against a taxpayer for delinquent personal property taxes. You advise that you do not know whether the judgment has been docketed in the circuit court clerk's office. On September 26, 1990, real property of the taxpayer was sold at a foreclosure sale by the substitute trustee under a deed of trust. On October 5, 1990, your tax collector notified the trustee of the delinquent personal property taxes and demanded payment.

II. Applicable Statutes

Sections 58.1-3910 through 58.1-3960 of the Code of Virginia detail the procedures for the collection of local personal property taxes. In addition to the enforcement of the payment of personal property taxes through a judicial proceeding pursuant to § 58.1-3953, local treasurers may collect delinquent personal property taxes by distrainting and selling the property, without the necessity of obtaining a court order. See §§ 58.1-3919, 58.1-3941, 58.1-3942. An additional means for the collection of delinquent local taxes is provided in § 58.1-3952:

The treasurer or other tax collector of any county, city or town may apply in writing to any person indebted to or having in his hands estate of a taxpayer for payment of taxes more than thirty days delinquent out of such debt or estate. Payment by such person of such taxes, penalties and interest, either in whole or in part, shall entitle him to a credit against such debt or estate. The taxes, penalties and interest shall constitute a lien on the debt or estate due the taxpayer from the time the application is received.

The means provided for the collection of personal property taxes are cumulative. See § 58.1-3953.

Section 55-59.4 details the powers and duties of a trustee in the event of a foreclosure sale under a deed of trust. Section 55-59.4(A)(3) establishes four categories for the distribution of the proceeds of the foreclosure sale:

The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same, first, to discharge the expenses of executing the trust . . . secondly, to discharge all taxes, levies, and assessment, with costs and interest if they have priority over the lien of the deed of trust . . . thirdly, to discharge in the order of their priority, if any, the remaining debts and obligations secured by the deed, and any liens of record inferior to the deed of trust under which sale is made, with lawful interest; and, fourthly, the residue of the proceeds shall be paid to the grantor or his assigns; provided, however, that the trustee as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the grantor's equity, without actual notice thereof prior to distribution; provided further that such order of priorities shall not be changed or varied by the deed of trust. [Emphasis added.]

Section 58.1-3340 provides that "[t]here shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance." (Emphasis added.)
Section 8.01-446 requires the clerk of each circuit court to keep a judgment docket, in which the clerk is to docket any judgment for money rendered in the circuit court and, when required by any person interested who delivers to the clerk an authenticated or certified abstract, any judgment rendered by a district court judge.

Section 8.01-458 provides that every judgment rendered in the Commonwealth by any state court shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, from the time such judgment is recorded on the judgment lien docket of the clerk's office of the county or city where such land is situated.

III. Personal Property Taxes Are Inferior to Lien of Deed of Trust

Section 55-59.4(A)(3) requires the trustee, after payment of the expenses of executing the trust, to discharge all taxes, levies and assessments that have priority over the lien of the deed of trust. While § 58.1-3340 provides that taxes assessed on real estate create a lien prior to any other lien or encumbrance, no similar provision of the Code provides that taxes assessed on the personal property of the taxpayer create a lien on the taxpayer's real property that has priority over pre-existing liens. It is my opinion, therefore, that the City's lien for taxes on personal property in the facts you present is inferior to the lien of the deed of trust.

IV. Docketed Judgment for Personal Property Taxes Creates Lien on Real Estate

After the foreclosure sale proceeds first have been applied to the trust expenses and to the discharge of priority liens for taxes, levies and assessments, the trustee then discharges the remaining debts and obligations secured by the deed of trust, and any inferior liens, in that order. See § 55-59.4(A)(3). Although personal property taxes do not constitute debts and obligations secured by the deed, if the judgment obtained in the general district court was recorded on the circuit court judgment lien docket, the City has a lien of record inferior to the deed on the real estate from the time the judgment was recorded. See § 8.01-458; see also 1986-1987 Att'y Gen. Ann. Rep. 47.

Based on the above, it is my opinion that, if the judgment was recorded, the trustee should satisfy the lien for personal property taxes from any proceeds of the sale remaining after satisfying the prior obligations detailed in § 55-59.4(A)(3). It is further my opinion that, if the judgment was not recorded, the trustee has no obligation to satisfy the judgment for personal property taxes unless he has received an application pursuant to § 58.1-3952, as discussed below.

V. Section 58.1-3952 Creates Lien for Personal Property Taxes on Residue of Proceeds Payable to Grantor Pursuant to § 55-59.4(A)(3)

Section 58.1-3952 authorizes a treasurer or tax collector to apply to a person "having in his hands estate of a taxpayer" for payment of delinquent taxes. When proper application and notice have been given pursuant to § 58.1-3952, the delinquent taxes "constitute a lien on the debt or estate due the taxpayer from the time the application is received." I am not aware of any statute that excludes from § 58.1-3952 property of a taxpayer that is in the hands of a trustee under a sale pursuant to a deed of trust.

Under § 55-59.4(A)(3), the grantor or his assignee under the deed of trust is entitled to receive from the trustee any residue of the proceeds of sale remaining after all prior liens have been satisfied. If any residue is available for distribution to the taxpayer in the facts you present, the trustee is a "person indebted to or having in his hands estate of
[the] taxpayer," as described in § 58.1-3952. Section 55-59.4(A)(3), however, provides that the trustee is not bound by any lien upon this residue unless he or she has actual notice of this lien before distribution, and § 58.1-3952 provides that no lien attaches until notice is given. I am of the opinion, therefore, that in the facts you present, the trustee is obligated to apply any residue due the taxpayer to satisfy the City's personal property tax lien only if the trustee received the application for payment required by § 58.1-3952 before the residue was distributed to the taxpayer.

1If the judgment for personal property taxes had been docketed prior to the deed of trust, the lien of the judgment would, of course, have priority over the lien of the deed of trust.

TAXATION: REAL PROPERTY TAX – SPECIAL ASSESSMENT FOR LAND PRESERVATION – REVIEW OF LOCAL TAXES.

Duty of commissioner of revenue to reduce acreage of unsurveyed remainder parcel in land book; lots not meeting minimum acreage requirement of land-use taxation subject to roll-back taxes; refund due for taxes erroneously assessed and paid on acreage previously conveyed.

February 7, 1990

Mr. Joseph Rigo
Commissioner of the Revenue for York County

You ask several questions arising from the subdivision of a parcel of land into five smaller parcels. The original parcel qualified for land-use taxation.

I. Facts

The original parcel of land owned by A had been assessed since 1958 as 50.49 acres, measured by metes and bounds in the original conveyance. You state that the parcel had been in land-use taxation since the enactment of this program in York County. In 1978, A deeded a portion of his parcel to his son, B. In this conveyance, A thought he was transferring a ten-acre parcel to B. A survey later measured B's parcel at 22.79 acres, however, and not ten acres. When B recorded this plat of survey in 1983, your office corrected B's assessment in the land book to be 22.79 acres, rather than ten acres. A's remaining parcel was not surveyed, and no plat has been recorded on the remainder. A's real estate assessment has not changed.

In 1987, A deeded 15.04 surveyed acres from the original parcel of land to another son, C. A then assumed his unsurveyed remainder parcel consisted of 25.45 acres, as assessed by your office. A deeded the residual property in three parcels to his daughters D, E and F. When those parcels were surveyed, however, they totaled only 13.57 acres, not 25.45, with no land remaining, and each individual parcel was less than five acres.

Based on these facts, you ask whether (1) A's unsurveyed remainder parcel should have been reduced on the land book by the additional 12.79 acres added to B's parcel; (2) roll-back taxes are precipitated by A's transfer of the parcels to D, E and F; and (3) A, upon his written application, is entitled to a refund pursuant to § 58.1-3990 of the Code of Virginia for taxes paid on acreage previously conveyed.
II. Applicable Statutes

Section 58.1-3281 requires the commissioner of the revenue to ascertain all the real estate and the person to whom it is chargeable with taxes on January 1 of each year. Section 58.1-3313 requires the commissioner of the revenue to correct mistakes made in land book entries.

Section 58.1-3241 requires that individual lots split off from qualifying parcels shall meet the minimum acreage requirement to qualify for land-use taxation or be subject to roll-back taxes. Section 58.1-3241(A) provides:

Separation or split-off of lots, pieces or parcels of land from the real estate which is being valued, assessed and taxed under an ordinance adopted pursuant to this article [Article 4, Chapter 32 of Title 58.1], either by conveyance or other action of the owner of such real estate, shall subject the real estate so separated to liability for the roll-back taxes applicable thereto, but shall not impair the right of each subdivided parcel of such real estate to qualify for such valuation, assessment and taxation in any and all future years, provided it meets the minimum acreage requirements and such other conditions of this article as may be applicable. . . .

No subdivision of property which results in parcels which meet the minimum acreage requirements of this article, and which the owner attests is for one or more of the purposes set forth in § 58.1-3230, shall be subject to the provisions of this subsection.

Section 58.1-3233 details the duties of a commissioner of revenue in the assessment of real estate for land-use taxation. The minimum five-acre requirement is described in § 58.1-3233(2).

Section 58.1-3990 authorizes local governing bodies by ordinance to provide for refunds of local taxes erroneously paid and provides, in part:

If such ordinance be passed, and the commissioner of the revenue is satisfied that he has erroneously assessed any applicant with any local taxes, he shall certify to the tax-collecting officer the amount erroneously assessed. . . .

***

No refund shall be made in any case when application therefor was made more than three years after the last day of the tax year for which such taxes were assessed . . . .

III. Remainder of A's Unsurveyed Parcel Should Be Reduced by Additional Acreage Added to B's Parcel

You first ask whether A's unsurveyed remainder parcel should have been reduced on the land book by the additional 12.79 acres shown to be part of B's parcel by the survey and the plat recorded in 1983. Section 58.1-3281 requires a commissioner of the revenue to determine ownership of real estate on January 1 of each year.

In this instance, A's original parcel had been assessed since 1958 on 50.49 acres. The survey of the parcel A conveyed to son B in 1978 showed the new parcel to include 22.79 acres rather than the approximately ten acres deeded by metes and bounds. Prior Opinions of this Office conclude that a commissioner of the revenue should correct acreage figures shown in the land book upon receiving information that the existing land book fig-

The best information available in the facts you present demonstrates that 22.79 acres was conveyed from the original tract of 50.49 acres. It is my opinion that § 58.1-3313 requires a commissioner of the revenue to correct acreage figures shown in the land book to reflect the best information available. It is further my opinion, therefore, that A's unsurveyed remainder parcel should have been reduced on the land book by the additional 12.79 acres shown to be part of B's parcel by the plat recorded in 1983.

IV. Individual Lots Must Meet Acreage Requirement for Eligibility for Land-Use Taxation

You next ask whether A's conveyance of the three residual parcels to children D, E and F subjects these parcels to liability for roll-back taxes.

Each individual lot or parcel separated from a parcel that has been assessed under land-use taxation must satisfy the minimum acreage requirements of § 58.1-3233 to avoid subjecting the separated lot or parcel to liability for roll-back taxes. See § 58.1-3241(A). Prior Opinions of this Office consistently conclude that the separation of lots that do not meet the minimum acreage requirements triggers the application of roll-back taxes. Att'y Gen. Ann. Rep.: 1986-1987 at 306; 1985-1986 at 305; 1982-1983 at 545; 1979-1980 at 339.

In the facts you present, none of the three parcels conveyed by A to children D, E and F contains the required five acres. It is my opinion, therefore, that A's conveyance of the three residual parcels to D, E and F subjects each of these three parcels to liability for roll-back taxes.

V. Taxpayer May Apply for Refund of Taxes Erroneously Paid Due to Error in Number of Acres Assessed

Your final question is whether A, upon his written application, is entitled to a refund pursuant to § 58.1-3990 for taxes paid on acreage previously conveyed. I assume that the jurisdiction you serve has enacted an ordinance pursuant to § 58.1-3990 to provide for refunds of local taxes erroneously paid. Taxes assessed against, and paid by, A on acreage previously conveyed would constitute an erroneous assessment and payment. It is my opinion, therefore, that upon application of A, refunds would be due him for taxes paid on that acreage, subject to the applicable three-year statute of limitations on such refunds.

VI. Summary

To summarize, it is my opinion in the facts you present that:

1. A's unsurveyed remainder parcel should be reduced in the land book by the additional acreage added to B's parcel by survey;

2. Roll-back taxes are due on the parcels transferred to D, E and F because the individual lots do not meet the minimum acreage requirement for land-use taxation; and

3. A is entitled to a refund for the applicable three-year limitation period under an ordinance passed pursuant to § 58.1-3990 for taxes erroneously assessed and paid on acreage previously conveyed.

TAXATION: REVIEW OF LOCAL TAXES - COLLECTION BY DISTRESS, SUIT, LIEN, ETC.

PROFESSIONS AND OCCUPATIONS: ATTORNEYS - FEES.

General district court not authorized to award attorney's fees to locality in suit brought to collect delinquent real estate or personal property taxes.

February 9, 1990

The Honorable Joseph A. Gallagher
Judge, Thirty-First Judicial District

You ask whether a general district court is authorized to award attorney's fees in a suit brought to collect delinquent local personal property and real estate taxes pursuant to § 58.1-3953 of the Code of Virginia. If I conclude that the court is authorized to award attorney's fees in these cases, you also ask whether attorney's fees may be awarded when the locality is represented by the local government attorney's office rather than by private counsel.

I. Applicable Statutes

Section 58.1-3953 provides that payment of local taxes may be enforced in the same manner and to the same extent as the enforcement of demands between individuals. Section 58.1-3957 further provides:

Whenever the services of any attorney employed to collect taxes which are a lien on real estate result in the collection of any such tax, such attorney may be compensated for his services whether or not any suit is instituted for the collection of the tax or the sale of the real estate.

II. General District Court Has No Authority to Award Attorney's Fees to County in Action Brought Pursuant to § 58.1-3953

The general rule in Virginia concerning the award of attorney's fees is well established that, in the absence of a statutory or contractual provision to the contrary, attorney's fees are not recoverable by the prevailing litigant. See, e.g., CUNA Mutual Insurance v. Norman, 237 Va. 33, 38, 375 S.E.2d 724, 726 (1989); Gilmore v. Basic Industries, 233 Va. 485, 490, 357 S.E.2d 514, 517 (1987). Although § 58.1-3957, quoted above, does authorize a locality to compensate attorneys for the successful collection of delinquent real estate taxes whether or not suit is instituted, this statute does not authorize a court to award such fees. See 1974-1975 Att'y Gen. Ann. Rep. 446. I am aware of no statute which authorizes a general district court to award attorney's fees in the circumstances you describe.1

Based on the above, it is my opinion that a general district court is not authorized to award attorney's fees to a locality in a suit brought to collect delinquent real estate or personal property taxes pursuant to § 58.1-3953. Since I conclude that attorney's fees are not authorized in the facts you present, a response to your second question is unnecessary.
Section 54.1-3933 authorizes a court to award attorney's fees to be paid out of money or property under the control of the court. The authority of a court to award attorney's fees pursuant to this statute is confined to cases where counsel discovers, creates or preserves money or property which inures to the common benefit of all. It is not to be exercised where the interests of the party whose fund is sought to be charged are antagonistic to the party for whose benefit the suit is brought. McCormick v. Elsea, 107 Va. 472, 475, 59 S.E. 411, 412-13 (1907). Tax collection suits brought pursuant to § 58.1-3953 involve antagonistic interests of the parties and, therefore, no award of attorney's fees under § 54.1-3933 would be appropriate. To the extent former § 54-71, the predecessor statute to § 54.1-3933, is relied upon in a prior Opinion of this Office for the proposition that a court may award attorney's fees to a locality in a suit to collect delinquent taxes under § 58.1-3953, the Opinion is incorrect. See 1979-1980 Att'y Gen. Ann. Rep. 335, 336.

TAXATION: REVIEW OF LOCAL TAXES - COLLECTION BY DISTRESS, SUIT, LIEN, ETC. - COLLECTION BY TREASURERS, ETC.

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.

Treasurer statutorily authorized to sell goods or chattels seized by distress to satisfy delinquent tax bills; sheriff may sell such goods without writ of fieri facias or other court order. Statutory procedure for sale of distressed property by treasurer, sheriff.

August 3, 1990

The Honorable Stephen L. Moloney
Treasurer for the City of Fairfax

You raise several questions concerning the collection of taxes through the sale of goods or chattels seized by distress. Specifically, you ask (1) whether a local treasurer is authorized to sell goods or chattels seized by distress, (2) whether a sheriff may sell such goods other than pursuant to a writ of fieri facias or other writ issued by a court, and (3) what procedures must be followed by a treasurer or sheriff in the sale of distressed goods or chattels.

I. Applicable Statutes

Section 58.1-3919 of the Code of Virginia grants local treasurers the authority to collect unpaid taxes by distress:

The treasurer, after the due date of any tax, shall call upon each person chargeable with such tax who has not paid the same prior to that time, or upon the agent, if any, of such person resident within the county, city or town for payment thereof; and upon failure or refusal of such person or agent to pay the same he shall proceed to collect by distress or otherwise. Should it come to the knowledge of the treasurer that any person owing taxes is moving or contemplates moving from the county, city or town prior to the due date of such taxes, he shall have power to collect the same by distress or otherwise at any time after such bill shall have come into his hands.

Section 58.1-3941 also addresses the use of distress for collection of local taxes:

Any goods or chattels in the county, city or town belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, constable or collector.
Notice requirements in § 58.1-3942, applicable when distressed goods are subject to a security interest, refer to the sale of these goods by the local treasurer or sheriff:

No security interest in goods or chattels shall prevent the same from being distrained and sold for taxes or levies assessed thereon, no matter in whose possession they may be found.

Prior to such sale for distress, the treasurer, sheriff . . . or other party conducting the sale shall give notice to any secured party of record as his name and address shall appear on the records of the Department of Motor Vehicles, the Department of Game and Inland Fisheries, the State Corporation Commission, or in the office of the clerk of any circuit court where the debtor has resided to the knowledge of the party to whom the tax is owing during a one-year period prior to the sale. Notice shall also be given to any secured party of whom the party to whom the tax is owing shall have knowledge. [Emphasis added.]

Section 8.01-492 details the procedure for the sale of distrained goods:

In any case of goods and chattels which an officer shall distrain or levy on, otherwise than under an attachment ... the officer shall fix upon a time and place for the sale thereof and post notice of the same at least ten days before the day of sale at some place near the residence of the owner if he reside in the county or city and at two or more public places in the officer's county or city. If the goods and chattels be expensive to keep or perishable, the court from whose clerk's office the writ of fieri facias or the distress warrant was issued under which the seizure is made, or if the distress warrant was issued by a clerk, the court of which he is a clerk, may order a sale of the property seized under fieri facias or distress warrant to be made upon such notice less than ten days as to such court may seem proper. At the time and place so appointed, such officer shall sell to the highest bidder, for cash, such goods and chattels, or so much thereof as may be necessary.

II. Treasurer May Distrain and Sell Property to Collect Delinquent Taxes

A prior Opinion of this Office interpreting the scope of a local treasurer's authority to collect delinquent taxes pursuant to the predecessor statutes to §§ 58.1-3919, 58.1-3941 and 8.01-492 concludes that the treasurer may proceed by distress to seize and sell goods to satisfy delinquent tax bills. 1953-1954 Att'y Gen. Ann. Rep. 204. This prior Opinion also concludes that the treasurer may distrain property without a warrant, based upon the tax bill itself, may remove the property from the premises as part of the power to distrain property pursuant to former § 58-1001 (present § 58.1-3941), and may sell the property to satisfy delinquent taxes following the procedure detailed in former § 8-422.1 (present § 8.01-492). [Id. See also § 58.1-3942 (referring to sales for distress by treasurers to collect taxes); Att'y Gen. Ann. Rep.: 1968-1969 at 228; 1963-1964 at 285 (Opinions describing general authority of local treasurers to collect taxes by distress).]

Based on the above, it is my opinion that a treasurer has the authority pursuant to §§ 58.1-3919, 58.1-3941 and 8.01-492 to collect delinquent taxes by the seizure and sale of goods or chattels.

III. Sheriff May Sell Distrained Property Without Writ or Order Issued by Court

As discussed above, §§ 58.1-3941 and 58.1-3942 authorize a sheriff, as well as a local treasurer, to distrain property and sell that distrressed property to collect delinquent taxes. These statutes detail an extrajudicial procedure; no court order or writ of
fieri facias is required to exercise the power to distraint and sell property to collect delinquent taxes. See 1953-1954 Att'y Gen. Ann. Rep. 204. It is my opinion, therefore, that a sheriff may sell distrainted property without a writ of fieri facias or other court order to collect delinquent taxes.

IV. Treasurer, Sheriff Must Follow Procedure in § 8.01-492 in Selling Distrained Goods

Your final inquiry concerns the procedure a sheriff or treasurer must follow in effecting a sale of distrainted goods to pay delinquent taxes. As discussed in Parts I and II of this Opinion, § 8.01-492 details a procedure for the sale of distressed property by these officials, and a prior Opinion of this Office concludes that this procedure should be followed in such sales. 1953-1954 Att'y Gen. Ann. Rep. 204. It is my opinion, therefore, that the procedure described in § 8.01-492 must be followed in the sale of distressed property.

If such commissioner of the revenue, or other official performing the duties imposed on commissioners of the revenue under this title [Title 58.1], is satisfied that he has erroneously assessed such applicant with any such tax he shall correct such assessment. If the assessment exceeds the proper amount, he shall exonerate the applicant from the payment of so much as is erroneously charged if not paid into the treasury of the county or city. If the assessment has been paid, the governing body of the county or city shall, upon the certificate of the commissioner with consent of the town, city or county attorney, or if none, the attorney for the Commonwealth, that such assessment was erroneous, direct the treasurer of the county, city or town to refund the excess to the taxpayer, with interest if authorized pursuant to § 58.1-3991.

B. Local Ordinance Authorizing Correction

In addition to the procedure for administrative correction under § 58.1-3981, § 58.1-3990 authorizes localities to adopt ordinances providing for a separate administrative procedure for correction of an erroneous local tax assessment subject to a general three-year limitation period for refunds:

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

* * *

No refund shall be made in any case when application therefor was made more than three years after the last day of the tax year for which such taxes were assessed.

C. Judicial Correction of Erroneous Local Tax Assessments

Before July 1, 1988, § 58.1-3984(A) allowed application to the circuit court for judicial correction of an erroneous local tax assessment "within three years from the last day of the tax year for which any such assessment is made." Effective July 1, 1988, § 58.1-3984(A) was amended to change the event triggering commencement of the limitation period from the close of the tax year to the making of an assessment. This change was accomplished by substituting the word "in" for "for" in the first sentence. Ch. 282, 1988 Va. Acts 339. As then amended, § 58.1-3984(A) (Cum. Supp. 1988) provided, in part:

Any person assessed with local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law, within three years from the last day of the tax year in which any such assessment is made, apply for relief to the circuit court of the county or city wherein such assessment was made. [Emphasis added.]

Effective July 1, 1989, § 58.1-3984(A) was amended further to extend the limitation period for application to the circuit court from three to five years. 1989 Va. Acts, supra, at 129. At the same time, the close of the tax year again was made the event triggering commencement of the limitation period by replacing the word "in" with the word "for" in the first sentence. Id.
Section 58.1-3984(B) provides:

In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment of any tax is improper or is based on obvious error and should be corrected in order that the ends of justice may be served, and he is not able to correct it under § 58.1-3981, the commissioner of the revenue shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer. Such application may include a petition for relief for any of several taxpayers.  

II. Refunds Pursuant to § 58.1-3980 Not Controlled by Three-Year Limitation Period Provided in § 58.1-3990

In addition to the procedure for administrative correction by a commissioner of the revenue of erroneous local tax assessments pursuant to §§ 58.1-3980 and 58.1-3981, § 58.1-3990 authorizes localities to adopt ordinances providing for the refund of local taxes erroneously paid upon the commissioner of the revenue's certification that he has erroneously assessed the taxes. See Att'y Gen. Ann. Rep.: 1986-1987 at 315, 316; 1985-1986 at 296.

Section 58.1-3990 specifies that refunds under such an ordinance shall be subject to a three-year limitation period commencing with the close of the tax year for which the taxes were assessed. Section 58.1-3980 establishes an independent process for requesting administrative correction of local tax assessments and has its own five-year limitation period.

Based on the fact that §§ 58.1-3980 and 58.1-3981, and § 58.1-3990, establish separate and independent procedures for refunds of local taxes erroneously paid, it is my opinion that a treasurer may refund local taxes pursuant to §§ 58.1-3980 and 58.1-3981 beyond the three-year period prescribed in § 58.1-3990.

III. Ordinance Authorizing Refunds Not Required Before Treasurer May Refund Taxes Pursuant to §§ 58.1-3981 and 58.1-3984

Article 5, Chapter 39 of Title 58.1 establishes three independent procedures for correcting erroneous local tax assessments: (1) administrative correction pursuant to §§ 58.1-3980 and 58.1-3981; (2) administrative correction pursuant to a local ordinance adopted pursuant to § 58.1-3990; and (3) judicial correction pursuant to § 58.1-3984. See Att'y Gen. Ann. Rep.: 1986-1987 at 315, 316; 1985-1986 at 308, 309 n.4. The only procedure requiring the adoption of an ordinance by the local governing body is the second procedure—that provided in § 58.1-3990. See 1985-1986 Att'y Gen. Ann. Rep. 296.

Under the first procedure listed, the administrative correction procedure provided in §§ 58.1-3980 and 58.1-3981, a treasurer may be directed by the local governing body to issue a refund upon certification by the commissioner of the revenue, concurred in by the local government attorney for the jurisdiction involved. See 1986-1987 Att'y Gen. Ann. Rep., supra. Under the third procedure, a circuit court application pursuant to § 58.1-3984 also may result in a court order directing a treasurer to pay a refund.

Section 58.1-3983 provides that application to the local commissioner of the revenue is not required before a taxpayer may apply to the circuit court.

TAXATION: REVIEW OF LOCAL TAXES — GENERAL PROVISIONS OF TITLE 58.1.
The Honorable Charles B. Whitehurst Sr.
Treasurer for the City of Portsmouth

You ask whether, pursuant to its Charter, the City of Portsmouth may charge a fee to a taxpayer who provides legal authority to a treasurer to debit tax payments from bank accounts when such payment is denied for insufficient funds or because the account is closed.

I. Facts

You state that, pursuant to § 58.1-3920 of the Code of Virginia, which authorizes prepayment of local taxes, certain taxpayers have provided you with the legal authority to debit their accounts at certain financial institutions to effect the prepayment of their taxes. You further state that, when the debit is disallowed because of insufficient funds or because the taxpayer's account is closed, you incur a significant amount of administrative time and expense.

II. Applicable Charter Provision and Statutes

The Charter for the City of Portsmouth (the "Charter" and the "City") provides in Article II, § 2.14:

Whenever, in the judgment of council, it is deemed advisable in the enforcement of any ordinance or regulation, in the rendering of services or in the exercise of any of its powers, it may establish and collect such fees and charges as it may find to be reasonable therefor.


Section 15.1-29.4 authorizes a city to "provide by ordinance a fee," not to exceed twenty dollars, when a check or draft for the payment of taxes or any other sums due "is ... returned for insufficient funds or because there is no account or the account has been closed."

Section 58.1-3920 authorizes local treasurers to accept prepayments of local taxes.

III. City May Impose Fees Authorized by Charter


The Charter was enacted by Chapter 471, 1970 Va. Acts 952, and has been amended by the General Assembly several times since its enactment. Section 2.14 of the Charter, which was enacted pursuant to a 1974 amendment, specifically grants the City the
authority to collect reasonable fees and charges in rendering its services and exercising its powers. 1974 Va. Acts, supra. Furthermore, § 15.1-29.4 of the Code, which was enacted originally in 1973 & § 15.1-37.9, grants all counties, cities and towns the authority to charge a fee for the return of a dishonored check. Ch. 105, 1973 Va. Acts 149. No charter provision is necessary for a locality to have this power.

Because they deal with the same subject matter, § 15.1-29.4 of the Code and § 2.14 of the Charter should be construed to give force and effect to each. See Sobole v. Herman, 175 Va. 489, 496, 9 S.E.2d 459, 462 (1940); 1983-1984 Att'y Gen. Ann. Rep. 140, 142. The authority granted to the City in 1974 by § 2.14 of the Charter is in addition to the authority granted in 1973 under § 15.1-29.4. The fact that the City may, in connection with its powers of taxation, enact an ordinance pursuant to § 15.1-29.4 to impose a fee for returned checks does not imply that the City may not also enact an ordinance pursuant to § 2.14 of the Charter to impose a similar fee for a disallowed debit in the facts you present.

Based on the above, it is my opinion that the City has the authority pursuant to § 2.14 of the Charter to enact an ordinance imposing a reasonable fee in connection with providing for the prepayment of taxes by automatic debiting of a taxpayer's account when the debit is refused because of insufficient funds or because the account is closed.

1 Section 58.1-12 likewise requires that, upon providing notice of nonpayment, a penalty of twenty-five dollars is to be added to any tax due under Title 58.1, when the amount shown on the face of a tendered check is not paid by the bank on which it is drawn.

"Such a charge is not in the nature of a penalty but constitutes a fee to cover the administrative expense incurred by the City when the debit is refused. See 1977-1978 Att'y Gen. Ann. Rep. 99. To require that each fee enacted under § 2.14 be specifically enumerated in the Charter or authorized by statute would result in § 2.14 having no effect.

TAXATION: STATE RECORDATION TAX.

Deed conveying fraternity house to nonprofit university qualifies for statutory exemption if intended use of property serves legitimate educational purpose and university will not derive substantial profit; factual determination to be resolved by clerk of circuit court. Legal standards established by Supreme Court of Virginia to be used as guide. "Small profit" merely "incidental" to primary educational purpose does not negate exemption.

August 22, 1990

The Honorable D. Bruce Patterson
Clerk, Circuit Court of Rockbridge County


I. Facts

Washington and Lee University (the "University") has begun a process of acquiring ownership of all fraternity houses in Lexington associated with the University. The University will renovate these houses and lease them back to the fraternities. The fraternity
members will pay rent to their fraternities; each fraternity in turn will pay a lump sum rent to the University.

II. Applicable Statutes

State recordation taxes on deeds conveying real estate are imposed pursuant to § 58.1-801, which provides, in part, that "[o]n every deed admitted to record, except a deed exempt from taxation by law, there is hereby levied a state recordation tax."

A number of exceptions to the recordation tax exist. Subdivision 1 of § 58.1-811(A), which is pertinent to your inquiry, provides an exemption from the tax imposed by § 58.1-801 for any deed conveying real estate "[t]o an incorporated college or other incorporated institution of learning not conducted for profit, where such real estate is intended to be used for educational purposes and not as a source of revenue or profit."

III. Whether Fraternity Owned by University or College Exempt from Recordation Tax Is Question of Fact for Clerk

Pursuant to § 58.1-811(A)(1), the deed in question will be exempt if the intended use of the property is for educational purposes, and not for revenue or profit. Whether a particular property's intended use qualifies for exemption is a question of fact that ultimately must be resolved by you as clerk of the circuit court. See 1985-1986 Att'y Gen. Ann. Rep. 276. Your factual determination should be guided by the legal standards that have been established by the Supreme Court of Virginia in the context of the analogous real property tax exemption for property owned by nonprofit colleges and universities for "educational purposes." That exemption may be lost if the property is "leased or is otherwise a source of revenue or profit." Section 58.1-3603. See also Va. Const. Art. X, § 6(a)(4) (1971); § 58.1-3606(4). Because the University is a nonprofit institution of learning, a deed conveying the fraternity house to the University will qualify for the recording tax exemption provided in § 58.1-811(A)(1) if (1) the intended use of the property conveyed is "educational," and (2) the property will not be "a source of revenue or profit."

The leading case construing the "educational" purpose requirement of the analogous property tax exemption in Article X, § 6(a)(4) of the Constitution of Virginia (1971) is Hanover County v. Trustees, 203 Va. 613, 125 S.E.2d 812 (1962).

In Hanover, the Supreme Court of Virginia held that a college's purchase of lots for subsequent sale as faculty housing served an educational purpose. Therefore, the lots were exempt from the property tax, even though the college would gain a "small" profit or revenue from the transaction. Id. at 617-18, 125 S.E.2d at 815-16. The Court held that the educational purpose requirement was satisfied because (1) evidence showed that the college's governing body had "in good faith . . . made a reasonable determination that the campus must be expanded and as to how the land was to be used in promoting the purpose for which the college was established"; and (2) the "small profit" the college would derive from acquiring, selling and renting the property in question was "a mere incident to the main purpose" of "anchor[ing] the faculty to the college," an action which "has a direct reference to the purposes for which the college was established, and tends immediately and directly to promote an efficient administration." Id. at 617-18, 125 S.E.2d at 816. In addition to faculty housing, the intended uses of the property included preparation of lectures and conferences with students. Id. at 617, 125 S.E.2d at 815.

Although the Court in Hanover recognized the constitutional and statutory requirement that exempt educational property not be used as a source of revenue or profit, the Court indicated that a "small profit" that was merely "incidental" to the college's primary educational purpose would not negate the exemption. Id. at 617-18, 125 S.E.2d at 816. Consistent with the holding in Hanover, a prior Opinion of this Office construes
"source of revenue or profit" under the predecessor to § 58.1-3603 (former § 58-14) to mean a substantial net profit remaining after deducting from gross income all proper expenses. 1975-1976 Att'y Gen. Ann. Rep. 339, 340. Whether a particular land acquisition will actually further an asserted educational purpose and not be disqualified from exemption by the expectation of a substantial profit is another question of fact that must be resolved by the local taxing official. See id.; 1985-1986 Att'y Gen. Ann. Rep. 278.

If the University has provided you with factual information sufficient for you to find that its governing body made a good-faith, reasonable determination that acquisition of the fraternity houses is intended to serve an educational purpose and that any profit derived will be insubstantial and purely incidental to the primary educational purpose, you may properly conclude that the deed qualifies for exemption from the recordation tax under § 58.1-811(A)(1). If, however, you find that the evidence fails to indicate a legitimate educational purpose or indicates that the University will derive a substantial profit, the deed would not qualify for exemption and would be subject to taxation under § 58.1-801.


TAXATION: STATE RECORDATION TAX.

Instrument that neither refinances debt secured by, nor modifies terms or parties of, prior recorded deed of trust taxable as separate deed of trust; recordation tax based on original principal amount, if ascertainable.

June 13, 1990

The Honorable J. Curtis Fruit
Clerk, Circuit Court of the City of Virginia Beach

You ask whether an instrument entitled "Performance Deed of Trust" is subject to the recordation tax imposed by § 58.1-803 of the Code of Virginia and, if so, what amount should be the basis for assessment of the tax. The instrument presented to you secures a purchaser's performance of the seller's obligation to pay a note secured by a prior deed of trust, which previously has been recorded. The instrument provides that the original principal amount of the note is $90,669, but does not indicate the extent to which the principal has been paid.

I. Applicable Statutes

Section 58.1-803(A) provides, in part:

A recordation tax on deeds of trust or mortgages is hereby imposed at a rate of 15¢ on every $100 or portion thereof of the amount of bonds or other obligations secured thereby. . . . In any case in which the amount which may be secured under a deed of trust or mortgage is not ascertainable, the tax shall be based upon the fair market value of the property conveyed, determined as of the date of the deed of trust or mortgage.
Section 58.1-803(D) provides:

On deeds of trust or mortgages, the purpose of which is to refinance or modify the terms of an existing debt with the same lender, which debt is secured by a deed of trust or mortgage on which the tax imposed hereunder has been paid, the tax shall be paid only on that portion of the amount of the bond or other obligation secured thereby which is in addition to the amount of the existing debt secured by a deed of trust or mortgage on which the tax has been paid. The instrument shall certify the amount of existing debt.

Section 58.1-809 provides that:

[S] 58.1-803 [is] not to be construed as requiring the payment of any tax for the recordation of any deed of trust ... or other writing supplemental to any such deed ... theretofore admitted to record ... upon which the tax herein imposed has been paid ... when the sole purpose and effect of the supplemental instrument or writing is ... to secure or to better secure the payment of the amount contracted for in a prior instrument ... or to modify the terms, conditions, parties, or provisions of such prior instruments, other than to increase the amount of the principal obligation secured thereby.

II. Instrument That Neither Refinances Debt Secured by Prior Instrument nor Modifies Terms or Parties of Prior Instrument Taxable Pursuant to § 58.1-803

The purpose of the instrument you describe is to make the purchaser of the property responsible for the performance of the seller's obligations under an existing deed of trust and note—basically, the instrument provides for the assumption of a pre-existing debt. The instrument reflects a new transaction pursuant to which the purchaser and the seller have made a separate agreement. You have not described an agreement that, within the meaning of § 58.1-803(D), "refinance[s] or modify[ies] the terms of an existing debt with the same lender."

Section 58.1-809 applies only to instruments that modify the parties to, or the terms of, a previously taxed deed of trust. See Att'y Gen. Ann. Rep.: 1987-1988 at 562; 1984-1985 at 251, 252; id. at 381, 382; 1983-1984 at 410. The statute does not apply to an instrument like the one you describe that evidences a separate, new agreement.

It is my opinion that this instrument does not represent a modification of an existing deed of trust, as that phrase is used in § 58.1-803(D), or a supplemental writing under § 58.1-809. It is further my opinion, therefore, that the instrument is subject to tax as a separate deed of trust pursuant to § 58.1-803.

III. Recordation Tax Based on Amount of Obligation Secured if Ascertained from Instrument

Section 58.1-803(A) provides that the tax shall be assessed on the basis of the fair market value of the property only where the amount of the obligation cannot be ascertained from the face of the instrument. The instrument presented to you secures the purchaser's performance of the obligation to pay the entire principal balance of the original note and does not demonstrate that any lesser amount is owed. It is my opinion, therefore, that the tax should be assessed on the basis of the original principal amount stated in the instrument presented to you.
TAXATION: STATE RECORDATION TAX.


February 20, 1990

The Honorable David A. Bell
Clerk, Circuit Court of Arlington County

You ask whether a particular deed of trust is subject to the recordation tax imposed by § 58.1-803 of the Code of Virginia. The beneficiary of the deed of trust that is the subject of your inquiry is the National Consumer Cooperative Bank.

I. Applicable Statutes

Section 58.1-812 provides that "[e]xcept as otherwise provided in this chapter [Chapter 8 of Title 58.1], no... deed of trust... shall be admitted to record without the payment of the tax imposed thereon by law." Section 58.1-803 imposes a recordation tax on deeds of trust. Section 58.1-811 grants certain exemptions from the tax, none of which applies to the deed of trust you present for review.

The National Consumer Cooperative Bank (the "Bank") was established by the National Consumer Cooperative Bank Act, 12 U.S.C.A. §§ 3001-3051 (West 1989) (the "Act"). The Act authorizes the Bank to make loans to certain eligible corporations. See 12 U.S.C.A. § 3018. Section 3019(a) further provides:

The Bank, including its franchise, capital, reserves, surplus, mortgages, or other security holdings and income shall be exempt from taxation now or hereafter imposed by any State, county, municipality, or local taxing authority, but any real property held by the Bank shall be subject to any State, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

II. Federal Law Controls When State Law Conflicts Concerning Tax Exemption

A federal law supplants a conflicting state law under the authority of the supremacy clause of the Constitution of the United States. United States Const. art. VI; Gibbons v. Ogden, 9 Wheat. 1, 211 (1824). The tax exemption provisions of the Act prevail over any conflicting state statutes which may be read to authorize the imposition of recordation taxes against the Bank. See 1987-1988 Att'y Gen. Ann. Rep. 504 (federal statute exempting Farm Credit Banks from certain federal, state and local taxation prevails over conflicting state statutes).

III. Recordation Taxes on Bank Prohibited by Act

The Act prohibits any state or local taxation on the Bank except taxes on its real estate. A recordation tax is a tax on the privilege of using the state's registration laws; it is not a tax on real estate. Pocahontas Collieries Co. v. Comm'th, 113 Va. 108, 73 S.E. 446 (1912). A deed of trust with the Bank as beneficiary is within the language of the federal statute exempting the Bank from the imposition of these taxes. It is my opinion, therefore, that the Bank is exempt from payment of the recordation tax imposed by § 58.1-803 on the deed of trust you present.
You include a copy of the deed of trust with your request.

The Supreme Court of Virginia has held that, under a federal statute similar to § 3019(a) of the Act, the recordation tax is unenforceable against a federal land bank. Federal Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935).

This conclusion is in agreement with those from other states that have considered this issue. See Tenn. Dep't Rev. Ltr. Ruling #88-3 to Paul T. Schuerman (scope of Bank's exemption from recordation tax assessed pursuant to Tenn. Code Ann. § 67-4-4-9); letters from James E. Silvey & J.V. Parramore Jr., Fla. Dep't Rev., to Bernard A. Barton Jr. (Nov. 15, 1988) (clarification of Technical Assistance Advisement 88(M)-004 A as to exemption of notes and mortgages from documentary stamp tax; intangible personal property owned by Bank exempt from tax); from John P. Dugan, N.Y. Dep't Tax'n & Fin., to Brian Flanagan, Esq. (Apr. 25, 1985) (opinion advising that no mortgage recording tax due on mortgage to Bank); from Catherine M. Shultz, Md. Off. Att'y Gen., to Hon. Larry W. Shipley (Feb. 21, 1985) (allowance of claim for refund of recordation tax Bank paid for recording of financing statement).

TAXATION: STATE RECORDATION TAXES — RETAIL SALES AND USE TAX — TAX EXEMPT PROPERTY.

FIRE PROTECTION: FIRE DEPARTMENTS AND FIRE COMPANIES.

COUNTIES, CITIES AND TOWNS: GENERAL.

Volunteer fire and rescue companies not exempt from payment of recordation taxes imposed on deeds, deeds of trust or mortgages.

October 19, 1990

Ms. Sharon E. Pandak
County Attorney for Prince William County


I. Facts

You state that volunteer fire companies have been organized in Prince William County to provide volunteer fire and rescue services, and that, pursuant to a county ordinance, an association has been formed consisting of the chief of the Prince William County Fire and Rescue Department and the chief officer of each fire and rescue company in the county. This association enters into a written agreement with the county board of supervisors, consenting to be bound by Article VI of the county code, which authorizes the association to establish policies and procedures for providing a fire and rescue system within the county. Prince William County, Va., Code art. VI, § 9-84 (1989). Member companies are to operate in accordance with such policies and procedures. Id. § 9-87. Public funds may be appropriated to volunteer fire and rescue companies that are members of the association and that comply with the policies and procedures established by the association. Id. § 9-91.

II. Applicable Statutes

Section 58.1-801 imposes a state recordation tax on every deed admitted to record. Section 58.1-803 imposes a recordation tax on deeds of trust and mortgages. Section
58.1-811 grants certain exemptions from the recordation taxes imposed by §§ 58.1-801 and 58.1-813. Section 58.1-811(A)(3) specifically provides that such taxes shall not apply to any deed conveying real estate "[t]o the United States, the Commonwealth, or to any county, city, town, district or other political subdivision of the Commonwealth."

Sections 27-8 and 27-8.1 authorize the formation of volunteer fire companies in any town, city or county. Section 27-14 further authorizes the governing body of a county, city or town to enact ordinances establishing the powers and duties of such fire departments. Section 27-23.6 provides, in part:

Any county may contract with any volunteer fire-fighting companies or associations in the county or towns therein for the fighting of fire in any county so contracting or town therein. If any contract be entered into by a county the fire-fighting company shall be deemed to be an instrumentality of the contracting county and as such exempt from suit for damages done incident to fighting fires therein.

Section 15.1-25 authorizes a county to appropriate money to any rescue squad or association furnishing voluntary fire-fighting services.

III. Volunteer Fire and Rescue Companies Not Exempt from Recordation Tax

Exemptions from the recordation tax are strictly construed against the taxpayer. Commonwealth v. Community Motor Bus, 214 Va. 155, 157, 198 S.E.2d 619, 620-21 (1973); 1977-1978 Att'y Gen. Ann. Rep. 327. Section 58.1-811 contains no express exemption for volunteer fire and rescue companies. Section 58.1-811(A)(3) exempts only federal, state and local governments and political subdivisions of the Commonwealth from payment of the recordation tax. Volunteer fire and rescue companies are not themselves political subdivisions of the Commonwealth. A political subdivision is created by the legislature to exercise some portion of the State's sovereignty in regard to one or more specific governmental functions. See Att'y Gen. Ann. Rep.: 1985-1986 at 149, 150; id. at 336; 1979-1980 at 5, 5-6; 1978-1979 at 305; 1977-1978 at 454. While the General Assembly has authorized the establishment of volunteer fire companies and also has authorized counties to contract with these companies to provide a local governmental service, it has not established such fire companies as political subdivisions of the Commonwealth.

Your inquiry, therefore, concerns whether volunteer fire and rescue companies, nevertheless, may utilize the county's tax exemption in § 58.1-811(A)(3), because the companies and the county are closely related and the companies are deemed to be instrumentalities of the county by operation of § 27-23.6.

An entity's designation as an instrumentality of the county does not, by itself, entitle it to a tax exemption to which the county is entitled. See Roller v. Milk Commission, 204 Va. 536, 132 S.E.2d 427 (1963) (Commission was instrumentality of Commonwealth but was not Commonwealth and, therefore, not entitled to exemption from costs in § 14-197). Each case must be determined by applying the applicable statutes to the particular facts presented.

Section 27-23.6 refers to exemption from damage suits but not to tax exemptions in connection with fire companies' being deemed instrumentalities of counties. When the legislature has intended to grant tax exemptions to volunteer fire and rescue companies, it has done so by specific language. See § 58.1-608(8)(a) (exempting from sales and use tax "[t]angible personal property purchased for use or consumption by a volunteer fire department or volunteer rescue squad not conducted for profit"); § 58.1-3610 (exempting from taxation the real and personal property of "[v]olunteer fire departments and volunteer rescue squads which operate exclusively for the benefit of the general public with-
out charge”). No such specific statutory exemption exists, however, for the recordation tax imposed by §§ 58.1-801 and 58.1-803.

In some instances, the relationship between a government and another entity may be such that the entity receives the benefit of the tax exemption granted the government. In the facts you present, however, the relationship between the county and the volunteer fire and rescue companies does not differ from that contemplated in the other exemption statutes cited above. As a result, it is clear that the General Assembly contemplated this type of relationship but did not grant a specific statutory exemption from the recordation tax. It is my opinion, therefore, that § 58.1-811(A)(3) does not exempt volunteer fire and rescue companies from the payment of recordation taxes imposed by §§ 58.1-801 and 58.1-803.

1 Prior Opinions of this Office conclude that, on the basis of the holding in Federal Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935), the recordation tax may not be imposed on the Administrator of Veterans Affairs or the Small Business Administration because they are instrumentalities of the federal government. See Att'y Gen. Ann. Rep.: 1984-1985 at 381; 1976-1977 at 296. Every case, however, must be determined on the basis of its own facts. See, e.g., R. F. C. v. Menihan Corp., 312 U.S. 81 (1941) (corporate agency of federal government not endowed with government's immunity from litigation costs); 1974-1975 Att'y Gen. Ann. Rep. 477, 478 (property of Marine Corps League not exempt from local property tax). Moreover, while a state may be limited in its ability to impose a tax on an instrumentality of the federal government, no such limitation would apply to a state's ability to tax instrumentalities or political subdivisions of the state.

An entity may be an instrumentality of the government for some purposes but not for other purposes. See Artist v. Virginia Intern. Terminals, Inc., 679 F. Supp. 587 (E.D. Va.), aff'd, 857 F.2d 977 (4th Cir. 1988).

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. - MERCHANTS’ CAPITAL TAX.

Rental videotapes considered "daily rental property" subject to local merchants' capital tax; valued on cost basis for purposes of applying tax.

September 6, 1990

The Honorable Shirley L. Wheeler
Commissioner of the Revenue for Giles County

You ask whether, for purposes of local taxation of merchants' capital, rental videotapes should be valued on a cost basis or by some other method of valuation.

I. Applicable Statutes

Section 58.1-3509 of the Code of Virginia authorizes localities to tax merchants' capital and provides, in part, that "[t]he capital of merchants is segregated for local taxation only."

The definition of merchants' capital in § 58.1-3510, includes daily rental property. Section 58.1-3510(B) defines "daily rental property" as "all tangible personal property held for rental and owned by a person engaged in the short-term rental business . . . ."
II. Rental Videotapes Valued on Cost Basis for Merchants' Capital Tax

Rental videotapes clearly are "daily rental property" subject to the local merchants' capital tax under § 58.1-3510, quoted above. Prior Opinions of this Office conclude that the inventory subject to the merchants' capital tax must be valued on a cost basis. See Att'y Gen. Ann. Rep.: 1987-1988 at 560; 1974-1975 at 479.1

Based on the above, it is my opinion that rental videotapes are to be valued on a cost basis for purposes of applying the merchants' capital tax.

1 Another prior Opinion of this Office concludes that rental videotapes are to be valued by the percentage of original cost method. 1987-1988 Att'y Gen. Ann. Rep. 595. That conclusion was based, however, on the fact that at the time the Opinion was rendered, rental videotapes were taxable as tangible personal property. Effective July 1, 1988, an amendment to § 58.1-3510 made such tapes taxable as merchants' capital. Chs. 572, 591, 1987 Va. Acts 913, 971 (Reg. Sess.). The method of valuation prescribed in that prior Opinion, therefore, is no longer applicable.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. — REVIEW OF LOCAL TAXES.

Ten dollar penalty for late filing applies to returns of taxable tangible personal property; locality may not levy penalty against each item of personalty on return filed with commissioner of revenue.

June 19, 1990

The Honorable G. Steven Agee
Member, House of Delegates

You ask whether a locality, in assessing a penalty for the late filing of a return of tangible personal property, may levy the alternative ten dollar penalty in § 58.1-3916 of the Code of Virginia against each item of personal property listed on the return.

I. Applicable Statutes

Section 58.1-3518 requires every taxpayer owning any tangible personal property on January 1 that is subject to taxation to file a return with the local commissioner of the revenue for the appropriate jurisdiction on a form supplied by the commissioner.

Section 58.1-3916 provides: "No penalty for failure to file a return shall be greater than ten percent of the tax assessable on such return or ten dollars, whichever is greater . . . ."

II. Personal Property Tax Penalty Applies to Return and Not to Each Item of Personalty on Return

Your question anticipates the levy of a penalty of ten dollars against each item of personal property contained in a tangible personal property return, when the sum total of these levies would exceed the penalty of ten percent of the tax due on the property.

Gen. Ann. Rep.: 1987-1988 at 489, 490; 1980-1981 at 63. Section 58.1-3518 requires every taxpayer owning property subject to taxation to "file a return thereof." (Emphasis added.) The applicable language contained in § 58.1-3916 does not suggest that the ten dollar penalty may be charged for each item of personal property on that return. To the contrary, a plain reading of the statute limits the penalty to the greater of ten dollars per return or ten percent of the tax assessable on the return. Based on the above, it is my opinion that a locality may not levy the alternative ten dollar penalty in § 58.1-3916 against each item of property listed on a return of tangible personal property filed with the commissioner of the revenue.

1 Although the Department of Taxation, pursuant to § 58.1-3517, has authorized the use of individual forms for each article of taxable tangible personal property for which individuals are required to file a return, that authorization does not enable a locality to treat each such form, or item thereon, as a separate return for purposes of imposing penalties pursuant to § 58.1-3916.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. - SITUS FOR TAXATION.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE - PROPERTY SEGREGATED FOR LOCAL TAXATION; EXCEPTIONS.

Pleasure boat owned by nondomiciliary but docked in Virginia locality subject to personal property taxation in Virginia.

January 19, 1990

The Honorable Stanley R. Lewis
Commissioner of the Revenue for Middlesex County

You ask whether a Virginia locality may assess personal property taxes on a pleasure boat that is owned by a South Carolina domiciliary but that has been docked in Middlesex County continuously since 1985. You state that a South Carolina locality has notified you that the boat and all other personal property belonging to a South Carolina resident is taxable by South Carolina under its taxation statutes, and you further ask whether this fact would affect the imposition of personal property taxes on the boat in the Commonwealth.

I. Applicable Statutes

Tangible personal property is made subject to local taxation pursuant to Article X, § 4 of the Constitution of Virginia (1971). See also Va. Code Ann. § 58.1-3500 (statute paralleling constitutional provision). Section 58.1-3511 of the Code of Virginia provides, in part, that "the situs for purposes of assessment of . . . boats . . . as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked."

II. Boat Owned by Domiciliary of Another State but Docked in Virginia Locality Subject to Personal Property Tax in Virginia

As quoted above, § 58.1-3511 provides that the test for imposition of a personal property tax on a boat is based on its normal location for garaging, parking or docking on January 1 of the year in which the personal property tax is imposed. See 1979-1980 Att'y Gen. Ann. Rep. 353. Prior Opinions of this Office consistently conclude that the phrase
"normally garaged, docked or parked" means that the personal property being taxed must have been located in a particular jurisdiction for six months or more. See Att'y Gen. Ann. Rep.: 1987-1988 at 592, 593; 1986-1987 at 329, 330; 1979-1980 at 353.

In the facts you present, the pleasure boat has been docked in a Virginia locality for several years, including 1989. It is my opinion, therefore, that this boat is subject to personal property taxation in the Virginia locality in which it has been docked. The authority to impose this tax in Virginia is not affected by the fact that a similar tax may be imposed against the same property by South Carolina or any other jurisdiction outside the Commonwealth. See 1957-1958 Att'y Gen. Ann. Rep. 274, 275.

Because South Carolina law does not alter the rules concerning the personal property taxation of a pleasure boat under Virginia law, I do not address the taxpayer's liability under South Carolina law. I note, however, that the due process clause of the Constitution of the United States prohibits the ad valorem taxation by the owner's domicile of tangible personal property permanently located in some other state. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202 (1905). In other words, an essential requirement to the validity of a tax is that the property be within the territorial jurisdiction of the taxing power. Id. at 204.

TAXATION: TAX EXEMPT PROPERTY — REAL PROPERTY TAX — LOCAL TAXES (GENERAL PROVISIONS).

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE — EXEMPT PROPERTY.

Transaction whereby property leased to charitable organization exempt from real property taxes to be reacquired by lessor for nominal sum at end of term does not transfer ownership for purposes of local real property tax exemption.

August 29, 1990

The Honorable Alma Leitch
Commissioner of the Revenue for the City of Fredericksburg

You ask whether the Tidewater Chapter of the American Red Cross (the "Tidewater Chapter") may take advantage of its status as a charitable organization with respect to real property taxes payable on several office condominiums currently being offered for lease to the Tidewater Chapter by Snowden Office Partnership ("Snowden"). The Tidewater Chapter is considering a transaction whereby it would acquire legal title to the condominiums from Snowden for a substantial fee payable in monthly installments over a five-year period. At the end of this five-year period, the Tidewater Chapter would sell the units back to Snowden for a nominal sum.

I. Applicable Constitutional and Statutory Provisions

Section 58.1-3201 of the Code of Virginia provides that "[a]ll real estate, except that exempted by law, shall be subject to such annual taxation as may be prescribed by law." Real property is taxed to the owner of the property. See § 58.1-3015.

Article X, § 6(a)(6) of the Constitution of Virginia (1971) exempts from taxation

property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be pro-
vided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly and subject to such restrictions and conditions as may be prescribed. [Emphasis added.]

Pursuant to Article X, § 6(a)(6), § 58.1-3609(A) exempts from local real property taxation [the real ... property of an organization classified in §§ 58.1-3610 through 58.1-3621 and used by such organization for a ... charitable ... purpose as set forth in Article X, Section 6 (a) (6) of the Constitution of Virginia ... 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.

Local chapters of the American National Red Cross, including the Tidewater Chapter, are classified as charitable organizations. See § 58.1-3616. In accordance with Article X, § 6(f), § 58.1-3609(B) provides a rule of strict construction for exemptions from local property taxation.

II. Transaction in Facts Presented Does Not Transfer Ownership for Purposes of Tax Exemption

A principal requirement for exemption from taxation pursuant to Article X, § 6(a)(6) and § 58.1-3609(A) is ownership of the property by an organization classified as exempt. See 1984-1985 Att'y Gen. Ann. Rep. 372. Unless the property will be owned by the Tidewater Chapter, therefore, the exemption under § 58.1-3609(A) is not available.

Based on the information you provide, the agreement under consideration, although structured in the form of a purchase, is in substance a lease under which Snowden must be considered the owner of the property for tax purposes. Even though Snowden will not hold actual legal title to the property, it will have the right to receive monthly payments throughout the agreed five-year term and to reacquire legal title for a nominal sum upon completion of that term. Under these circumstances, the Tidewater Chapter cannot be said to have acquired "ownership" of the property. The mere fact that the Tidewater Chapter will hold legal title to the property does not justify shifting the incidence of taxation in order effectively to grant Snowden an exemption from real estate taxation. See 1977-1978 Att'y Gen. Ann. Rep. 433, 434 (legal title alone is not controlling in determining ownership of property for tax purposes).

Based on the facts you present and applying the rule of strict construction required by § 58.1-3609(B), it is my opinion that the condominium units that are the subject of your inquiry would remain fully assessable to Snowden for local real property taxation during the five-year term of the agreement.

WELFARE (SOCIAL SERVICES): CHILD WELFARE, HOMES, AGENCIES, ETC.

Person taking unrelated minor into home, other than by placement from child-placing agency, excepted from licensing requirement for "independent foster home" only when child is legitimate child of such person's bona fide personal friends. Any other instance requires licensure by Commissioner of Social Services.

September 7, 1990

The Honorable George F. Allen
Member, House of Delegates
You ask whether a person who accepts an unrelated pregnant minor to live in his or her home must be licensed or screened by a state agency.

I. Applicable Statutes

Section 63.1-195 defines "independent foster home" as

a private family home in which any child, other than a child by birth or adoption of [the person who maintains the home], resides as a member of the household and has been placed therein independently of a child-placing agency except (i) a home in which are received only children related by birth or adoption of [sic] the person who maintains such home and legitimate children of personal friends of such person . . . .

Section 63.1-196(a) provides:

Every person not an officer, employee or agent of the Commonwealth, county, town or city acting within the scope of his authority as such, who serves as or maintains a child-placing agency, a child-care center, family day-care system or a family day-care home shall obtain an appropriate license from the Commissioner of Social Services.

II. Section 63.1-196(a) Requires Licensure by Commissioner of Social Services for Persons Housing Unrelated Minor Child; Exception for Housing Child of Personal Friends

Under the statutory definition in § 63.1-195, it is clear that any person taking into his or her home a child other than the person's own natural or adopted child is maintaining an "independent foster home," except when the child is related by birth or adoption to the person maintaining the home, or is the "legitimate child[] of personal friends."


It is my opinion, therefore, that a person taking an unrelated minor child into his or her home, other than by placement from a child-placing agency, is excepted from the licensing requirement for "independent foster home[s]" only when the child is the legitimate child of bona fide personal friends of the person accepting the child. In any other instance, in my opinion, § 63.1-196(a) requires that the person providing the home for the child obtain an appropriate license from the Commissioner of Social Services.

When the minor is placed in the home by a child-placing agency, the home must meet the requirements adopted by the State Board of Social Services for "agency foster homes." See §§ 63.1-56, 63.1-205.

WORKERS' COMPENSATION.

CIVIL REMEDIES AND PROCEDURE: ACTIONS.
Private corporation engaged in business unrelated to provision of emergency medical services neither liable in tort to third party for acts committed by employees paid wages by corporation and released from work for volunteer rescue squad activities nor liable to rescue squad members for injuries sustained during rescue squad activities.

March 6, 1990

The Honorable Charles R. Hawkins
Member, House of Delegates

You ask certain questions concerning the potential civil liability of a private corporation, several employees of which serve as members of a volunteer rescue squad.

I. Facts

A town is provided emergency medical services by a single rescue squad or life saving crew ("rescue squad"). The rescue squad is managed and staffed exclusively by community volunteers. A private corporation located in the town is engaged in a business that is unrelated to the provision of emergency medical services. Several of the corporation's employees are volunteer members of the rescue squad. You state that the corporation typically releases a rescue squad member from work if an emergency that requires rescue squad attention occurs while that member is on duty. The corporation also continues to pay that member's wages while the member is absent from work for rescue squad service. The emergencies are unrelated to the corporation's business. Membership or participation in the rescue squad program is not required for employment with the corporation.

II. Corporation Not Liable For Tortious Acts of Rescue Squad Members

You first ask whether the corporation would be vicariously liable to a third party for the tortious act of a rescue squad member committed in the course of the member's response to an emergency call, if the corporation releases the member from his job and continues to pay wages during the member's absence from work. You state that your inquiry is prompted by the rule in Virginia that "[e]ven a volunteer ... is liable for an injury negligently inflicted on the person or property of another." Richmond v. Warehouse Corp., 148 Va. 60, 73, 138 S.E. 503, 507 (1927). Accord Penn v. Manns, 221 Va. 88, 92, 267 S.E.2d 126, 129 (1980).

Under the doctrine of respondeat superior, an employer is vicariously liable for the tortious act of his employee if the employee was performing his employer's business and acting within the scope of his employment. Kensington Associates v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987). The Supreme Court of Virginia has applied a four-factor test to determine the existence of a master-servant relationship:

Four factors enter into determination of the question whether a master-servant relationship exists within the contemplation of the doctrine of respondeat superior, (1) selection and engagement of the servant, (2) payment of compensation, (3) power of dismissal, and (4) power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative.


In the facts you present, it is my opinion that the rescue squad member would not be performing the corporation's business or acting within the scope of the corporation's employment while on a rescue squad call. The corporation exercises no power of control...
over the rescue squad member during the member's rescue squad activity. It is my opin-
ion, therefore, that the corporation in the facts you present would not be liable in tort to
third parties for acts committed by on-duty rescue squad members, even if these mem-
bers are released from work for the corporation and continue to be paid wages by the
corporation for the time spent on rescue squad activities during normal work hours with
the corporation. See N. & W. Ry. Co. v. Haun, 167 Va. 157, 187 S.E. 481 (1936) (corpora-
tion not liable for torts of paid employee acting as special police officer). 1

III. Corporation Also Not Liable for Injuries Sustained by Rescue Squad Members

You also ask whether the corporation in the facts you present would be liable pur-
suant to the Virginia Workers' Compensation Act, §§ 65.1-1 through 65.1-163 of the Code
of Virginia (the "Act"), to rescue squad members for injuries sustained by these individ-
uals during rescue squad activities if the corporation releases the members from work
and continues to pay their wages.

"[T]he Act applies to the contractual relationship of master and servant." Inter-
modal Services, Inc. v. Smith, 234 Va. 596, 600, 364 S.E.2d 221, 223 (1988) (quoting Stover
v. Ratliff, 221 Va. 509, 511, 272 S.E.2d 40, 42 (1980)). "It would seem clear from the
history and purposes and general provisions of the [A]ct that the legislature did not have
in mind as beneficiaries any other persons than such as are commonly understood as fall-
ing within a contractual relationship of master and servant." Mann v. Lynchburg, 129 Va.
the Supreme Court of Virginia applied the four-factor, master-servant test described in
Part II of this Opinion to determine the applicability of the Act. Id. at 511-12, 272 S.E.2d
at 42. The Stover Court reiterated that the dispositive factor in the master-servant rela-
tionship is the power of control over the employee's actions. Id.

Under the same rationale discussed above, and in Part II, the facts you present do
not support a conclusion that a master-servant relationship exists between the corpo-
ration and the rescue squad members during an emergency rescue squad call. It is my opin-
ion, therefore, that the Act does not apply to a claim for compensation by a rescue squad
member arising from such facts. It is further my opinion, therefore, that a corporation
would not be liable pursuant to the Act to rescue squad members for injuries sustained by
these members during rescue squad activities, even if the corporation has released the
members from work and continued to pay their wages.

1 Va. Code Ann. § 8.01-225 provides limited statutory immunity to persons rendering
emergency care and provides, in part, that "[a]ny person who, in good faith, renders
emergency care or assistance, without compensation, to any injured person at the scene
of an accident... shall not be liable for any civil damages for acts or omissions resulting
from the rendering of such care or assistance." A "person" is defined to include "a corpo-
ration." Section 8.01-2.
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(See also General Provisions: Common Law, Statutes and Rules of Construction)

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Definitions. Terms in statute given ordinary meaning in absence of statutory definition.

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Effect given to all provisions of statute so that no part rendered void, inoperative.

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