OPINIONS

of the

ATTORNEY GENERAL

and

REPORT

to the

GOVERNOR OF VIRGINIA

from January 1, 1991 to December 31, 1991

Commonwealth of Virginia

Office of the Attorney General

Richmond

1991
THE 1991 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. 1991).

**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, 1991, to December 31, 1991. Opinions begin on the page on which the headnote first appears.
January 2, 1992

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, 1991, through December 31, 1991, 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 15,400 court cases 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
## Personnel of the Office

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<td>Paul N. Anderson</td>
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<td>Joan Andrews</td>
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<td>Michael G. Ellison</td>
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<td>Troy E. Hedblom</td>
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<td>Gwendolyn A. James</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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ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 1991

Edmund Randolph ............................................ 1776-1786
James Innes ................................................ 1786-1796
Robert Brooke .............................................. 1796-1799
Phillip 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.
Harvey B. Apperson .......................................... 1947-1948
J. Lindsay Almond Jr. .......................................... 1948-1957
Kenneth C. Patty ............................................ 1957-1958
A.S. Harrison Jr. ............................................ 1958-1961
Frederick T. Gray ............................................ 1961-1962
Robert Y. Button ............................................. 1962-1970
Andrew P. Miller ............................................. 1970-1977
Anthony F. Troy ............................................. 1977-1978
Gerald L. Baliles ............................................. 1982-1985
William G. Broaddus .......................................... 1985-1986
Mary Sue Terry ................................................. 1986-

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

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

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

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


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


Board of Med. v. Richter. From Va. Ct. App. Appeal filed under § 8.01-626. Reversed lower court ruling and held that Board's refusal to grant continuance was not "case decision" under Administrative Process Act and that circuit court lacked jurisdiction to enjoin Board from proceeding with formal hearing. Rev'd.


College of Wm. & Mary v. Central Fidelity Bank. From Cir. Ct. Mecklenburg Co. Appeal from determination that taxes be paid from residuary estate. Residuary legatees petitioned to vacate trial court's order. Aff'd.


Commonwealth v. Rafferty. From Cir. Ct. Fairfax Co. Appeal of dismissal of refusal to submit to blood or breath test. Rev'd and remanded.


Cottom v. Sullenberger. Orig. juris. Petition for writ of mandamus to compel judge to allow respondent to effect appeal of right and to suspend distribution of assets of estate. Dismissed.


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

Dixon v. Spain. Orig. juris. Petition for writ of prohibition to have court proceedings stayed and case directed to another judge. Dismissed.
Dixon v. Spain. Orig. juris. Petition for writ of prohibition to have judge stay proceedings in matter until court has full jurisdiction. Dismissed.


Elder v. Evans. Orig. juris. Petition for writs of habeas corpus, mandamus and prohibition to have custody of plaintiff's child released to him. Dismissed.


Hackler v. Circuit Ct. of 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. Denied.


In re Adams. Orig. juris. Petition for writ of mandamus requiring judge to process inmate's petition for name change. Dismissed.

In re Anderson. Orig. juris. Petition for writ of mandamus to have court comply with rules by signing petitioner's statements of facts to establish records for appeal. Dismissed.

In re Clay. Orig. juris. Petition for writ of mandamus to require judge to sign final order and allow petitioner to proceed in forma pauperis. Dismissed.

In re Daily Press. Orig. juris. Petition for writ of prohibition to prohibit judges from presiding in action to avoid appearance of impropriety. Dismissed.
In re Dawson. From Cir. Ct. City of Petersburg. Appeal of denial of clerk's request for appointment of attorney to defend him in civil case. Resolved.

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. Cert. denied.

In re Ferry. Orig. juris. Petition for writ of prohibition to have judge recuse himself in domestic case. Dismissed.

In re Graham. Orig. juris. Petition for writ of mandamus to command court to take witness into custody for trial in Louisiana. Dismissed.

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

In re Jaffe. Orig. juris. Petition for writ of prohibition against court. 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 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. Withdrawn.

In re Simms. Orig. juris. Petition for writ of mandamus to direct judge to enter judgment in proceeding filed by petitioner. Dismissed.

In re Speller. Orig. juris. Petition for writ of mandamus commanding court to act on motion filed in divorce proceeding. Dismissed.

In re Thomas. Orig. juris. Petition for writ of prohibition to have court suspend criminal trial until motions are heard. Dismissed.

In re Weidman. Orig. juris. Petition for writ of prohibition to vacate order issued by lower court consolidating several actions into single trial. Denied.

In re Wessendorf. Orig. juris. Appeal of dismissal of petition for peremptory writ of mandamus to have motion heard, judge recuse himself, and stay of proceedings. Cert. denied.

In re Willmore. Orig. juris. Petition for writ of prohibition to have judge recuse himself from hearing felony indictments in which petitioner is defendant. Dismissed.


Martinez v. Commonwealth. From Va. Ct. App. Appeal based on whether prosecutor in criminal case may argue to jury for specific sentence, and whether objection to argument was properly preserved for appeal. Aff'd.


Moore v. Gillis. From Cir. Ct. City of Richmond. Appeal of dismissal of action alleging unsafe conditions caused plaintiff to be injured when he was hit by slamming door. Appeal on remand denied.


Thomas v. Folkes. Orig. juris. Petition for mandamus or prohibition to have judge suspend criminal trial until petitioner's first attorney is free to represent him. Withdrawn.


Turner v. Williams. From Cir. Ct. Southampton Co. Denial of writ of habeas corpus seeking relief from death sentence. Aff'd.


Worrell Enter. 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. Rev'd.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Antzes v. Commonwealth. From Cir. Ct. Fairfax Co. Appeal of trial court's commitment of defendant to Department of Mental Health, Mental Retardation and Substance Abuse Services after finding of not guilty by reason of insanity under § 19.2-181(1).


Davidson v. Commonwealth. From Cir. Ct. Smyth Co. Appeal of death penalty for multiple murders as part of same act or transaction.


In re Holland Gen. Contractors. Orig. juris. Petition for writ of prohibition to prevent court from taking further action in civil matter.

In re Tijerina. From St. Bar Disciplinary Bd. Appeal of injunction entered against attorney not licensed to practice law in Virginia.

In re Whitehead. Orig. juris. Petition for writ of mandamus directing judge to comply with court rules regarding appeal.


Kirby v. Town of Claremont. From Cir. Ct. Surry Co. Plaintiff requests court to declare easement has been extinguished, to enjoin public use of roadway, and to award damages and other relief.


Llamera v. Commonwealth. From Cir. Ct. Arlington Co. Appeal of trial court ruling allowing expert testimony on significance of particular amount of cocaine, at trial for possession with intent to distribute.

Morrissey v. Virginia St. Bar. From St. Bar Disciplinary Bd. Appeal of dismissal of petition of attorney whose license to practice law has been suspended.

Ridings v. DeHardit. Orig. juris. Petition for writ of mandamus demanding that judge produce records necessary for inmate's pro se criminal appeal.


Tull v. Commonwealth. From Cir. Ct. Accomack Co. Petition for appeal of decision that denial of wetlands permit was taking requiring compensation by Commonwealth.


CASES IN THE SUPREME COURT OF THE UNITED STATES


Coleman v. Thompson. From 4th Cir. Ct. App. Appeal of decision that procedural default cannot be excused because of error by counsel in state collateral proceeding. *Aff'd.*


Wright v. West. From 4th Cir. Ct. App. Appeal of decision about whether federal habeas court may grant relief to state prisoner merely because it disagrees with good faith reasonable decision reached by state court. Pending.
ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

CONSTITUTION OF VIRGINIA: EDUCATION - SCHOOL BOARDS.

State and Local Government Conflict of Interests Act's nepotism standards govern uniformly throughout Commonwealth; state and local governmental entities may not promulgate more restrictive nepotism policies. Construction of Act's provisions creating uniform nepotism policy binding on local school boards not inconsistent with Constitution. Constitution does not empower school boards to adopt more restrictive nepotism standards.

September 12, 1991

The Honorable Frank W. Nolen
Member, Senate of Virginia

You ask whether the powers conferred on a local school board by Article VIII, § 7 of the Constitution of Virginia (1971), allow it to adopt a nepotism policy that is more restrictive than that established by § 2.1-639.16 of the Code of Virginia, a portion of the State and Local Government Conflict of Interests Act, Chapter 40.1 of Title 2.1, §§ 2.1-639.1 through 2.1-639.24 (the "Act").

I. Applicable Constitutional and Statutory Provisions

Article VIII, § 7 provides that "[t]he supervision of schools in each school division shall be vested in a school board."

Section 2.1-639.1, which states the purpose and scope of the Act, provides:

A. The General Assembly of Virginia, recognizing that our system of representative government is dependent in part upon (i) citizen legislative members representing fully the public in the legislative process and (ii) its citizens maintaining the highest trust in their public officers and employees, finds and declares that the citizens are entitled to be assured that the judgment of public officer and employees will not be compromised or affected by inappropriate conflicts. To that end and for the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts this State and Local Government Conflict of Interests Act so that the standards of conflict of such officers and employees may be uniform throughout the Commonwealth.

B. This chapter shall supersede all general and special acts and charter provisions which purport to deal with matters covered by this chapter ....

C. This chapter shall be liberally construed to accomplish its purpose.

Section 2.1-639.16 of the Act generally prohibits school boards from employing, and division superintendents from recommending the employment of, certain designated relatives of either school board members or division superintendents, but makes certain exceptions to that general rule. Section 2.1-639.16 provides, in part:

Notwithstanding any other provision of this chapter, it shall be unlawful for the school board of any county or city or of any town constituting a separate school division to employ or pay any teacher or other school board employee
II. Act Requires Uniform Nepotism Policies


The current language of § 2.1-639.1 is substantially the same as that contained in its predecessor, § 2.1-599, with one significant exception. Section 2.1-599 declared the legislative purpose: "that the minimum standards of conduct of such officers and employees may be uniform throughout the Commonwealth." Id. (Supp. 1986). By deleting the word "minimum" but continuing to require that the standards of conduct be "uniform" in § 2.1-639.1, the General Assembly has confirmed the prior Opinions of this Office, establishing conclusively that the standards set by the Act must apply uniformly across the Commonwealth. See Ch. 1, 1987 Va. Acts 1, 2 (Spec. Sess.).

I am of the opinion, therefore, that the nepotism standards set forth in the Act govern uniformly throughout the Commonwealth, and that state and local governmental entities may not promulgate more restrictive nepotism policies.

III. Constitution Does Not Empower School Boards to Adopt More Restrictive Nepotism Standards

The supervisory power invested in local school boards by Article VIII, § 7 has never been interpreted to provide such boards with absolute autonomy concerning the internal
affairs of their respective school divisions. To the contrary, the Supreme Court of Virginia has recognized that the supervisory power of school boards is not plenary.

In *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977), the Court noted

the School Board's special contention that it has constitutional authority to select the mode or manner of carrying out its functions independent of legislative grant or interference. The Board claims this authority under the mandate of "supervision" expressed in Article VIII, Section 7 of the Virginia Constitution. [Emphasis added.]

The Court answered this claim as follows:

The general power of school boards to supervise does not necessarily include the right to deal with the labor relations of employees in any manner the boards might choose, unfettered by legislative restriction. Indeed, to say that the constitutional power to supervise includes authority to bargain collectively... is to say, at the same time, that the General Assembly could not prohibit school boards from so bargaining; this would be not only unrealistic but also a subversion of the powers of the General Assembly.

217 Va. at 576, 232 S.E.2d at 41 (emphasis added).

This does not suggest, however, that the constitutional vesting of supervisory power in local school boards is a principle without substance. Indeed, the Court has invalidated legislation transferring to other entities those functions indispensable to the daily supervision of schools. See, e.g., *School Board v. Parham*, 218 Va. 950, 243 S.E.2d 468 (1978) (binding arbitration delegated to "outside" panel divested school board of personnel management); *Howard v. School Board*, 203 Va. 55, 58, 122 S.E.2d 891, 894 (1961) (statute allowing referendum on disposal of school property divested school board of essential constitutional function); *Harrison v. Day*, 200 Va. 439, 452, 106 S.E.2d 636, 646-47 (1959) (statute authorizing Governor temporarily to close schools divested local school boards of constitutional powers); cf. *Russell County School Bd. v. Anderson*, 238 Va. 372, 384 S.E.2d 598 (1989) (advisory panel does not divest school board of supervisory power). By adopting the Act and imposing a uniform nepotism policy, however, the General Assembly has not transferred or delegated school system management to a third party or outside entity. See 1982-1983 Att'y Gen. Ann. Rep. 444, 446 (standards of quality imposing "floor" for teacher salaries does not result in school board's "total divestiture of daily management responsibility"). Moreover, the Supreme Court of Virginia has never ruled that the power to establish a more restrictive nepotism policy constitutes an indispensable function essential to the daily supervision of the schools.

The school employment relationships prohibited by § 2.1-639.16 were prohibited long before the adoption of the Act. See Ch. 471, 1928 Va. Acts 1186. The Act is designed, therefore, to incorporate traditional school board antinepotism standards. See Ch. 176, 1971 Va. Acts 387 (Spec. Sess.), repealing former § 22-208 and placing it in Title 2.1.

Based on the above, it is my opinion that a construction of §§ 2.1-639.1 and 2.1-639.16 of the Act to create a uniform nepotism policy binding on local school boards is not inconsistent with Article VIII, § 7. It is further my opinion, therefore, that a school board may not validate or decriminalize conduct or employment relationships that the General Assembly has prohibited in the Act. Similarly, a school board may not fashion its own stricter amendment to § 2.1-639.16 by refusing to recognize exceptions to, or broadening the prohibitions under, the uniform nepotism standard set by that section.
ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY - GENERAL PROVISIONS; QUALIFICATION; ELIGIBILITY, ETC.

No constitutional or statutory provision prohibits spouses from holding separate constitutional offices at same time in same jurisdiction. Attorney General declines to render conflict of interests advisory opinions concerning local officials, unless requested by local official to review conclusion of Commonwealth's attorney that official's interest or conduct constitutes violation of Act.

March 27, 1991

The Honorable Donald L. Boswell
Sheriff for Henrico County

You ask whether a husband and wife may hold office as sheriff and circuit court clerk, respectively, at the same time in the same jurisdiction.

I. Applicable Constitutional and Statutory Provisions

Article VII, § 4 of the Constitution of Virginia (1971) establishes the local offices of sheriff and circuit court clerk. Article VII, § 6 contains the Constitution's restriction on the holding of multiple constitutional offices and provides, in part, that, "[u]nless two or more units exercise functions jointly as authorized in §§ 3 and 4 [of Article VII], no person shall at the same time hold more than one office mentioned in this Article."

Section 15.1-50(A) of the Code of Virginia contains the parallel statutory provision to Article VII, § 6, and provides that "[n]o person holding the office of treasurer, sheriff, attorney for the Commonwealth, clerk of the court in the office of which deeds are recorded, [or] commissioner of the revenue ... shall hold any other office mentioned in Article VII of the Constitution at the same time ...." This statute then details exceptions to this prohibition, none of which addresses the question you raise.

The State and Local Government Conflict of Interests Act, §§ 2.1-639.1 through 2.1-639.24 (the "Act"), details the standards of ethical conduct for both state and local officers, including sheriffs and circuit court clerks. The Act defines certain conduct that generally is prohibited, as well as other prohibited or restricted interests in contracts that are entered into and transactions that are considered by state and local agencies, officials and employees in the course of their public duties. Section 2.1-639.23(B) expressly provides that "[t]he provisions of [the Act] relating to an officer or employee serving at the local level of government shall be enforced by the Commonwealth's attorney within the political subdivision for which he is elected."

Section 2.1-639.23(B) further provides, in part:

Each Commonwealth's attorney shall render advisory opinions as to whether the facts in a particular case would constitute a violation of the provisions of [the Act] to the governing body and any local officer or employee in his jurisdiction and to political subdivisions other than a county, city or town, including regional political subdivisions whose principal offices are located within the jurisdiction served by such Commonwealth's attorney. In case the opinion given by the Commonwealth's attorney indicates that the facts would
constitute a violation, the officer or employee affected thereby may request that the Attorney General review the opinion. A conflicting opinion by the Attorney General shall act to revoke the opinion of the Commonwealth's attorney.

II. No Constitutional or Statutory Provision Prohibits Spouses Serving as Constitutional Officers at Same Time in Same Jurisdiction

The only prohibition set forth in the constitutional and statutory provisions quoted above concerns a person's inability to serve in more than one constitutional office. That prohibition does not extend to one person serving as a constitutional officer in a particular jurisdiction and his or her spouse serving at the same time in another constitutional office in the same jurisdiction. Prior Opinions of this Office and court decisions consistently conclude that a constitutional officer—a sheriff, Commonwealth's attorney, circuit court clerk, treasurer, or commissioner of the revenue—is a popularly elected, independent local official who is not subject to the control and jurisdiction of the local governing body of the county or city served. See, e.g., Himple v. Moore, 673 F. Supp. 758, 759 (E.D. Va. 1987); Sherman v. City of Richmond, 543 F. Supp. 447, 449 (E.D. Va. 1982); Atty Gen. Ann. Rep.: 1986-1987 at 130, 131; 1978-1979 at 289, 291; 1976-1977 at 46, 47.

Recognizing that these officials are popularly elected and enjoy considerable independence in the performance of their duties, the General Assembly has not enlarged upon the prohibitions detailed in the Constitution of Virginia and in § 15.1-50(A).

Based on the above, and with the possible exception of the provisions of the Act discussed below, it is my opinion that no constitutional provision or statute prohibits a husband and wife from holding office as the sheriff and the circuit court clerk, respectively, at the same time in the same jurisdiction.

III. Duty of Commonwealth's Attorney to Render Advisory Opinions on Possible Conflict of Interests for Local Official

As discussed above, § 2.1-639.23(B) provides that the local Commonwealth's attorney has exclusive authority to enforce the Act with respect to officers and employees of local government. If the Commonwealth's attorney concludes that certain facts presented by the local official's interest or conduct constitute a violation of the Act, the local official may ask this Office to review that conclusion. "A conflicting opinion by the Attorney General shall act to revoke the opinion of the Commonwealth's attorney." Section 2.1-639.23(B).

Because the Act places responsibility for the initial decision on conflict of interests questions on the Commonwealth's attorney, and because the local official involved ultimately may call upon the Attorney General to review that initial decision, this Office consistently has declined to render conflict of interests advisory opinions concerning local officials, including constitutional officers, unless the request is initiated through the process described above. You should submit your inquiry concerning the possible application of the Act, therefore, to the Commonwealth's attorney for your county.

1Indeed, I am aware that, in several Virginia jurisdictions, spouses now serve as constitutional officers in the same county or city.
Act's notice of meeting requirements met when public body notifies correspondent that
town council meets at same time and place on certain day every month and gives notice
of any special meetings. Date, time and place of reconvened meeting may be announced
at regularly scheduled meeting; further written notice not required.

August 5, 1991

The Honorable R. Beasley Jones
Member, House of Delegates

You ask several questions concerning The Virginia Freedom of Information Act,
§§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"). You first ask whether a
public body, asked to provide notice on a continual basis of meetings held by that body,
has complied with the Act by responding that the body meets "on the second Tuesday of
every month." You also ask whether, when notice has properly been given for a public
meeting, additional notice must be given if the meeting is recessed and then reconvened
on another date.

I. Facts

You state that a news correspondent for a radio station requested that the local
town council notify him of all council meetings. The mayor responded by letter that the
council meets on the second Tuesday of each month, and that the correspondent would be
notified of any special meetings. You also state that the correspondent contends that the
Act requires notification "on a continual basis" and the one letter mailed to the corre-
spondent, described above, does not satisfy that requirement.

You further state that the council recessed a regularly scheduled meeting on
April 9, 1991, and reconvened the meeting on April 23, 1991. No written notice was given
to the correspondent of the reconvened meeting, although the mayor announced in open
session at the conclusion of the April 9, 1991, meeting that the council would reconvene
on April 23, 1991.

II. Applicable Statute

Section 2.1-343 of the Act concerns public meetings and provides, in part:

Notice including the time, date and place of each meeting shall be furnished
to any citizen of this Commonwealth who requests such information. . . .
Requests to be notified on a continual basis shall be made at least once a
year in writing and include name, address, zip code and organization of the
requester. Notice, reasonable under the circumstance, of special or emer-
gency meetings shall be given contemporaneously with the notice provided
members of the public body conducting the meeting.

III. Public Bodies Required to Give Notice of Meeting

Dates; Adequate Notice Given in Facts Presented

As discussed above, § 2.1-343 of the Act requires that notice be given of the "time,
date and place of each meeting" of a public body to any citizen requesting that information,
and also that "[r]equests to be notified on a continual basis shall be made at least
once a year in writing and include name, address, zip code and organization of the
requester."

The purpose of the Act is to ensure "the people of this Commonwealth . . . free
entry to meetings of public bodies wherein the business of the people is being conducted."
Section 2.1-340.1. In the facts you present, the correspondent asked to be notified of council meetings. The mayor notified the correspondent that regular council meetings are held on the second Tuesday of each month and that further notice would be provided of any special council meeting.

It is a well-established rule of statutory construction that absurd results in construing statutes are to be avoided. *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); 1986-1987 Att'y Gen. Ann. Rep. 307, 308. Nothing in the Act requires a public body to repeat identical regular meeting notices when the correspondent could merely mark his calendar to attend the meetings on the same day, at the same time and place each month. It is my opinion, therefore, that the requirements of the Act are met in the facts you present when the public body notified the correspondent that the body meets at the same time and place "on the second Tuesday of every month," and notifies the requester of any special meetings.¹ To require a public body to notify a requester prior to each regularly scheduled meeting would impose a substantial administrative burden upon public bodies that is not required by the Act.

IV. Date and Time of Reconvened Meeting May Be Announced at Regularly Scheduled Meeting; Further Written Notice Not Required

A prior Opinion of this Office concerns facts substantively similar to those you present and concludes that

[where the public has been given notice as required by law in regard to a public hearing, I am of the opinion that the hearing may be continued for conclusion to a date, time and place certain in the future, provided that the governmental body in question announces to the public at the public hearing the need to recess and reconvene the public hearing. Unless otherwise required by law, re-advertising the continued public hearing by newspaper publication is not necessary and, in many cases, would not be practical if the public hearing were recessed or adjourned from day to day as permitted, for example, by § 15.1-162 of the Code in local budget hearings.


Based on the above, it is my opinion that when notice has properly been given for a public meeting, the requirements of the Act are satisfied if the public body announces at that meeting the date, time and place when the meeting will be reconvened. The continuance of a meeting by a public body, however, should not be employed as a ruse to avoid the notice requirements of the Act.

¹I am aware that a prior Opinion of this Office concludes that former § 2.1-343 "permits an individual to request the unit of government that he be notified on a continuous basis of the time and place of each meeting of said governmental body." See 1972-1973 Att'y Gen. Ann. Rep. 494, 495. There is no indication in this prior Opinion that the regular meeting notice provided by the mayor in your inquiry was given. Likewise, there is no indication that regular, rather than special, meetings were the subject of the prior Opinion.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.
General Assembly intended Act to apply to "official records" in existence at time particular request for records made; otherwise, requested records could not be produced by public body within required five working day period. Act does not authorize person to make continuing request for records not in existence at time request made.

March 7, 1991

Dr. C.M.G. Buttery
State Health Commissioner, Department of Health

You ask whether The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), authorizes a person to make a continuing request for official records that are not in existence at the time the request is made. As an example, you state that a well driller may request copies of all applications for well permits to be filed with the Department of Health in the future so that he may contact the applicants to advise them of his services.

I. Applicable Statutes

Section 2.1-340.1 describes the policy underlying the Act and further provides that the Act should be liberally construed to ensure the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies.

Section 2.1-341 defines the term "official records" as

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

Section 2.1-342 provides that all "official records" not subject to one of the Act's 44 exemptions from mandatory disclosure are open to inspection and copying by any Virginia citizen and specifies the procedure for requesting official records from a public body. A response by a public body to a request for inspection and copying of an "official record" generally must be made within five working days following the receipt of the request. See § 2.1-342.

II. Legislative Intent, Based upon Statutory Language, Is That Act Apply Only to Existing Records

It is a well-established rule of statutory construction that various provisions of a statute must be read as a consistent and harmonious whole, with effect given to each word. Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984); VEPCO v. Prince William Co., 226 Va. 392, 397-98, 309 S.E.2d 308, 311 (1983); Att'y Gen. Ann. Rep.: 1987-1988 at 563, 564; 1985-1986 at 177, 178. The primary object in the interpretation of a statute is to ascertain and give effect to the legislative intent underlying the statute. See Volland v. Arlington Co. Electoral Bd., 218 Va. 674, 679, 222 S.E.2d 793, 797 (1976). In defining the term "official records" as "written or printed books . . . prepared, owned, or in the possession of a public body," the General Assembly clearly intended that the Act apply only to official records in existence at the time the particular request for records is made. Otherwise, the requested records could not be produced by the public body within the five working day period required by § 2.1-342(A). Indeed, § 2.1-342(A) expressly provides that "[p]ublic bodies shall not be required to create . . . a particular requested record if it does not already exist."
The conclusion that the definition of "official records" in § 2.1-341 applies only to records in existence at the time the particular request for records is made is further supported by the fact that the General Assembly has authorized citizens to make a request for continuing notifications of public meetings under the Act. See § 2.1-343. If the legislature had intended to authorize such continuing requests for documents, in addition to meeting notifications, it could have done so expressly.

III. Applies Only to Records in Existence and in Custody of Public Body at Time Request for Official Records Is Received

Based on the above, it is my opinion that the Act does not authorize a person to make a continuing request for official records that are not in existence at the time the request is made. The Act applies to official records that are in existence and in the custody of a public body at the time the request for these records is received. Compare 86 Conn. Op. Att'y Gen. 79 (1986) (under substantively similar definition of "public records" in Connecticut Freedom of Information Act, "it is clear that it is only existing information which must be disclosed").

The Supreme Court of Virginia has held that "the purpose or motivation behind a request is irrelevant to a citizen's entitlement to requested information" pursuant to the Act. Associated Tax Service v. Fitzpatrick, 236 Va. 181, 187, 372 S.E.2d 625, 629 (1988).

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

MINES AND MINING: GENERAL AND ADMINISTRATIVE PROVISIONS.

Certificates issued by Board of Examiners of Department of Mines, Minerals and Energy considered public documents, not exempt from disclosure under Act. Names and qualifications of job applicants and notes evaluating identifiable applicants considered "personnel records," exempt from mandatory disclosure. Test/examination used by Department for rating or selection of job applicants and results of individual applicants' performance on such test exempt from mandatory disclosure as personnel record. Document containing general selection or rating criteria applicable to all candidates for particular position subject to disclosure under Act; ratings of individual applicants using such criteria considered personnel records exempt from mandatory disclosure to persons other than applicants.

December 5, 1991

The Honorable J. Jack Kennedy Jr.
Member, Senate of Virginia

You ask the following questions concerning The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"):  

1. Does the Act require the Board of Examiners (the "Board") of the Department of Mines, Minerals and Energy (the "Department") to disclose the number, date of issuance and type of certificates the Board issues to persons certified to work in mines?

2. Does the Act require the Department to disclose the name and qualifications of applicants for employment with the Department, the selection panel's notes concerning each applicant interviewed and the names of the applicants recommended for employment?
3. Does the Act require the Department to disclose the selection or rating criteria used to rank applicants at various times during the selection process, and the ranking of individual applicants?

I. Applicable Statutes

The Act is designed to ensure "the people of this Commonwealth ready access to records in the custody of public officials." Section 2.1-340.1(A), set out in Ch. 538, 1990 Va. Acts 784, 785 (Reg. Sess.). Section 2.1-342(A) provides, in part, that,

[except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of this Commonwealth, representatives of newspapers and magazines with circulation in this Commonwealth, and representatives of radio and television stations broadcasting in or into this Commonwealth.

Section 2.1-342(A) further provides:

Public bodies shall not be required to create or prepare a particular requested record if it does not already exist. Public bodies may, but shall not be required to, abstract or summarize information from official records or convert an official record available in one form into another form at the request of the citizen.

The term "official records," as it is used in the Act, is defined 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 2.1-341.

A "public body" is defined as "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." Id. The public bodies listed in the definition of "meeting" include "any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or any political subdivision of the Commonwealth." Id.

Section 2.1-342(B) provides:

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

** **

3. State income, business, and estate tax returns, personal property tax returns, scholastic records and personnel records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof...
9. Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by any public body.

As used in this subdivision 9, "test or examination" shall include (i) any scoring key for any such test or examination, and (ii) any other document which would jeopardize the security of such test or examination. Nothing contained in this subdivision 9 shall prohibit the release of test scores or results as provided by law, or limit access to individual records as is provided by law. However, the subject of such employment tests shall be entitled to review and inspect all documents relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, such test or examination shall be made available to the public.

Chapters 1 (§§ 45.1-1.1 through 45.1-33) through 14 (§§ 45.1-158 through 45.1-161) of Title 45.1 comprise the Virginia Mine Safety Law of 1966. See § 45.1-1.10.

Section 45.1-12 provides:

The Board may require certification of persons who work in mines . . . .

The Board may require examination of applicants for certification, and may require such other information from applicants as may be necessary to ascertain competency and qualifications for each particular job skill. The examinations herein provided for shall be conducted under such rules, conditions and regulations as the Board shall deem most efficient . . . .

Section 45.1-14 describes the types of certificates of competency which the Board is authorized to grant.

II. Certificates Issued by Board Not Exempt from Disclosure Under Act

You ask whether the Act requires the Board to disclose to a third party the number, date of issuance and type of certificate issued to a person certified to work in mines. For purposes of the Act, it is important to distinguish between a request for information and a request for documents. Section 2.1-342 concerns only the latter. The Act thus guarantees citizen access only to existing written documents and other physical records. It specifically does not require a public body to create new records, to abstract or summarize information from existing official records, or to convert records from one form to another. I assume, therefore, for purposes of this Opinion, that your question concerns the disclosure of copies of actual individual certificates, or that a document already exists that lists certificate types, numbers and issuance dates for current certificate holders. If no such list exists, the Board is not required to create one. See § 2.1-342(A)(4).

Prior Opinions of this Office interpreting the "scholastic records and personnel records" exemption from disclosure under § 2.1-342(B)(3) have limited its application to records within the Act's intended scope of confidentiality that contain personal information concerning individual students or employees. See, e.g., 1974-1975 Att'y Gen. Ann. Rep. 581 (report of school-by-school achievement test results not identifying performance of individual students is subject to disclosure). While the certificates issued by the Board reveal the fact that the certificate holder has passed the tests and met the other relevant criteria for certification, they do not contain test scores or other indicators of individual performance, nor do they reveal other information of a personal nature that the certificate holder may have provided on his or her application to be certified.

In fact, the only obvious purpose of issuing these certificates in written form is to give the certificate holder and the public documentary proof that has been certified. For that reason, in my opinion, the certificate itself is fundamentally a public document that, in contrast to employment applications, evaluation forms and other personnel records prepared or maintained by an agency for its own internal administrative purposes, falls outside the scope of the exemption in § 2.1-342(B)(3), and must be disclosed on request. It is further my opinion that a document listing only the information contained on one or more such certificates, if such a document exists, also would be subject to disclosure under the Act.

III. Names of Employment Applicants, Qualifications of Identifiable Applicants and Evaluator's Notes of Identifiable Applicants Are "Personnel Records" Exempt from Mandatory Disclosure

You next ask whether the Act requires the Department to disclose the name and qualifications of applicants for employment, the selection panel's notes concerning each applicant interviewed and the names of the applicants recommended for employment during the selection process.

Prior Opinions of this Office conclude that applications for public employment are personnel records. Att'y Gen. Ann. Rep.: 1981-1982 at 433; 1973-1974 at 456. Another prior Opinion concludes that § 2.1-342(B)(3) exempts a local governing body from disclosing the names and applications of applicants for appointment to a position on a public board or commission. See 1981-1982 Att'y Gen. Ann. Rep., supra, at 434. It is my opinion, therefore, that under § 2.1-342(B)(3), the Board and the Department are not required to disclose the names, applications or qualifications of applicants for employment, notes of interviews with applicants, or the names of applicants recommended for employment.

A report that evaluates the performance of a city school superintendent also has been considered a personnel record. See 1974-1975 Att'y Gen. Ann. Rep. 580. Notes evaluating an identifiable employment applicant are similar to the performance evaluation of an employee.

IV. Tests Used to Rate Applicants and Ratings of Individuals Exempt from Disclosure Under Act; General Selection Criteria Not Exempt

Your third question is whether the Act requires the Board and the Department to disclose the selection or rating criteria used to rank job applicants at various times during the selection process, and the ranking of individual applicants.

Section 2.1-342(B)(9) exempts from disclosure "[a]ny test or examination used, administered or prepared by any public body for purposes of evaluation of . . . (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion." In my opinion, therefore, any test or examination used by the Department for the rating or selection of job applicants would be exempt from mandatory disclosure.
under § 2.1-342(B)(9). It is further my opinion that the results of individual applicants' performance on such a test would be exempt from disclosure as a personnel record. See § 2.1-342(B)(3), (9).

Assuming that a document exists containing general selection or rating criteria that apply to all candidates for a particular position, no exemption from the mandatory disclosure provisions of the Act applies to such a document, and it is my opinion that it must be disclosed. It is further my opinion, however, based on the above, that ratings of individual applicants using such criteria are personnel records exempt from mandatory disclosure to persons other than the applicants themselves. See 1974-1975 Att'y Gen. Ann. Rep. 580.

1But see 1979–1980 Att'y Gen. Ann. Rep. 301, concluding that § 2.1–342(B)(3) exempts teaching certificates from disclosure under the Act because they "contain the professional qualifications of teachers." I am advised by the Department of Education, however, that the teacher certificate in use at the time that Opinion was rendered contained detailed information about the individual teacher more clearly personal in nature than anything found on the certificate about which you inquire.

2You note that the Commonwealth of Virginia's Application for Employment, DPT Form 10-012, contains a statement that "[i]nformation contained on this application may be disseminated to other agencies, nongovernmental organizations or systems on a need-to-know basis for good cause shown as determined by the agency head or designee." While this statement may permit the Board or the Department to make limited disclosure of application information, it does not require any disclosure. The same is, of course, true of § 2.1–342(B), which exempts various categories of records from mandatory disclosure, but does not prohibit disclosure of any record.

"Section 2.1–342(B)(9) further provides that "[w]hen ... any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, such test or examination shall be made available to the public." This exception to the general exemption for tests would apply to any test no longer used by the Department.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

POLICE (STATE): DEPARTMENT OF STATE POLICE.

Terms "inquiry" and criminal "investigation" synonymous for purposes of Department of State Police's authority to conduct investigations when requested by certain officials; State Police public body within meaning of Freedom of Information Act; citizen's request for documents concerning investigation falls within disclosure exemption requirements of Act. State Police expressly prohibited from disclosure of records related to ongoing criminal investigation; may disclose records of completed investigation.

June 21, 1991

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask several questions concerning the applicability of various provisions of The Virginia Freedom of Information Act to certain hypothetical facts.
1. Facts

The hypothetical situation you present involves "[a] citizen [who] would request the Department of State Police to provide copies of memoranda, correspondence, interviews and other documents related to a completed inquiry into possible criminal offenses that came to the Department's attention through a story appearing in the media." You further state that "[t]he request would specifically ask for documentation pertaining to who authorized the inquiry, when it was authorized, the purpose of the inquiry and names of possible targets of the inquiry."

You state that "may also assume that persons were interviewed by agents of the State Police and, following those interviews, the persons who were interviewed reported the facts of the interviews and the content of the interviews to representatives of the media." You ask that

I assume further that at least one of those persons interviewed initiated the contact with the press shortly after the completion of the interview. That person has been subsequently giving interviews to various reporters and has discussed the contents of the interviews. Another person interviewed confirmed the interview with the press and did not make any assertion of confidentiality as to the contents of the interview.

Based upon these assumed facts, you ask the following three questions:

1. Would the request for information as to documentation pertaining to who authorized the inquiry, when it was authorized, the purpose of the inquiry and the names of the possible targets fall within the exemption provided in § 2.1-342(B)(1) of the Code of Virginia?

2. Would the request for documentation pertaining to who authorized the inquiry, when it was authorized, the purpose of the inquiry and the names of possible targets fall within an exemption under § 2.1-342(B)(6) . . . ?

3. Bearing in mind that the hypothesis presented contemplates that the inquiry is complete, would the prohibitions contained in § 52-8.3 . . . have any application?

II. Applicable Statutes

The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "Act"), is designed 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 that,

except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular hours of the custodian of such records. Access to such records shall not be denied to citizens of this Commonwealth, representatives of newspapers and magazines with circulation in this Commonwealth, and representatives of radio and television stations broadcasting in or into this Commonwealth.

Section 2.1-342(A) further provides:

Public bodies shall not be required to create or prepare a particular requested record if it does not already exist. Public bodies may, but shall not be required to, abstract or summarize information from official records or
convert an official record available in one form into another form at the request of the citizen.

The term "official records," as it is used in the Act, is defined 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 2.1-341.

A "public body" is defined as "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." Section 2.1-341. The public bodies listed in the definition of "meeting" include "any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or any political subdivision of the Commonwealth." Id.

Section 2.1-342(B) provides, in part:

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

1. Memoranda, correspondence, evidence and complaints related to criminal investigations; reports submitted to the state and local police, to investigators authorized pursuant to § 53.1-16 and to the campus police departments of public institutions of higher education as established by Chapter 17 (§ 23-232 et seq.) of Title 23 in confidence; portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity; and all records of persons imprisoned in penal institutions in this Commonwealth provided such records relate to the imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions of [the Act].

Criminal incident information relating to felony offenses shall not be excluded from the provisions of [the Act]; however, where the release of criminal incident information is likely to jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information.

* * *

6. Memoranda, working papers and records compiled specifically for use in litigation or as a part of an active administrative investigation concerning a matter which is properly the subject of an executive or closed meeting under § 2.1-344 and material furnished in confidence with respect thereto.
Section 52-8.1 requires the Bureau of Criminal Investigation ("BCI") of the Department of State Police (the "Department" or "State Police") to conduct investigations of any matters referred to it by the Governor. Section 52-8.1 also requires that BCI conduct investigations concerning suspected Class 1, 2 or 3 felonies on request of the Attorney General or any sheriff, chief of police, Commonwealth's attorney or grand jury, and authorizes BCI to investigate other matters when requested by any of these officials. Section 52-8.2 prohibits any such investigation concerning an elected state or local official unless requested by the Governor, the Attorney General or a grand jury.

Section 52-8.3 provides:

Any person employed by a law-enforcement agency or other governmental agency within the Commonwealth who has or has had access in an official capacity to an official written record or report submitted in confidence to the Department of State Police relating to an ongoing criminal investigation, and who uses or knowingly permits another to use such record or report for any purpose not consistent with the exemptions permitted in § 2.1-342, or other provision of state law, shall be guilty of a Class 2 misdemeanor.

The provisions of this section shall not be construed to impede or prohibit full access to information concerning the existence of any criminal investigation or to other verbal disclosures permitted by state police operating procedures.

III. Act Requires Disclosure of "Documents," Not Information; Department "Inquiry" Synonymous with "Criminal Investigation"; Documents Concerning Investigation Exempt from Disclosure Under § 2.1-342(B)(1)

The State Police constitute a "public body" within the meaning of the Act. See § 2.1-341.

At the outset, it is important to distinguish between a request for information and a request for documents, the latter of which is what is addressed by § 2.1-342. The Act guarantees citizen access to existing written documents and other physical records; it specifically does not require a public body to create new records, to abstract or summarize information from existing official records, or convert records from one form to another. Section 2.1-342(A). I assume, therefore, for purposes of this Opinion, that your hypothetical questions are about access to existing records.

Section 2.1-342(B)(1) clearly exempts "[m]emoranda, correspondence, evidence and complaints relating to criminal investigations" from required disclosure under the Act. (Emphasis added.) Your hypothetical question about that section refers to a State Police "inquiry." The first issue, therefore, is whether, for the purposes of the Department's authority under Title 52 and for purposes of the Act, there is a legally significant difference in these two terms.

"Criminal investigation" is not defined in the Act. Dictionaries, however, treat the terms "inquiry" and "investigation" as synonymous. For example: "Investigation. The process of inquiring into or tracking down through inquiry," Black's Law Dictionary 825 (6th ed. 1990). "[I]nquiry .... The act of inquiring; a question or interrogation; search for information or knowledge; research; investigation." The Webster Encyclopedic Dictionary of the English Language 444 (1967).

The Supreme Court of Virginia has construed the term "investigation" broadly, holding that it encompassed a routine consideration and approval by the State Corporation Commission of a gas pipeline rate application. Commonwealth Gas Pipeline v. Anheuser-
Busch, 233 Va. 396, 404, 355 S.E.2d 605, 609 (1987). See also Mason v. Peaslee, 173 Cal. App. 2d 587, 343 P.2d 805, 808 n.2 (1959) ("investigation" means the process of inquiring into or tracking down through inquiry, and "investigate" means to follow up by patient inquiry or observation).

The Department's enabling legislation, moreover, empowers it, within prescribed limitations, to conduct "investigations" of certain matters. See §§ 52-8.1, 52-8.2. There is no reference in those enabling statutes to "inquiries." If there were a distinction between an investigation and an inquiry, therefore, the Department would lack specific authority to conduct the latter.

It is my opinion, therefore, based on the above, that the terms "inquiry" and "investigation" have the same meaning for purposes of both the Department's authority under Title 52 and the Act.

In your hypothetical situation, the citizen's request pertains to "memoranda, correspondence, interviews and other documents related to [the] completed inquiry into possible criminal offenses." Section 2.1-342(B)(1) exempts from disclosure "[m]emoranda, correspondence, evidence and complaints related to criminal investigations," as well as "reports submitted to the state and local police . . . in confidence." Having concluded that the "inquiry" in your hypothetical situation is synonymous with a "criminal investigation," I am further of the opinion that the documents you describe would fall within the plain meaning of the exemption in § 2.1-342(B)(1).

IV. Applicability of Exemption for Documents Compiled as Part of Administrative Investigation Dependent on Facts Not Stated in Hypothetical Situation

You also ask whether the documents sought by your hypothetical citizen would be exempt from disclosure by § 2.1-342(B)(6). That exemption applies to "[m]emoranda, working papers and records compiled specifically for use in litigation or as a part of an active administrative investigation concerning a matter which is properly the subject of an executive or closed meeting under § 2.1-344."

The primary object of statutory interpretation is to ascertain and give effect to legislative intent. Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). Statutes should be read as a whole, with every provision being given effect, if possible. Gallagher v. Commonwealth, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964). Under these principles, it is my opinion that the General Assembly's use of the phrase "administrative investigation" in § 2.1-342(B)(6) implies something different from the "criminal investigation" referred to in § 2.1-342(B)(1).

The former exemption, moreover, is applicable only when the documents are compiled for use in litigation or when the subject of the investigation is one which would "properly [be] the subject of an executive meeting." Section 2.1-342(B)(6). Your hypothetical situation does not mention any litigation, and since the Department, while a "public body" under the Act, does not typically hold meetings, the reference to executive meetings in § 2.1-342(B)(6) does not readily appear applicable to your hypothetical situation. In my opinion, therefore, the § 2.1-342(B)(6) exemption does not apply clearly to the documents you describe.

V. State Police Not Barred by § 52-8.3 from Disclosing Records of Completed Investigation

Section 2.1-342(A) makes it clear that disclosure of documents under the Act is required, "[e]xcept as otherwise provided by law." A specific bar to disclosure expressed
elsewhere in the Code, therefore, may override the general disclosure requirements imposed by the Act.

Section 52-8.3 contains an express limitation on disclosure of Department records or reports relating to "an ongoing criminal investigation," making such disclosure a misdemeanor. That express prohibition, therefore, overrides the provisions of § 2.1-342(B)(1), which exempts disclosure of such records or reports from required disclosure, but permits disclosure at the Department's discretion. Section 52-8.3 has this overriding effect, however, only for records or reports about ongoing investigations. Since your hypothetical situation involves a completed investigation, it is my opinion that § 52-8.3 would not apply, and that the Department would be permitted by § 2.1-342(A) to disclose the documents you describe, even though, as discussed above, § 2.1-342(B)(1) would exempt those documents from required disclosure.

AGRICULTURE, HORTICULTURE AND FOOD: COMPREHENSIVE ANIMAL LAWS - AUTHORITY OF LOCAL GOVERNING BODIES AND LICENSING OF DOGS.

Maintenance of dog pound mandatory for counties and cities, optional for towns; county lacks power to impose fee on town for use of county dog pound. Town not empowered to adopt leash law for cats.

March 1, 1991

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

You ask several questions concerning the application of §§ 3.1-796.93 and 3.1-796.95 of the Code of Virginia. You first ask whether the Town of Rocky Mount or the County of Franklin (the "Town" and the "County") is responsible for maintaining a pound for confining dogs running at large in violation of an ordinance enacted by the Town pursuant to § 3.1-796.93 or § 3.1-796.95. You next ask whether the County may charge a fee to the Town for the Town's use of the County's pound. You also ask whether the Town may enact a leash law for cats under the same two sections.

I. Applicable State Statutes

Section 3.1-796.93 provides:

The governing bodies of the counties, cities and towns of this Commonwealth are hereby authorized to prohibit the running at large of all or any category of dogs in all or any designated portion of such county, city or town during such months as they may designate. Governing bodies may also require that dogs be confined, restricted or penned up during such periods. For the purpose of this section, a dog shall be deemed to run at large while roaming, running or self-hunting off the property of its owner or custodian and not under its owner's or custodian's immediate control. Any person who permits his dog to run at large, or remain unconfined, unrestricted or not penned up shall be deemed to have violated the provisions of this section.

Section 3.1-796.95 authorizes the governing body of any city to adopt a leash ordinance and to conduct a nonbinding referendum to ascertain the sense of the voters on the adoption of such an ordinance.

Section 3.1-796.96(A) provides, in part:
The governing body of each county or city shall maintain or cause to be maintained a pound or enclosure in accordance with guidelines issued by the Department of Agriculture and Consumer Services and shall require dogs running at large without the tag required by § 3.1-796.86 or in violation of an ordinance passed pursuant to § 3.1-796.93 to be confined therein. [Emphasis added.]

II. Provision of Dog Pound Mandatory for Counties and Cities, Optional for Towns

The language of § 3.1-796.93, by which counties, cities and towns are "authorized to prohibit" dogs from running at large "during such months as they may designate," clearly implies that the adoption of an ordinance for such purposes is discretionary with the governing body of the county, city or town. See 1986-1987 Att'y Gen. Ann. Rep. 209, 210 (interpreting former § 29-213.63, predecessor to § 3.1-796.93). In contrast, by its use of the phrase "shall maintain or cause to be maintained," § 3.1-796.96 imposes a mandatory obligation on cities and counties to provide a pound for the confinement of dogs running at large that are either unlicensed or in violation of a local ordinance adopted under § 3.1-796.93 or § 3.1-796.95. See 1989 Att'y Gen. Ann. Rep. 250, 251-52 (use of "shall" in statute indicates intent that its provisions be mandatory).

While the maintenance of a local pound is mandatory for counties and cities, towns have no comparable obligation. A prior Opinion of this Office concludes that before 1978, towns were obligated to maintain dog pounds, but that 1978 and 1981 amendments to several sections in Title 29 made the provision of a pound optional for town governing bodies. 1983-1984 Att'y Gen. Ann. Rep. 170, 172. Because § 3.1-796.96 refers to cities and counties, but not to towns, it is my opinion that the conclusion reached in that Opinion is still correct, and that the Town is not required to maintain its own pound, but may use that provided by the County.

III. County Not Authorized to Charge Town for Use of County Dog Pound

It is settled beyond dispute that local governments in Virginia possess only those powers granted to them by state statutes, either expressly or by necessary implication. See generally 5A M.J. Counties § 34 (1988); 13B id. Municipal Corporations § 25. The Supreme Court of Virginia has held that a statutory grant of power to perform a function does not, in the absence of express authorization, include the power to impose a fee for performing the function. Nat. Realty Corp. v. Virginia Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968) (statute granting power for administration and enforcement of subdivision ordinance did not give city power to impose fee for review of plat). Section 3.1-796.96 contains no reference to the imposition of fees, and I am not aware of any other statute that authorizes the County to charge a fee to the Town for use of the County's dog pound. It is my opinion, therefore, that the County lacks the power to impose such a fee.

IV. Town Not Authorized to Adopt "Leash Law" for Cats

Your final inquiry concerns whether the Town has the power to adopt a local leash law applicable to cats, under the authority granted by § 3.1-796.93 or § 3.1-796.95. A prior Opinion of this Office concludes that the statutes authorizing localities to require dogs to be licensed did not confer similar authority with regard to cats. 1982-1983 Att'y Gen. Ann. Rep. 65, 66. Sections 3.1-796.93 and 3.1-796.95, like the statutes interpreted in that Opinion, refer only to dogs. If the General Assembly intended those sections to apply to ordinances governing cats, it could have provided so expressly.

I am of the opinion, therefore, that the Town is not empowered to adopt a leash law applicable to cats.
1991 REPORT OF THE ATTORNEY GENERAL

In contrast, § 3.1-796.98, which authorizes counties, cities and towns to adopt restrictions for rabies control, including leashing requirements, expressly applies to both dogs and cats.

A prior Opinion of this Office concludes that the pounds maintained by cities and counties under § 3.1-796.96 may, but are not required to, accept stray or unwanted cats. 1989 Att'y Gen. Ann. Rep. 19.

ALCOHOLIC BEVERAGES: ALCOHOLIC BEVERAGE CONTROL.

Virginia's "tied house" laws require separation between manufacturing and wholesale interests in alcoholic beverages and retail interests. Federal "tied house" law not violated without corresponding violation of state law. State board interpretation that charitable organization with banquet license to sell beer and wine at event not "retail licensee," as term used in Virginia's "tied house" statute, given considerable weight by federal court applying its "tied house" law.

January 9, 1991

The Honorable Richard L. Saslaw
Member, Senate of Virginia

You ask whether a licensed Virginia beer wholesaler that co-sponsors a charitable event by making contributions of cash or property to the charitable organization conducting the event also may sell alcoholic beverages to the charitable organization without violating § 4-79.1 of the Code of Virginia, assuming that the organization has obtained the appropriate alcoholic beverage ("ABC") license to purchase and resell such products. You further ask whether Virginia Alcoholic Beverage Control Board Regulation VR 125-01-2, § 10 permits such co-sponsorship at events where the beer wholesaler separately sells alcoholic beverages to the charitable organization for resale at the charitable event. You note, however, that in no instance is the co-sponsorship conditioned directly or indirectly on the selection of the co-sponsoring wholesaler's brand or brands of beer for resale at the event.

I. Facts

You state that several charities have been told by investigators from the federal Bureau of Alcohol, Tobacco and Firearms (the "ATF Bureau") that, if a beer wholesaler co-sponsors a charitable event and only that wholesaler's products are sold at the event, federal law will be violated because a violation of § 4-79.1 has taken place.

When a beer manufacturer or beer wholesaler co-sponsors a charitable event, the industry co-sponsor generally donates cash or property to the charity. As you point out, these donations help the charity defray the costs of conducting the event. Co-sponsorship customarily involves an agreement, which may be rather formal in nature, guaranteeing the industry co-sponsors a certain amount of advertising for themselves and their products in conjunction with advertising for the event. In some instances, the charitable organization itself does not sell any alcoholic beverages at the event. On other occasions, the charity obtains a banquet license, which permits wine and beer to be sold or consumed at the event. The event may be held on the premises of a business that holds an ABC retail license issued by the Virginia Alcoholic Beverage Control Board (the "Board"). When the charity itself sells beer at the event and only the co-sponsoring beer wholesaler's products are sold, however, the question arises whether the co-sponsoring industry members unlawfully have arranged an "exclusive outlet" for their products, even though the co-sponsorship agreement expressly disclaims any such intent or understanding.
II. Applicable Statutes and Regulations

Section 4-79.1(C) provides, in part:

Subject to such exceptions as may be provided by statute or the Board's regulations, no manufacturer, bottler, importer, broker or wholesaler of alcoholic beverages, whether licensed in this Commonwealth or not, shall sell, rent, lend, buy for or give to any retail licensee, or to the owner of the premises in which the business of any retail licensee is conducted, any (i) money, equipment, furniture, fixtures, property, services or anything of value with which the business of such retail licensee is or may be conducted, or for any other purpose, (ii) advertising materials, and (iii) business entertainment, provided that no transaction permitted under this section or by regulation of the Board shall be used to require the retail licensee to partially or totally exclude from sale at its establishment alcoholic beverages of other manufacturers or wholesalers. [Emphasis added.]

This section comprises a substantial part of Virginia's "tied house" laws, which are designed to require a separation between manufacturing and wholesale interests in alcoholic beverages on the one hand, and retail interests on the other. See § 4-32.1(C).

Regulation VR 125-01-2, § 10(A) authorizes limited alcoholic beverage advertising in connection with the co-sponsorship of certain public events and provides:

Alcoholic beverage advertising in connection with the sponsorship of public events shall be limited to sponsorship of conservation and environmental programs, professional, semi-professional, or amateur athletic and sporting events and events of a charitable or cultural nature by distilleries, wineries, and breweries.

7 Va. Regs. Reg. 487, 492 (1990). This regulation primarily addresses the advertising of alcoholic beverages and does not contemplate the creation of an exception to § 4-79.1. Additional provisions of this regulation contain various restrictions and conditions on alcoholic beverage advertising in connection with the co-sponsorship of public events, including those of a charitable nature. The regulation authorizes sponsorship by manufacturers, but restricts wholesalers to co-sponsorship. 7 Va. Regs. Reg., supra, § 10(B)(10), at 492.

Federal law prohibits any manufacturer or wholesaler of alcoholic beverages (including wine and beer) from engaging, directly or indirectly, in certain practices that generally operate to create an exclusive outlet, violate federal "tied house" provisions, constitute a form of commercial bribery, or amount to consignment sales. 27 U.S.C.A. § 205(a)-(d) (West Supp. 1990). The federal statute is supported by lengthy regulations promulgated by the ATF Bureau that deal with these practices. See 27 C.F.R. pts. 6, 8, 10, 11 (1990).

Federal statutes are of particular importance in this area because of a portion of 27 U.S.C.A. § 205(f) (West Supp. 1990), which provide:

In the case of malt beverages, the provisions of subsections (a) [Exclusive outlet], (b) ["Tied house"], (c) [Commercial bribery], and (d) [Consignment sales] of this section shall apply to transactions between a retailer ... in any State and a brewer ... or wholesaler of malt beverages outside such State only to the extent that the law of such State imposes similar requirements with respect to similar transactions between a retailer ... in such State and a brewer ... or wholesaler of malt beverages in such State, as the case may be. [Emphasis added.]
Clarifying federal regulations provide that this federal statute applies "to transactions between a retailer in any State and a brewer . . . or wholesaler of malt beverages inside or outside such State only to the extent that the law of such State imposes requirements similar to the requirements of" 27 U.S.C.A. § 205(a)-(d), 27 C.F.R. § 6.4(b). A "retailer" is defined by federal regulations as "[a]ny person engaged in the sale of distilled spirits, wine or malt beverages to consumers." Id. § 6.11.

III. State Statute Applies Only to "Retail Licensees"

Section 4-79.1(C), by its terms, applies "to any retail licensee, or to the owner of the premises in which the business of any retail licensee is conducted." (Emphasis added.) The term "retail licensee" is not defined by Virginia statute or by the Board's regulations. Historically, however, the Board has not considered the holder of a banquet license, which is a type of license issued for a charitable event at which wine or beer is to be consumed or sold, to be a "retail licensee." I am advised that this interpretation by the Board dates back at least to 1959. The rationale for this interpretation is that a banquet license is temporary in nature and not for commercial or business use, and that its issuance is exempt from the posting and publishing requirements of § 4-30, which apply to all other types of "retail licenses" authorized in § 4-25. Further, § 4-25 specifies the various types of licenses that the Board may issue and classifies the types of "retail" licenses and other types of licenses that authorize the sale "at retail" of wine or beer. A banquet license is not included within the "retail" categories mentioned in § 4-25. For these reasons, the Board has not viewed beer and wine manufacturers' and wholesalers' dealings with banquet licensees as subject to the restrictions of § 4-79.1.

As noted in Graham v. Peoples Life Insurance Co., 7 Va. App. 61, 68, 372 S.E.2d 161, 165 (1988), "[w]ell established principles dictate that courts give great weight to a construction accorded a statute by public officials charged with the statute's administration and enforcement." The Board's statutory construction that the term "retail licensee" does not include the holder of a banquet license for purposes of § 4-79.1, therefore, should be accorded considerable weight. Further, § 4-79.1 is a penal statute, and, therefore, should be strictly construed against the Commonwealth and in favor of the defendant. See Commonwealth v. American Booksellers Assoc., 236 Va. 168, 178, 372 S.E.2d 618, 624 (1988). Based on the above, it is my opinion that a charitable organization in the facts you present is not a "retail licensee," as that term is used in § 4-79.1(C).

Obviously, federal law will apply to the sale of wine and wine wholesalers regardless of Virginia law. In cases involving malt beverages and beer wholesalers, however, there must be a corresponding violation of state law before federal law is violated. 27 U.S.C.A. § 205(f). The Board's interpretation of § 4-79.1, of course, is not binding on federal authorities and does not bar federal action against a beer wholesaler's or manufacturer's federal permit to sell alcoholic beverages. A federal court, however, has ruled that administrative interpretation of 27 U.S.C.A. § 205 (West Supp. 1990) by the federal agency charged with its enforcement is entitled to considerable weight. Distilled Brands v. Dunigan, 222 F.2d 867, 870 (2d Cir. 1955). Such deference to administrative agency interpretations likewise is an established principle of statutory construction under Virginia law. Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); see also 1989 Att'y Gen. Ann. Rep. 202, 203. It is my opinion, therefore, that a federal court applying § 205 would give considerable weight to the Board's interpretation that a charitable organization with a banquet license to sell beer and wine at an event is not a "retail licensee," as that term is used in § 4-79.1(C).

1 For purposes of this Opinion, it is assumed that none of these charities holds an ABC retail license from the Virginia Alcoholic Beverage Control Board.
Court costs do not bear interest. Attorney fees awarded pursuant to terms of note, when allowable to prevailing party, deemed part of costs. On judgment for balance of note, plus costs and attorney fees, no accrual of interest on either fees or other costs awarded.

May 10, 1991

The Honorable Robert R. Carter
Judge, Chesapeake General District Court

You ask whether, on a judgment for the balance of a note, court costs and attorney fees as provided for in the note, with a contract interest rate also provided in the note, interest accrues on either the court costs or the attorney fees. If so, you ask whether that interest accrues at the contract rate or the statutory rate. Your question assumes that the note is silent about whether interest accrues on any court costs or attorney fees awarded.

I. Applicable Statutes

Section 6.1-330.54 of the Code of Virginia provides, in part, that "the judgment rate of interest shall be an annual rate of eight percent, except that a money judgment entered in an action arising from a contract shall carry interest at the rate lawfully charged on such contract, or at eight percent annually, whichever is higher." Section 8.01-382 provides, in part:

Except as otherwise provided in § 8.3-122,[1] in any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence.

II. Costs Do Not Bear Interest; Attorney Fees Part of Costs When Awarded to Prevailing Party

In Virginia, "[t]he general principle is, that costs are considered as an appendage to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, 'as an increase of damages by the court.'" M'Rea v. Brown, 16 Va. (2 Munf.) 46, 47-48 (1811) (citation omitted); see also Ashworth v. Tramwell, 102 Va. 852, 47 S.E. 1011 (1904). In Scott v. Doughty, 130 Va. 523, 107 S.E. 729 (1921), the Supreme Court of Virginia held that "[t]he allowance of costs depends entirely upon statute, no costs being allowed in any case at common law. There is no statute in Virginia allowing interest on costs." Id. at 526-27, 107 S.E. at 730 (citation omitted). The United States Bankruptcy Court for the Eastern District of Virginia, citing Scott, also has noted that "[t]here is no authority permitting interest on court costs and, therefore, the award of costs shall not bear interest." In re Morrissey, 37 B.R. 571, 574 (1984). I am not aware of any current statute providing for interest on costs that would alter the holdings in these cases.
Section 14.1-196 directs clerks of court to "tax" costs against the losing party in certain classes of cases, and to "include therein . . . the fee of such party's attorney, if he has one." (Emphasis added.) While § 14.1-196 does not specifically address attorney fees awarded pursuant to the terms of a note, it does reflect the general rule that attorney fees, when allowable to the prevailing party, are deemed to be part of "costs." See 5A M.J. Costs § 3, at 4-13 (1988 & Supp. 1990). As with other taxable costs, there is no express statutory provision in Virginia for the accrual of interest on attorney fees awarded to the prevailing party in any type of action.

Based on the above, I am of the opinion that on a judgment for the balance of a note, plus costs and attorney fees, no interest accrues on either the attorney fees or the other costs awarded. It is not necessary, therefore, to address what interest rate applies to such attorney fees or other costs.

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1 Section 8.3-122, a part of the Uniform Commercial Code, provides, in part:

"(4) Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment

"(a) in the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;

"(b) In all other cases from the date of accrual of the cause of action."

2 The attorney fees provided in § 14.1-196 are set at $5.00 "in a case of the Commonwealth," $15.00 in certain chancery causes, and $50.00 in cases in the Court of Appeals and Supreme Court of Virginia.

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CIVIL REMEDIES AND PROCEDURE: JUDGMENTS AND DECREES GENERALLY - JUDGMENTS BY CONFESSION.

Circuit court clerk may include amount of attorney fees and collection costs in confession of judgment when terms of debt instrument so provide.

November 14, 1991

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

You ask whether a circuit court clerk may include attorney fees and collection fees when recording a confessed judgment.

I. Applicable Statutes

Section 8.01-431 of the Code of Virginia provides for confessions of judgment in a pending suit:

In any suit a defendant may, whether the suit be on the court docket or not, confess a judgment in the clerk's office for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for. The same shall be entered of record by the clerk in the order book and be as final and as valid as if entered in court on the day of such confession. And the clerk shall enter upon the margin of such book opposite where such judgment or decree is entered, the date and time of the day at which the same was confessed, and the lien of such judgment or decree shall run from the time such judgment is recorded on the judgment lien docket of the clerk's office of the county or city in which land of the defendant lies.
Section 8.01-432 provides for confessions of judgment irrespective of whether a suit is pending:

Any person being indebted to another person, or any attorney-in-fact pursuant to a power to 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 8.01-436 specifies the proper form for a confession of judgment:

"Virginia: In the clerk's office of the .......... court of the .......... of .............., I, (or we) A.B., (or A.B. and C.D., etc.) hereby acknowledged myself (or ourselves) to be justly indebted to, and do hereby confess judgment in favor of (name of creditor) in the sum of ........ dollars ($ ........) with interest thereon from the .... day of ..........., nineteen hundred ...., until paid, and the cost of this proceeding (including the attorney's fees and collection fees provided for in the instrument on which the proceeding is based) hereby waiving the benefit of my (or our) homestead exemptions as to the same, provided the instrument on which the proceeding is based carries such homestead waiver.

Given under my (or our) hand, this .... day of ..........., nineteen hundred and ............

(Signatures)

or, if by an attorney-in-fact, signatures and seals of debtors,

By .................

his (or their) attorney-in-fact."

II. Clerk May Include Attorney Fees and Collection Costs in Confessed Judgment When Terms of Debt Instrument So Provide

Section 8.01-431 limits confessed judgments in pending suits to "so much principal and interest as the plaintiff may be willing to accept a judgment or decree for." Section 8.01-432 limits confessed judgments irrespective of pending suits to "only such principal and interest as [the] creditor may be willing to accept a judgment for." Either of these provisions, read alone, might imply that attorney fees and collection costs may not be included in a confessed judgment.

Under accepted principles of statutory construction, however, statutes dealing with the same subject matter should, to the extent possible, be read together, the object being to give effect to the legislative intent. Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1976); 1990 Att'y Gen. Ann. Rep. 233, 234-35. Sections 8.01-431 and 8.01-432, therefore, must be read together with § 8.01-436, which applies to judgments confessed under either § 8.01-431 or § 8.01-432. The "form" confession of judgment in § 8.01-436, by its plain language, permits the inclusion of attorney fees and collection costs when they are provided in the note or other instrument on which the confession of judgment is based. In my opinion, therefore, a circuit court clerk may include the amount
of attorney fees and collection costs specified in the underlying note or other instrument
on judgments confessed under either § 8.01-431 or § 8.01-432.1

1 As a prior Opinion of this Office concludes, a clerk accepting a confession of judg-
ment acts "purely in a ministerial capacity" and not in a magisterial capacity. 1966-1967
Att'y Gen. Ann. Rep. 57, 58. As this prior Opinion points out, "[i]f the makers of the note
feel that confession of judgment was not proper, they have the right to have the matter
reviewed by the circuit court by following the procedure set forth in § 8-357 [now
§ 8.01-433] of the Code." Id.

CIVIL REMEDIES AND PROCEDURE: UNIFORM ENFORCEMENT OF FOREIGN JUDG-
MENTS ACT — EXECUTIONS AND OTHER MEANS OF RECOVERY.

Properly authenticated copy of foreign judgment filed in circuit court clerk's office
enforced in same manner as Virginia judgment. Foreign judgment becomes domestic
judgment upon proper filing in clerk's office; filing date is day of entry of judgment. Exe-
cution may not issue until expiration of 21-day period from date of filing.

October 28, 1991

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

You ask whether the clerk of a circuit court in which a foreign judgment is dock-
eted under § 8.01-465.2 of the Code of Virginia may issue execution on that judgment
pursuant to §§ 8.01-466 and 8.01-511. You also ask when the twenty-one day waiting
period that is required under § 8.01-466 before the judgment creditor may request execu-
tion would commence on such a judgment.

I. Applicable Statutes

The Uniform Enforcement of Foreign Judgments Act, §§ 8.01-465.1 through
8.01-465.5 ("the Act"), "details the procedure for filing foreign judgments entitled to full
Rep. 83.

Section 8.01-465.2 provides that once a properly authenticated copy of the foreign
judgment is filed in the clerk's office, the "judgment so filed has the same effect and is
subject to the same procedures, defenses and proceedings for reopening, vacating, or
staying as a judgment of a circuit court of any city or county of this Commonwealth and
may be enforced or satisfied in like manner."

Section 8.01-466 directs the clerk to issue a writ of fieri facias, at the request of a
judgment creditor, twenty-one days after the date of entry of the judgment. Section
8.01-511 permits the judgment creditor to obtain a summons in garnishment after a writ
of fieri facias has been issued.

II. Foreign Judgments Filed Under Act Treated Like Virginia Judgments;
Execution Process May Issue 21 Days After Judgment Filed

A prior Opinion of this Office concludes that,
Once docketed in a Virginia circuit court pursuant to the Act, a foreign judgment, in effect, becomes a judgment of that court. It may be enforced in the same manner as a judgment of a Virginia court and is subject to the same defenses and procedures as any other Virginia judgment.

Once the properly authenticated copy of the foreign judgment is filed in your office, therefore, you may issue execution under §§ 8.01-466 and 8.01-511 as if the judgment had been rendered by your court or any other court of the Commonwealth.

Because the foreign judgment becomes a domestic judgment upon proper filing in the clerk's office, the day of filing is the date of entry of the Virginia judgment. For purposes of § 8.01-466, therefore, it is my opinion that the twenty-one day period that must expire before issuance of a writ of fieri facias runs from the date that the foreign judgment is properly filed in your office.

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

You ask two questions concerning the filing of a security agreement or financing statement in the clerk's office of a circuit court pursuant to the Uniform Commercial Code ("U.C.C."). Your first question is whether a circuit court clerk must refuse to file a copy of a security agreement or a financing statement if the copy presented for filing contains only a copy of the debtor's signature, rather than the original signature itself. Since § 8.9-402 of the Code of Virginia authorizes a copy of a security agreement or financing statement to be filed in the circuit court clerk's office if the original has been filed elsewhere in the Commonwealth, you also ask what measure of proof is required that the original security agreement or financing statement has been filed with the State Corporation Commission, or with another circuit court clerk.

1. Applicable Statutes

Section 8.9-402(1) provides:

A financing statement is sufficient if it gives the names of the debtor and the secured party [and] is signed by the debtor .... When the financing statement covers timber to be cut or minerals ... or goods which are or are
to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner and, if the secured party desires it to be indexed against such real estate, an indication to that effect ... A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this Commonwealth.

The Official Comment\(^1\) following § 8.9-402 notes that "[a] copy of the security agreement may be filed in place of a separate financing statement, if it contains the required information and signature." Id. ¶ 1. The Official Comment also recognizes that "[s]ometimes more than one copy of a financing statement or of a security agreement used as a financing statement is needed for filing. In such a case the section permits use of a carbon copy or photographic copy of the paper, including signatures." Id. ¶ 2 (emphasis added).

Section 8.1-201(39) provides that the term "signed," as it is used in the U.C.C., "includes any symbol executed or adopted by a party with present intention to authenticate a writing."\(^1\)1

The Official Comment following § 8.1-201 further provides:

The inclusion of authentication in the definition of "signed" is to make clear that as the term is used in [Titles 8.1 to 8.10] a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead ... The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing.

Id. ¶ 39.

II. Carbon, Photographic or Other Reproduction of Signature on Security Agreement or Financing Statement Is Adequate for Filing

Before the 1964\(^2\) and 1973\(^3\) amendments to the U.C.C., Virginia required original signatures on security agreements or financing statements presented for filing in a clerk's office of a circuit court. Before the 1964 amendments, the United States District Court for the Eastern District of Virginia, in interpreting the U.C.C., had held that a security agreement was invalid because the "signature" had been printed on a form contract. In Re Adkins, 197 F. Supp. 287 (E.D. Va. 1961). The Supreme Court of Virginia also had held long ago that a security agreement was required to be authenticated in the same method as a document produced for recodperation. Callahan v. Young, Clerk, 90 Va. 574, 577, 19 S.E. 163, 164 (1894). While present § 55-106 still requires an original signature\(^4\) on documents to be recorded, a prior Opinion of this Office concludes that the filing requirements of § 8.9-402 are not controlled by the language of § 55-106 because a 1977 amendment to § 8.9-402 changed the word "recorded" to "indexed." 1986-1987 Att'y Gen. Ann. Rep. 55, 56.

It is my opinion, therefore, that a copy of a debtor's signature on a security agreement or financing statement satisfies the § 8.9-402 requirement that this document be "signed." This conclusion is based on the broad statutory definition of the term "signed" and the accompanying Official Comment to § 8.9-402, as well as the 1973 amendment to that section and its accompanying Official Comment specifically authorizing carbon, photographic or other reproduction of security agreements or financing statements

III. State Corporation Commission Clerk's Recordation
Certificate on Counterpart Sufficient Proof of Filing

Your second inquiry concerns what proof is required that the original security agreement or financing statement has been filed with the State Corporation Commission (the "Commission") or in another circuit court clerk's office when a copy of such document is presented for filing pursuant to the last sentence of § 8.9-402(1). The U.C.C. does not prescribe a method of proving the previous filing with the Commission. Section 8.1-103 of the U.C.C. does provide, however, that "[u]nless displaced by the particular provisions of [Titles 8.1 to 8.10], the [general] principles of law . . . shall supplement its provisions."

The recording statutes in Article 1, Chapter 6 of Title 55, provide for the recordation of documents in more than one city or county. Section 55-109.1 provides that, when a counterpart of an original document is presented to a circuit court clerk at the time of recording the original document, that clerk shall certify the recordation of the original document on the counterpart. "[T]he clerk in any other recording office in any other city or county shall accept for recordation in his office any such counterpart so certified." Section 55-109.1.

The clerk of the Commission uses two methods to verify the filing of security agreements or financing statements in his office. The first method is by mechanically stamping a photocopy furnished by the filer with an imprint showing the date and time of filing. This "confirmation copy" is then returned to the filer. The second method is by affixing a certificate to a copy and affixing his signature and the seal of the Commission to attest that the copy is a true copy. The latter procedure, authorized by § 12.1-19, "shall have the same faith, credit, and legal effect as copies made and certified by the clerks of the courts of this Commonwealth from the records and files thereof." Section 12.1-19(3). In my opinion, either of these methods provides adequate verification that the document has been filed with the clerk of the Commission.

Based on the above, it is my opinion that a circuit court clerk may accept and file a copy of a financing statement or security agreement certified by another circuit court clerk pursuant to § 55-109.1, and may likewise accept and file either a stamped "confirmation copy," or a copy certified pursuant to § 12.1-19(3), from the clerk of the Commission.

1 The Official Comments of the U.C.C. are not binding on courts, "but they do repres en t powerful dicta." In Re Varney Wood Products, Inc., 458 F.2d 435, 437 (4th Cir. 1972).

"Amendments to § 8.1-201 by the 1964 Session of the General Assembly added subsec-
tion 39, which defines the term "signed." Ch. 219, 1964 Va. Acts 293, 297 (Reg. Sess.).

"Amendments to § 8.9-402(1) by the 1973 Session of the General Assembly added the provision allowing "[a] carbon, photographic or other reproduction of a security agreement or a financing statement" to be filed. Ch. 509, 1973 Va. Acts 1099, 1122.


Section 8.9-402 limits the use of such copied documents to situations where the original has been filed elsewhere in the Commonwealth or the document terms authorize the filing of copies.
CONSERVATION: AIR POLLUTION CONTROL BOARD — VIRGINIA WASTE MANAGEMENT ACT.

Certification by Departments of Air Pollution Control and Waste Management that proposed medical waste incinerator to be located in city complies with applicable local zoning and other ordinances not required for new or modified stationary air pollution source permit applications received on or before July 1, 1990. Opinions not rendered on validity of local certification submitted to Department of Waste Management requiring interpretation of local ordinances.

July 11, 1991

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether the Department of Air Pollution Control and the Department of Waste Management should accept a certification from the City of Richmond (the "City") that a proposed medical waste incinerator to be located in the City complies with applicable local zoning and other ordinances.

I. Applicable Statutes

Section 10.1-1321.1 of the Code of Virginia, a portion of Chapter 13 of Title 10.1, §§10.1-1300 through 10.1-1322, concerning the Air Pollution Control Board, requires local certification for new or modified stationary air pollution source permits in certain circumstances:

A. No application for a permit for a new or modified stationary air pollution source shall be considered complete unless the applicant has provided the Director [of the Department of Air Pollution Control] with notification from the governing body of the county, city, or town in which the source is to be located that the location and operation of the source are consistent with all ordinances adopted pursuant to Chapter 11 (§15.1-427 et seq.) of Title 15.1.

C. The provisions of this section shall apply only to applications received after July 1, 1990.

The statute in the Virginia Waste Management Act, §§10.1-1400 through 10.1-1457, requiring local certification is §10.1-1408.1. Section 10.1-1408.1(B) provides, in part:

No application for a new solid waste management facility permit shall be complete unless it contains the following:

1. Certification from the governing body of the county, city or town in which the facility is to be located that the location and operation of the facility are consistent with all applicable ordinances. [1]

II. Local Certification Not Required for New or Modified Stationary Air Pollution Source Permit Applications Received on or Before July 1, 1990

I am advised that the applicant for the new or modified stationary air pollution source permit that is the subject of your inquiry submitted its application to the Department of Air Pollution Control in June 1990. By its express terms, §10.1-1321.1 applies only to permit applications received after July 1, 1990. The statute, therefore, does not
require the applicant to obtain the certification required by § 10.1-1321.1 for its application to be considered complete by that department.

III. Validity Of Local Certification Submitted to Department of Waste Management Requires Interpretation of Local Ordinances

The material you provide indicates that the Department of Waste Management already has received local certification regarding the applicant's proposed facility. Pursuant to the terms of § 10.1-1408.1, therefore, the applicant has satisfied the requirement that an application for a solid waste management facility contain such a local certification in order to be complete.

Your question concerning the sufficiency of the City's ordinance approving the applicant's facility necessarily requires an interpretation of the City's ordinance itself. Prior Opinions of this Office consistently conclude that § 2.1-118, the authorizing statute for official Opinions of the Attorney General, does not contemplate that such an Opinion be rendered to interpret a local ordinance. See Att'y Gen. Ann. Rep.: 1986-1987 at 347, 348; 1981-1982 at 471, 472; 1977-1978 at 31; 1976-1977 at 17. As a result, I am unable to respond to your question concerning the sufficiency of the City's certification to the Department of Waste Management.

1Section 10.1-1408.1(B)(1) is substantively identical to the provisions of this statute as it existed immediately prior to July 1, 1990, the time when the applicant's permit application was made.

Constitution of Virginia: Bill of Rights.

Conservation: Chesapeake Bay Preservation Act.


Chesapeake Bay Preservation Area Designation and Management Regulations, adopted pursuant to Chesapeake Bay Preservation Act, containing buffer zone requirements restricting use of agricultural lands do not exact unconstitutional taking. Takings analysis based on economic viability of uses remaining to property owner being regulated. Buffer zone requirements reasonably related to protection of water quality. Whether regulations as applied to particular parcel of land by particular local government may exact taking must be determined by facts of case. Localities outside Tidewater empowered to adopt regulations' requirements in ordinances similar to those mandated for Tidewater jurisdictions.

July 2, 1991

The Honorable George F. Allen
Member, House of Delegates

You ask whether the buffer area requirements of the Chesapeake Bay Preservation Area Designation and Management Regulations and similar requirements in the zoning ordinances of localities outside the area to which those regulations apply on a mandatory basis create an unconstitutional "taking" of agricultural lands.

A. Constitutional Requirements and Zoning Enabling Statutes

The Fifth Amendment to the Constitution of the United States prohibits the taking of private property for public use, "without just compensation." Article I, § 11 of the Constitution of Virginia (1971) contains a similar prohibition.

Section 15.1-486 of the Code of Virginia authorizes localities to adopt zoning ordinances, dividing their territory into districts, and in each district regarding, among other matters:

(a) The use of land, buildings, structures and other premises for agricultural, business, industrial, residential flood plain and other specific uses;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used.

Section 15.1-489 details the permissible purposes of local zoning ordinances, including "to provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment," and "reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and groundwater."

B. Chesapeake Bay Preservation Act and Regulations

The Chesapeake Bay Preservation Act, §§ 10.1-2100 through 10.1-2115 (the "Bay Act"), establishes the Chesapeake Bay Local Assistance Board (the "Board"), and empowers it to adopt regulations and criteria for the Bay Act's implementation.

The Emergency Chesapeake Bay Preservation Area Designation and Management Regulations, VR 173-02-01.1, ?:7 Va. Regs. Reg. 1138 (1990) (the "Regulations"), adopted by the Board pursuant to the Bay Act, set forth criteria for use by local governments "to determine the ecological and geographic extent of Chesapeake Bay Preservation Areas" and to "establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or to use and develop land in these areas." Section 10.1-2107; see also ?:7 Va. Regs. Reg., supra, § 1.3, at 1140.

Local governments in Tidewater Virginia are required to designate the Chesapeake Bay Preservation Areas within their respective jurisdictions and must apply the Regulations to protect the quality of state waters within these designated preservation areas, through their comprehensive plans, zoning ordinances and subdivision ordinances. Section 10.1-2109. Local governments outside Tidewater Virginia also may employ the criteria in the Regulations and "may incorporate protection of the quality of state waters into their comprehensive plans, zoning ordinances and subdivision ordinances." Section 10.1-2110.

"Resource Protection Areas" under the Bay Act and Regulations consist of "sensitive lands at or near the shoreline that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may cause significant degradation to the quality of state waters." ?:7 Va. Regs. Reg., supra, § 3.2(A), at 1142. A Resource Protection Area includes a "buffer area" of natural or
established vegetation managed to protect other components of the Resource Protection Area. This buffer area must have a width of not less than 100 feet alongside tidal wetlands and other components of the Resource Protection Area, and along both sides of any tributary stream. Id. § 3.2(B)(5).

In agricultural lands, this buffer area may be reduced to 50 feet when the adjacent land is enrolled in an agricultural best management practices program and that program is being implemented. Id. § 4.3(B)(4)(a), at 1145. The buffer area may be reduced to 25 feet when an approved soil and water conservation plan has been implemented on the adjacent land. Id. § 4.3(B)(4)(b), at 1146. "The buffer area is not required for agricultural drainage ditches if the adjacent agricultural land has in place best management practices in accordance with a conservation plan approved by the local Soil and Water Conservation District." Id. § 4.3(B)(4)(c), at 1146.

II. Regulation Effects "Taking" if It Deprives Owner of All Economically Viable Use of Property

The Supreme Court of the United States long ago held that not every governmental regulation resulting in a diminution of property values constitutes a "taking" compensable under the Fifth Amendment. See Mugler v. Kansas, 123 U.S. 623 (1887) (state not required to compensate brewery owner for damage to property value resulting from prohibition law). Local zoning regulations and similar restrictions on land use, even when they diminish land values, likewise have long been upheld. See Euclid v. Ambler Co., 272 U.S. 365 (1926). However, the Supreme Court also has long acknowledged that some regulations go too far in restricting property uses, and thereby constitute a taking. Penna. Coal Co. v. Mahon, 260 U.S. 393 (1922) (state law barring subsurface coal mining to prevent subsidence under public buildings invalid exercise of police power to accomplish what state could only achieve by exercise of eminent domain, compensating owner of mineral rights).

These early cases establish the extremes. Analysis of specific taking claims, however, has proven difficult. The Virginia law of takings, like the federal law, is imprecise in its borders and definitions . . . .

***

The most important distinction in Virginia law, as in federal law, is that between eminent domain, in which private property is taken or damaged, and the exercise of the police power of the State, in which the use of the property is simply regulated for the public interest. The former is compensable; the latter is not.

1 A.E. Dick Howard, infra note 1, at 218, 219.

In recent cases, the Supreme Court of the United States has focused its takings analysis on the economic viability of the uses remaining to the property owner being regulated. The application of land use controls is a taking only if the ordinance or regulation "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." Agins v. Tiburon, 447 U.S. 255, 260 (1980) (citations omitted); see also Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987); Ciampitti v. United States, 22 Cl. Ct. 310 (1991); Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990).

The Supreme Court of Virginia has reached similar conclusions:
All citizens hold property subject to the proper exercise of the police power for the common good. Even where such an exercise results in substantial diminution of property values, an owner has no right to compensation therefor. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Supreme Court held that no taking occurs in these circumstances unless the regulation interferes with all reasonable beneficial uses of the property, taken as a whole.


Most recently, the Supreme Court of Virginia has held that a zoning ordinance does not constitute a taking unless the owner is "deprived of all economically viable uses of its property." *Virginia Beach v. Virginia Land Invest. Ass'n*, 239 Va. 412, 416-17, 389 S.E.2d 312, 314 (1990) (emphasis added).

III. On Their Face, Regulations on Agricultural Use Under Bay Act Do Not Exact Taking

The Regulations were adopted pursuant to the Bay Act, which makes an express legislative finding that the Regulations are necessary for "[t]he protection of the public interest in the Chesapeake Bay, its tributaries, and other state waters and the promotion of the general welfare of the people of the Commonwealth." Section 10.1-2100. The protection of Virginia's waters "is a valid exercise of the State's police power." *Commonwealth v. County Utilities*, 223 Va. at 542, 290 S.E.2d at 872.

The Regulations contain certain buffer zone requirements. 7:7 Va. Regs. Reg., supra Pt. I(B), § 3.2(B)(3), at 1142. Based on the above, it is my opinion that these buffer zone requirements are reasonably related to the protection of water quality.

The Regulations also include restrictions that land disturbance be minimized and that indigenous vegetation be preserved to the maximum extent possible consistent with the use and development allowed. Id. § 4.2(1)-(2), at 1143. Exemptions are made in the Resource Protection Area, including the buffer area, for water wells, passive recreational facilities, and historic preservation and archaeological activities. Id. § 4.5(C), at 1146. In agricultural areas, the buffer zone may be narrowed, and may be eliminated alongside agricultural drainage ditches, when the adjacent land is appropriately managed. Id. § 4.3(B)(4), at 1145-46. The Regulations specifically permit exceptions to the criteria where necessary to afford relief from any unconstitutional effect. Id. § 4.6, at 1146.

On their face, therefore, the Regulations provide for restrictions on the use, not for the physical appropriation, of agricultural lands in the buffer zone. These restrictions do not purport to eliminate all economically viable agricultural uses of the land. The Regulations allow for exceptions to avoid unconstitutional application; they are thus explicitly designed to avoid unconstitutional effects.

Based on the above, it is my opinion that the agricultural buffer zone requirements in the Regulations do not, on their face, exact an unconstitutional taking.

IV. Whether Regulations Exact Taking of Particular Parcel to Be Determined from Facts of Case

In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Supreme Court of the United States held that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case." Id. at 124 (citation omitted).
In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So too is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citations omitted).

Unless the landowner obtains an exception under § 4.6 of the Regulations, a local ordinance adopted pursuant to the Regulations will restrict the cultivation of a strip of his land potentially as great as 100 feet in width around tidal wetlands and other components of the locality's Resource Protection Area, and along both sides of any tributary stream. This use of buffer zones is analogous to the use of well-established setback requirements as part of local land use control, and the requirement that open spaces on privately owned land be landscaped and maintained in good condition, which have been approved by the courts. See, e.g., French v. Town of Clintwood, 203 Va. 562, 568, 125 S.E.2d 798, 802 (1962).

With respect to a particular tract of agricultural land, therefore, whether a local action in conformance with the Regulations interferes with all beneficial uses of that tract, or deprives the owner of all economically viable uses of his property, necessarily must be determined from the particular ordinance in question and the specific circumstances of its application. If such an unconstitutional impact were identified, § 4.6 of the Regulations would require the granting of an exception to eliminate the unconstitutional effect.

V. Localities Outside Tidewater Empowered to Adopt Restrictions Similar to Those Mandated by Bay Act and Regulations for Tidewater Jurisdictions

Section 10.1-2110 specifically authorizes localities not subject to the mandatory provisions of the Bay Act and Regulations nevertheless to incorporate those criteria into their comprehensive plans and subdivision and zoning ordinances for "protection of the quality of state waters." Section 10.1-2108 recognizes such provisions to be a valid exercise of local police powers. Similar authority is found in the general zoning enabling statutes. See § 15.1-489.

Although the legislative branch of a local government in the exercise of its police power has wide discretion in the enactment of zoning ordinances, its actions being presumed valid as long as they are not unreasonable and arbitrary, the authority of local governments in this area is not totally unrestricted. See Board of Supervisors v. Davis, 200 Va. 316, 322, 108 S.E.2d 152, 157 (1958). Zoning regulations necessarily "should be related to the character of the district which they affect." Bd. of Supervisors of Fairfax Co. v. Allman, 215 Va. 434, 444, 211 S.E.2d 48, 54, cert. denied, 423 U.S. 940 (1975) (citation omitted). Within these necessarily limited constraints, it is further my opinion that the statutes quoted above make the voluntary adoption of the Regulations' requirements in ordinances of localities outside Tidewater Virginia equally as valid as those mandatorily adopted by Tidewater jurisdictions.

1 Article I, § 11 actually requires just compensation for private property "taken or damaged" for public use. (Emphasis added.) While this appears to be a stricter standard...
than the federal constitutional requirement, the Virginia provision has, in fact, been applied similarly to the federal one, preserving a distinction between compensable "takings" and valid noncompensable restrictions on the use of property imposed through the state's or locality's exercise of its police power. See 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 218-23 (1974).

See also Bd. Sup. James City County v. Rowe, 216 Va. 128, 138-41, 216 S.E.2d 199, 208-10 (1975), where the Supreme Court of Virginia upheld an ordinance restricting the buildable area of certain commercial lots, but invalidated a requirement in the same ordinance for mandatory dedication in fee simple of a 55 foot right-of-way for a service road along the existing highway frontage of the same lots. The Court found that, where the need for the road was not generated by the plaintiff's proposed development, this mandatory dedication was a "taking" without compensation, in violation of Article I, § 11.

CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.

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

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

Bay Act requirements and board regulations implementing Act prevail over less stringent or inconsistent local zoning regulations; local zoning requirements may be more stringent than Bay Act and board's regulations, as long as vested rights not unlawfully impaired. Localities including Bay Act requirements in zoning ordinances required to include grandfather provisions to protect lawful existing uses made nonconforming by Act's requirements, or apply existing grandfather provisions in ordinances to achieve that result. Localities may not define vested rights by ordinance in manner inconsistent with Act's requirements; compliance with Act's requirements and board's regulations to maximum extent feasible. Determination whether grandfather provision consistent with Act and regulations made on case-by-case basis.

June 28, 1991

The Honorable John C. Watkins
Member, House of Delegates

You ask (1) whether the Chesapeake Bay Preservation Act, §§ 10.1-2100 through 10.1-2115 of the Code of Virginia (the "Bay Act"), permits local governments in the region subject to the Bay Act to include in ordinances implementing the Bay Act provisions that "grandfather" certain land uses and development practices, and, (2) if not, whether those local governments may "grandfather" certain uses or development rights that might be affected adversely by the Bay Act pursuant to their general statutory authority to adopt zoning ordinances.

I. Applicable Statutes

The Bay Act was enacted in 1988 for "[t]he protection of the public interest in the Chesapeake Bay, its tributaries, and other state waters and the promotion of the general welfare of the people of the Commonwealth." Section 10.1-2100. Local governments in Tidewater Virginia are required to designate, pursuant to criteria adopted by the Chesapeake Bay Local Assistance Board (the "Board"), Chesapeake Bay Preservation Areas within their jurisdictions and to incorporate measures to protect the quality of state waters into their comprehensive plans, zoning ordinances and subdivision ordinances. Section 10.1-2109. Section 10.1-2115 provides that the Bay Act "shall not affect vested rights of any landowner under existing law."
The general enabling legislation for local zoning ordinances is contained in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498. Section 15.1-491(a) authorizes the inclusion in local ordinances of provisions for variances and special exceptions.

Section 15.1-492 provides:

Nothing in this article shall be construed to authorize the impairment of any vested right, except that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations whenever they are enlarged, extended, reconstructed or structurally altered and may further provide that no "nonconforming" building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such "nonconforming" use.

Section 15.1-498 provides:

Whenever the regulations made under authority of this article require a greater width or size of yards, courts or other open spaces, require a lower height of building or less number of stories, require a greater percentage of lot to be left unoccupied or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this article shall govern. Whenever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, require a lower height of building or a less number of stories, require a greater percentage of lot to be left unoccupied or impose other higher standards than are required by the regulations made under authority of this article, the provisions of such statute or local ordinance or regulation shall govern.

Section 1-13.17 also 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.

II. Localities Required to Adopt "Grandfather" Provisions to Protect Existing Nonconforming Uses from Bay Act Requirements; Protection of Other Vested Rights Limited to Provisions Consistent with Bay Act

"The normal purpose of 'grandfather' provisions is to delay application of some new and stricter standard." 1980-1981 Att'y Gen. Ann. Rep. 331. In the context of zoning, "grandfather" provisions generally are used to protect a nonconforming use, which is a use lawfully existing on the effective date of the zoning restrictions and continuing since that time in nonconformance to the ordinance. Knowlton v. Browning-Ferris Industries of Virginia, 220 Va. 571, 260 S.E.2d 232 (1979). To merit protection as a nonconforming use, "the use must be actual and not merely contemplated." 6 Patrick J. Rohan, Zoning and Land Use Controls § 41.01[5], at 41-14 (1991). "These uses are permitted to continue, although technically in violation of the current zoning regulations, until they are abandoned. An exception of this kind is commonly referred to as a 'grandfather' exception."
"Grandfather" provisions normally are included to permit nonconforming uses "because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of such use." 4 E.C. Yokley, Zoning Law and Practice § 22-3, at 13 (4th ed. 1979).

The term "vested rights" is not defined in the Bay Act or elsewhere in the Code of Virginia. Generally, a vested right exists when an owner "has obtained a permit valid under existing zoning and in good faith incurs substantial obligation in reliance thereon [and] his rights to complete the project are generally protected against subsequent zoning amendments." 7 Patrick J. Rohan, supra, § 52.08[4], at 52-94. Recognizing that in many localities the site plan has replaced the building permit as the most vital document in the development process, the Supreme Court of Virginia has extended the scope of vested rights to include those cases where an owner obtains a special use permit, files and diligently pursues a bona fide site plan, and incurs substantial expense in good faith before a change in zoning. Fairfax County v. Cities Service, 213 Va. 359, 193 S.E.2d 1 (1972); Fairfax County v. Medical Structures, 213 Va. 355, 192 S.E.2d 799 (1972); see also 1989 Att'y Gen. Ann. Rep. 32, 35-36. In a recent case, the Supreme Court of Virginia has held that the determination of when rights become vested is a judicial function, not properly performed by an administrative official. Holland v. Johnson, Zoning Adm'r, 241 Va. 553, 403 S.E.2d 356 (1991).


Section 15.1-498, simply stated, requires that when local zoning ordinances and other state or local laws or regulations both impose requirements of the same nature with respect to a particular property, whichever statute, ordinance or regulation imposes a higher standard shall govern.

Section 15.1-492 represents a legislative determination that one category of vested rights, those established by an existing nonconforming use, must be "grandfathered." The Supreme Court of Virginia has held that § 15.1-492 "requires local governing bodies adopting zoning ordinances to protect nonconforming uses so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years." Bd. of Zoning App. v. McCalley, 225 Va. 196, 199, 300 S.E.2d 790, 792 (1983) (citation omitted). Accordingly, in my opinion, § 15.1-492 not only authorizes, but also requires, localities including Bay Act requirements in their zoning ordinances to include "grandfather" provisions designed to protect lawful existing uses that are made nonconforming by the Bay Act requirements, or to apply existing "grandfather" provisions in their ordinances to achieve that result.

For other categories of vested rights—those established at various stages in the development process but not yet constituting existing uses—the Bay Act limits local authority to adopt "grandfather" provisions in their local ordinances. Although § 10.1-2115 recognizes the protection of vested rights, localities may not define those vested rights by ordinance in a manner that is inconsistent with the Bay Act's express requirements and, as the 1989 Opinion quoted above notes, must require owners with such vested rights to comply with those requirements to the maximum extent feasible. See 1989 Att'y Gen. Ann. Rep., supra, at 36. For example, a locality under the mandatory provisions of the Bay Act may not provide in its ordinance that the owners of all existing subdivided lots are exempt from the buffer zone requirements imposed by the Bay Act and the Board's regulations. A locality may, however, include in its ordinance provisions for reducing the buffer zone requirement to protect vested rights on existing subdivided lots in individual cases through administrative waivers and exemptions (7 Va. Regs. Reg. VR 173-02-01.1 1138, § 4.5, at 1146 (1990)) and exceptions to the criteria (id. § 4.6, at
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1146). The availability of these waivers and exceptions in a local ordinance is consistent with the protection of vested rights established by § 10.1-2115.

The Bay Act requires that local governments use the criteria developed by the Board to ensure that land is used and developed in a manner that protects the quality of state waters "consistent with the provisions of [the Bay Act]." Section 10.1-2111. More specifically, local governments subject to the Bay Act must (1) incorporate the protection of state waters into their comprehensive plans "consistent with the provisions of [the Bay Act]" (§ 10.1-2109(B)); (2) have zoning provisions which are "consistent with the provisions of [the Bay Act]" and which "shall comply with all criteria set forth in or established pursuant to § 10.1-2107" (§ 10.1-2109(C)); and (3) incorporate water quality protection into their subdivision ordinances "consistent with the provisions of [the Bay Act]" and "ensure that all subdivisions developed pursuant to their subdivision ordinances comply with all criteria developed by the Board" (§ 10.1-2109(D)). The requirements of the Bay Act and the regulations adopted by the Board to implement it would prevail, therefore, over any less stringent or inconsistent local zoning regulations, including "grandfather" provisions that go beyond protection of existing uses and are not consistent with Bay Act requirements regarding protection of water quality.

There are some requirements in the criteria adopted by the Board, moreover, that do not lend themselves to grandfather provisions. See, e.g., 7 Va. Regs. Reg., supra, § 4.2(7), at 1143-44 (pump-out requirements for on-site sewage treatment systems and reserve drainfield requirements). Furthermore, a prior Opinion of this Office concludes that even a landowner who has a vested right to use his land in a manner previously approved by the locality must comply with the local requirements adopted under the Bay Act to the greatest extent possible. 1989 Att'y Gen. Ann. Rep., supra, at 36 ("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.' " (Citation omitted.)).

When the General Assembly has enacted a specific statute concerning the authority of a local governing body to act, reliance upon a more general grant of powers is not appropriate. See Att'y Gen. Ann. Rep.: 1990 at 162, 164; 1987-1988 at 363, 364. It is my opinion, therefore, that with respect to vested rights other than those protected by § 15.1-492 as existing nonconforming uses, localities may not rely on the general zoning enabling legislation to adopt "grandfather" provisions applicable to Bay Act requirements broader than those allowed under the Bay Act itself, but must give effect to those requirements to the maximum extent feasible consistent with the provisions of the Bay Act and the Board's regulations. Whether a particular "grandfather" provision is consistent with the Bay Act and the Board's regulations is a determination that must, of course, be made on a case-by-case basis.

CONSERVATION: SCENIC RIVERS ACT.

Statutory authorization for natural gas pipeline crossing portion of Guest River directed at above-ground crossings. Specific legislative authorization for particular location of underground pipeline on scenic river not required. No prohibition of underground gas pipeline at location on Guest River other than at locations specifically designated by statute. Department of Conservation and Recreation, administering agency for Guest River, should review and approve location and method of installation of proposed underground pipeline crossing to preserve scenic river's beauty and assure its use and enjoyment.

March 15, 1991
The Honorable Jack Kennedy  
Member, House of Delegates

You ask whether the Scenic Rivers Act prohibits an underground natural gas transmission line from crossing the portion of the Guest River designated as a part of the Virginia Scenic Rivers System. Specifically, you ask whether the authorization in § 10.1-411.1(D) of the Code of Virginia for crossings at designated locations has the effect of prohibiting any other crossings.

I. Applicable Statutes

Chapter 4 of Title 10.1, §§ 10.1-400 through 10.1-418, comprises the Scenic Rivers Act (the "Act"). The Act designates sections of certain rivers in the Commonwealth as components of the Virginia Scenic Rivers System, and imposes certain restrictions on construction on those designated rivers.

Section 10.1-402 provides:

The Department [of Conservation and Recreation] or administering agency may review and make recommendations regarding all planning for the use and development of water and related land resources including the construction of impoundments, diversions, roadways, crossings, channels, locks, canals, or other uses which change the character of a stream or waterway or destroy its scenic values, so that full consideration and evaluation of the river as a scenic resource will be given before alternative plans for use and development are approved. To effectuate the purposes of this section, all state and local agencies shall consider the recommendations of the Department or administering agency.

Section 10.1-405 specifies the duties of the administering agency. Among them is the duty to

[a]dminister the scenic river or section thereof to preserve and protect its natural beauty and to assure its use and enjoyment for its scenic, recreational, geologic, fish and wildlife, historic, cultural or other values and to encourage the continuance of existing agricultural, horticultural, forestry and open space land and water uses.

Section 10.1-405(A)(1).

Section 10.1-407 provides:

After designation of any river or section of river as a scenic river by the General Assembly, no dam or other structure impeding the natural flow thereof shall be constructed, operated, or maintained in such river or section of river unless specifically authorized by an act of the General Assembly.

Section 10.1-408 provides that "[e]xcept as provided in § 10.1-407, all riparian land and water uses along or in the designated section of a river which are permitted by law shall not be restricted by this chapter."

Section 10.1-411.1 designates a 6.5 mile segment of the Guest River in Wise County as a component of the Virginia Scenic Rivers System, and names the Department of Conservation and Recreation as the administering agency for that river. Section 10.1-411.1(D) provides:
Nothing in this chapter shall be construed to prevent the construction, use, operation and maintenance of a natural gas pipeline on or beneath the two existing railroad trestles, one located just south of the Swede Tunnel and the other located just north of the confluence of the Guest River with the Clinch River, or to prevent the use, operation and maintenance of such railroad trestles in furtherance of the construction, operation, use and maintenance of such pipeline. Nothing in this chapter shall be construed to prevent the construction, use, operation and maintenance of a natural gas pipeline traversing the river at, or at any point north of, the existing power line which is located approximately 200 feet north of the northern entrance to the Swede Tunnel.

II. Authorization of Specific Pipeline Crossings
in § 10.1-411.1(D) Directed at Above-Ground Crossings; Specific Authorization for Underground Crossings Not Required


Section 10.1-407 plainly requires only a "dam or other structure impeding the natural flow" of a designated scenic river to be "specifically authorized by an act of the General Assembly." Section 10.1-408 makes it clear that other land and water uses are not restricted by the Act. The Department of Conservation and Recreation has advised this Office that it does not consider underground pipelines, as opposed to those located above ground on bridges, trestles or other structures, to be structures that would impede the natural flow of a scenic river. The interpretation of a statutory provision by the agency charged with its administration is entitled to great weight. Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); 1989 Att'y Gen. Ann. Rep. 354, 356. That interpretation, moreover, is consistent with the plain meaning of the phrase "impeding the natural flow" in § 10.1-407.

It is my opinion, therefore, that the particular location of an underground pipeline on a scenic river does not require specific legislative authorization under §§ 10.1-407 and 10.1-408, and that the natural gas pipeline locations on the Guest River described in § 10.1-411.1(D) are included in that section for the purpose of authorizing pipelines to be placed or maintained above ground at those locations. Based on the above, I am further of the opinion that § 10.1-411.1(D) does not prohibit an underground gas pipeline at a location on the Guest River other than at those locations specifically designated.

Under § 10.1-405(A)(1), the Department of Conservation and Recreation is obligated to administer the scenic river in a manner that preserves and protects its natural beauty and assures the enjoyment of its "scenic, recreational, geologic, fish and wildlife, historic, cultural or other values." Pursuant to that provision, the Department should, in my opinion, review and approve the location and proposed method of installation of any proposed underground pipeline crossing of a designated scenic river. As discussed above, however, specific legislative authorization for the particular location of such underground crossing is not required.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS — LEGISLATURE — EXECUTIVE.
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY — GAMBLING.
ALCOHOLIC BEVERAGES: ALCOHOLIC BEVERAGE CONTROL.
COMMISSIONS, BOARDS AND INSTITUTIONS: ADMINISTRATIVE PROCESS ACT.

Tip jar games illegal gambling devices; do not constitute "raffles" permissible for fraternal and charitable organizations. Constitution prohibits Governor from suspending operation of duly adopted statute in absence of some other statute so authorizing. Alcoholic Beverage Control Board has statutory duty to suspend or revoke license of licensee in violation of statute prohibiting illegal possession of gambling device. Suspending enforcement, or penalties for violation, of statute requires legislative action. Governor not authorized to suspend application of gambling statute to tip jar games conducted by fraternal and charitable organizations, either directly or by authorizing or ordering ABC Board to do so.

September 10, 1991

The Honorable L. Douglas Wilder
Governor of Virginia

You ask whether "tip jar" games constitute illegal gambling, even though the proceeds from these games are used for charitable purposes. If so, you ask whether you are authorized as chief executive of the Commonwealth to suspend the enforcement of Virginia's gambling statutes with respect to fraternal organizations conducting such games for charitable purposes.

I. Facts

"Tip jar" is a term used to describe a container, typically a large wide-mouthed jar that is filled with tickets, or "tips," for a game in which the player pays for a chance to tip the jar with one hand while reaching into the jar with the other hand to select a ticket. The term "tip jar game" also describes a variety of similar lottery-type games in which the player randomly purchases preprinted tickets. The manufacturers preprinting these cards generally assure that a majority of the printed tickets are instant losers, but some are instant or delayed winners. The odds and the percentage or retention for the "house" are carefully controlled.

II. Applicable Constitutional and Statutory Provisions

Article I, § 5 of the Constitution of Virginia (1971) provides "[t]hat the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct." Article I, § 7 provides "[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." Article IV, § 1 provides that "[t]he legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates." Article V, § 7 provides, in part, that "[t]he Governor shall take care that the laws be faithfully executed."

Section 4-37(A) of the Code of Virginia details grounds for the Virginia Alcoholic Beverage Control Board ("ABC Board") to suspend or revoke licenses issued by it, including when it believes that the licensee "has allowed any form of illegal gambling to take place upon [the licensed] premises." Section 4-37(A)(1)(g).

Section 18.2-325(2)(a) defines a "gambling device" to include "[a]ny device . . . paraphernalia, equipment, or other thing . . . which [is] actually used in an illegal gambling operation or activity." "Illegal gambling" is further defined as
The making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance ....

Section 18.2-325(1).

Section 18.2-331 makes the possession of illegal gambling devices, under certain circumstances, a Class I misdemeanor.

A "raffle" is defined in § 18.2-340.1 as "a lottery in which the prize is won by a random drawing of the name or prearranged number of one or more persons purchasing chances."

III. Tip Jar Games Are Illegal Gambling Devices; Do Not Constitute "Raffles" Permissible for Fraternal and Charitable Organizations

The Court of Appeals of Virginia has held that one particular tip jar game--specifically Nevada Club Cards--is an illegal gambling device under § 18.2-325. Alcoholic Beverage Control Bd. v. VFW, 10 Va. App. 165, 390 S.E.2d 202 (1990). One circuit court also has held that certain other tip jar games constitute illegal gambling. Fraternal Order of Eagles v. Virginia ABC Bd., No. 91-CH-100 (Cir. Ct. City of Winchester Aug. 20, 1991).

In both cases discussed above, the defendants contended that the fact that the fraternal organizations had obtained permits for "charitable" raffles under Article 1.1, Chapter 8 of Title 18.2, §§ 18.2-340.1 through 18.2-340.14, made the tip jar games lawful. That argument was rejected in each case when the courts held that the tip jar games in question did not constitute a "raffle," as that term is defined in § 18.2-340.1(3). See, e.g., Alcoholic Beverage Control Bd. v. VFW, 10 Va. App. at 166, 390 S.E.2d at 204. I am aware of no authority that legalizes these illegal games merely because the profits from the games are used for charitable purposes. See 1989 Att'y Gen. Ann. Rep. 173, 174-75 ("fish bowl" game not raffle permitted under Article 1.1).

IV. Governor Not Empowered by Constitution to Suspend Operation of Statute

Your second question is whether you, as Governor, have the authority, directly or through the ABC Board, to suspend the operation and enforcement of the illegal gambling statutes as they apply to tip jar games conducted by fraternal and charitable organizations.

The Supreme Court of Virginia has interpreted the separation of powers provision in Article I, § 5 generally to prohibit the executive and judicial branches from exercising legislative powers not expressly delegated to them by the legislative branch. See generally 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 84-85 (1974). For example, the Court has concluded that it did not have the power to reduce the maximum jail term imposed in a local ordinance to coincide with the maximum allowed by state law, because doing so would violate the separation of powers provision in Article I, § 5. "Statutory laws are made solely by the legislative body." Boyles v. City of Roanoke, 179 Va. 484, 487-88, 19 S.E.2d 662, 683 (1942).

Several prior Opinions of this Office examine the power of the Governor to act without legislative authorization, and conclude that the Governor may not exceed the authority bestowed on him by the Constitution and laws of the Commonwealth. See, e.g., 1990 Att'y Gen. Ann. Rep. 1, 4 (discussing limits on authority to issue executive order.
prohibiting state agencies, boards or institutions from investing in companies not free of interests in South Africa).

Another such prior Opinion concludes that the Governor may not reorganize executive agencies by executive order when a statute prescribes some other method. 1983-1984 Att'y Gen. Ann. Rep. 180, 183. "To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice." Id. at 181.

Still another prior Opinion recognizes that the Governor has inherent authority to issue executive orders in furtherance of his constitutional duty to "take care that the laws be faithfully executed" as required by Article V, § 7. 1977-1978 Att'y Gen. Ann. Rep. 5, 7 (quoting Art. V, § 7). That authority is limited, however, by Article IV, § 1, vesting the legislative power of the Commonwealth in the General Assembly. "The Governor may not exercise any of that power. Thus, the Governor cannot legislate by executive order where an Act of Assembly is required." 1977-1978 Att'y Gen. Ann. Rep., supra (citations omitted) (Governor could not empower health coordinating council created by executive order to carry out statutory functions).

Article I, § 7 imposes strict limitations on the power to suspend the operation of statutes "without consent of the representatives of the people." There is some authority in other states for the Governor to exercise this power in time of war or under other conditions of emergency. See generally I A.E. Dick Howard, supra, at 90-94. I am not aware, however, of any Virginia court decision that discusses the limits of this gubernatorial authority or otherwise interprets Article I, § 7.

Two prior Opinions of this Office do apply Article I, § 7. One concludes that the power to suspend statutes is vested exclusively in the General Assembly and must be exercised by statute or by joint resolution of that body. See 1978-1979 Att'y Gen. Ann. Rep. 110, 112. The other concludes that even the General Assembly itself cannot suspend a statute's operation by inaction, but must take affirmative action to do so. See 1981-1982 Att'y Gen. Ann. Rep. 185 (asserting invalidity of legislative scheme that purported to allow local governments to adopt human services agency reorganization plans inconsistent with state statutes, if Governor approved and General Assembly did not take action to object at next legislative session). An earlier Opinion, while not mentioning Article I, § 7 or its predecessor constitutional provisions, concludes that the Governor has no authority to "waive" the provisions of state statutes imposing highway weight limits, even for the benefit of vehicles hauling national defense material. 1952-1953 Att'y Gen. Ann. Rep. 171. Based on the above, it is my opinion that Article I, §§ 5 and 7 prohibit you, as Governor, from suspending the operation of a duly adopted statute in the absence of some other statute authorizing you to do so.

Pursuant to its police powers to regulate gambling and intoxicating liquors, the General Assembly has imposed on the ABC Board the specific statutory duty of suspending or revoking the license of any licensee that the Board finds to have violated § 18.2-331, which prohibits the illegal possession of a gambling device. See § 4-37.1. The Governor's authority in this regard is more limited.

Suspending the enforcement of § 18.2-331, or the penalties prescribed for its violation in the case of the fraternal or charitable organizations you describe, would be in the nature of a legislative act requiring legislative authorization. See 1941-1942 Att'y Gen. Ann. Rep. 75 (gubernatorial proclamation establishing daylight savings time is legislative act requiring enabling statute because prescribing penalty and punishment is legislative function). It is further my opinion, therefore, that you are not authorized to suspend the application of § 18.2-325 to tip jar games conducted by fraternal and charitable organizations, either directly or by authorizing or ordering the ABC Board to do so.
1935-1936 Att'y Gen. Ann. Rep. 125, 126 ("the general purpose of the Alcoholic Beverage Control Act is to vest in the [ABC] Board the authority to conduct the system in such manner as the Board deems advisable, and the act does not confer on the Governor any power to curtail or restrict its operations").

1 The jar itself does not have a material effect on the legality of the game. Most tip jar games have manufacturer-selected names, such as Nevada Club Cards, Club Special Sudden Wealth, Jar-O-Do, FairPlay and Master Bulldog Tip.

2 Before 1971, the General Assembly's authority to regulate gambling and intoxicating liquors was prescribed by the Constitution of Virginia. See Parr v. Commonwealth, 198 Va. 721, 96 S.E.2d 160 (1957) (applying Va. Const. Art. IV, Sec. 60 (1902)); Com. v. Anheuser-Busch, Inc., 181 Va. 678, 26 S.E.2d 94 (1943) (applying Art. IV, Sec. 62). Article IV, § 14 of the 1971 Constitution provides that the omission of specific grants of authority formerly conferred on the General Assembly shall not be construed to deprive the General Assembly of its authority or to indicate a change in policy, "unless such purpose plainly appear."


4 As an administrative body to which the General Assembly has delegated certain regulatory powers under Title 4, the ABC Board may, in certain circumstances, have the authority to suspend the enforcement of regulations it has adopted pursuant to that legislative delegation. Such a suspension would, of course, be subject to the requirements of the Administrative Process Act, Chapter 1.1:1 of Title 9, §§ 9-6.14:1 to 9-6.14:25. See § 9-6.14:9.4 (governing withdrawal and repeal of regulations). This authority of the ABC Board does not extend to statutes.

The ABC Board and its enforcement personnel, of course, have the same rights as any law-enforcement agencies to establish priorities for their enforcement efforts. I assume, therefore, that the ABC Board could determine that enforcement actions against fraternal and charitable organizations are not an enforcement priority. As elected officials, local Commonwealth's attorneys have independent discretion whether to prosecute particular violations of criminal statutes. See 4A M.J. Commonwealth's and State's Attorney §§ 4, 6 (1990 & Supp. 1990). That discretion is not, of course, limited by the ABC Board's or the Governor's policy determinations.

CONSTITUTION OF VIRGINIA: EDUCATION — BILL OF RIGHTS.

EDUCATION: STANDARDS OF QUALITY.

Constitution establishes right to public elementary and secondary education for each child in Virginia. Right to public education defined through development and funding of Standards of Quality. Standards demonstrate educational needs of Virginia's children; legislative discretion to establish Standards not unlimited; intertwined with appropriations process.

August 23, 1991

The Honorable Richard L. Saslaw
Member, Senate of Virginia

In the context of legislative consideration of the February 1991 report of the Governor's Commission on Educational Opportunity for All Virginians, you ask several
questions concerning matters of constitutional interpretation that you describe as "founda-
tional" to any discussion of the question how best to assure educational equity for all
schoolchildren throughout the Commonwealth. You first ask to what level the right to a
public elementary/secondary education is guaranteed by the Constitution of Virginia. You
then ask several factual questions designed to help further to define that right.

I. Applicable Constitutional Provisions

The preamble to the Virginia Bill of Rights, Article I of the Constitution of Virginia
(1971), provides:

A DECLARATION OF RIGHTS made by the good people of Virginia in the
exercise of their sovereign powers, which rights do pertain to them and their
posterity, as the basis and foundation of government.

Article I, § 15 provides, in part:

That free government rests, as does all progress, upon the broadest possible
diffusion of knowledge, and that the Commonwealth should avail itself of
those talents which nature has sown so liberally among its people by assuring
the opportunity for their fullest development by an effective system of edu-
cation throughout the Commonwealth.

Article VIII (the "Education" article), § 1 provides:

The General Assembly shall provide for a system of free public elementary
and secondary schools for all children of school age throughout the Com-
monwealth, and shall seek to ensure that an educational program of high
quality is established and continually maintained.

Article VIII, § 2 provides, in part:

Standards of quality for the several school divisions shall be determined and
prescribed from time to time by the Board of Education, subject to revision
only by the General Assembly.

II. Child in Virginia Has Right to Public Education Guaranteed by Virginia Constitution

Your inquiry assumes that a constitutional right to a public education exists, but
this assumption has not been tested in the courts of the Commonwealth. Accordingly, the
question whether the Constitution of Virginia guarantees Virginia schoolchildren an edu-
cation must be resolved first before any conclusions may be drawn about the proper defi-
nition of that right.

Section 15 of the Virginia Bill of Rights, quoted above, derives from Thomas Jeffer-
sen's Notes on the State of Virginia. 1 A.E. Dick Howard, Commentaries on the Con-
stitution of Virginia 286 & n.13 (1974). The language of § 15 was added in 1971, placing
"education in the Bill of Rights alongside the other fundamentals of a free society." 1
A.E. Dick Howard, supra, at 285.

The basic spirit behind the addition of the education provision to the Decla-
ration of Rights was summarized by Senator Bateman when he said, "There
are certain minimums in this day and time that every child should be able to
expect as his right, as we are proposing to say in the new Bill of Rights."
Id. at 286 & n.15 (quoting Proceedings and Debates of The Senate of Virginia Pertaining to Amendment of the Constitution 214 (Ex. Sess. 1969) ("Senate Debates on Constitutional Revision").

Section 15 of the Virginia Bill of Rights does not expressly concern itself with the creation of a public school system. See 1 A.E. Dick Howard, supra, at 286-87. Section 15, rather, encourages the Commonwealth to foster the "diffusion of knowledge" through "an effective system of education throughout the Commonwealth." The public school system is but one manifestation of the policy animating § 15; it is part of a broad spectrum of universities, four-year colleges, community colleges, museums, libraries, and special schools and programs offering varied opportunities to the diverse interests and talents of Virginia's citizens.

The animating policy of Article I, § 15, as it pertains to public schooling at the elementary and secondary level, however, is "given fuller meaning in the Education article of the Constitution." 1 A.E. Dick Howard, supra, at 287.

The first clause of Article VIII, § 1 explicitly mandates a system of free public elementary and secondary schools. As described more fully in a prior Opinion of this Office, "the intention of the framers of the 1971 Constitution in including this mandatory language was to ensure that local governing bodies could not refuse to appropriate funds for schools, thereby causing the demise of public education within their jurisdiction." Based on the above, it is my opinion that the mandate included in Article VIII, read together with the language in Article I, establishes a right to a public elementary and secondary education for each child in Virginia.

III. Right to Public Education Is Defined by Board of Education and General Assembly Through Development and Funding of Standards of Quality; Discretion to Establish Standards Not Unlimited


In Chapter 13.1 of Title 22.1, §§ 22.1-253.13:1 through 22.1-253.13:8, entitled "Standards of Quality" ("Standards"), the Commonwealth crystallizes its needs, commitments, resources, research and priorities for the public school system. As provided in Article VIII, § 2, the Standards are determined and presented "from time to time by the Board of Education subject to revision only by the General Assembly." The Standards have been the vehicle, for example, for significant improvements in teachers' salaries and reduced class sizes in Virginia public schools. See Att'y Gen. Ann. Rep.: 1982-1983 at 444 (teacher salaries); 1979-1980 at 304 (class size).

The second clause of Article VIII, § 1 sets the goal to be sought by the General Assembly in fulfilling the mandate of a system of free public elementary and secondary schools. This goal is a "high quality" educational program in the public schools progressively achieved:

"In this Education Article, we [of the General Assembly] told ourselves ... that we look to the continued elevation of public education in Virginia."

The language of the second clause is deliberately aspirational and does not define the nature of the right protected in the Constitution. As originally proposed by the Commission on Constitutional Revision, the language of the second clause provided that the General Assembly "shall ensure that an educational program of high quality is established and maintained." 5 U. Rich. L. Rev., supra, at 270 & n.33 (quoting The Constitution of Virginia 61 (1969)). In the General Assembly, however, the precatory words "seek to" were inserted and the provision was passed in its current form. 5 U. Rich. L. Rev., supra, at 270-71; 2 A.E. Dick Howard, supra Pt. II, at 895.

It is my opinion, therefore, that the Standards define the right to an education guaranteed by the Constitution of Virginia. The Standards, however, are not—and cannot be—mathematically precise; they must necessarily reflect educational needs and fiscal realities. See Att'y Gen. Ann. Rep.: 1980-1981 at 79, 81; 1975-1976 at 312; 1972-1973 at 351. The Standards are intertwined with, but cannot be overshadowed by, the appropriations process. They demonstrate the real and immediate educational needs of Virginia's children. See 1972-1973 Att'y Gen. Ann. Rep., supra. Legislative discretion, therefore, is not unlimited in defining the Standards. See 1979-1980 Att'y Gen. Ann. Rep., supra, at 305. It is my opinion that this discretion must be exercised consistent with the educational policy underlying the Constitution of Virginia and may not be exercised in a manner that deprives Virginia's schoolchildren of their right to a public elementary and secondary education.9


In adopting the language of § 15, the General Assembly substituted the phrase "development by an effective system of education throughout the Commonwealth" in place of the proposed phrase "development through an effective system of public education." 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 286 & n.16 (1974) (citing The Constitution of Virginia: Report of the Commission on Constitutional Revision 99 (1969)). The intent of this change was expressed by Delegate Lyman C. Harrell Jr.: "We feel that the diffusion of knowledge should be through all types and forms of educational development and knowledge, from whatever source." Id. at 286 n.17 (quoting Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution 475 (Ex. Sess. 1969)) (emphasis added).


The constitutional revisors in 1970 were dedicated to "restoring order to the mayhem wreaked upon the state's educational system by its policy of massive resistance" during which schools were closed to avoid integration. Irby v. Fitz-Hugh, 693 F. Supp. 424, 428 (E.D. Va. 1988), aff'd, 889 F.2d 1352 (4th Cir. 1989), cert. denied, __ U.S. __, 110 L. Ed. 2d 270, 110 S. Ct. 2589 (1990); see also Bradley v. Balliet, 639 F. Supp. 650 (E.D. Va. 1986), aff'd, 829 F.2d 1308 (4th Cir. 1987).

It is important to note here a significant difference between the Constitution of Virginia and the Constitution of the United States. To conclude that a right to education is guaranteed by the Virginia Constitution does not mean that the right can be enforced through the equal protection clause of Article I, § 11. The Supreme Court of Virginia has held that Virginia's equal protection clause applies only to discrimination based on the specific classifications enumerated in the Virginia Constitution, i.e., "religious conviction, race, color, sex or national origin." Mohan v. NCPAC, 227 Va. 330, 338 n.4,
315 S.E.2d 829, 834 n.4 (1984) (discriminatory impact on freedom of speech may not be challenged as violation of equal protection clause under Virginia Constitution). This is in stark contrast to the federal equal protection clause, which establishes an independent constitutional guarantee requiring all individuals to be treated in a manner similar to others. Unlike the Virginia Constitution, the equal protection guarantee of the United States Constitution governs all governmental actions that classify individuals for different benefits or burdens under the law. See generally 2 Ronald D. Rotunda, et al., Treatise on Constitutional Law: Substance and Procedure § 18.1 (1986).

Section 2 deals with the essential components of quality education: standards and money. By the terms of section 2, the General Assembly has the ultimate say about both, although standards are determined in the first instance by the Board of Education, subject to revision by the Assembly." 2 A.E. Dick Howard, supra note 2, at 897.


A prior Opinion of this Office concludes that the General Assembly is not constitutionally required to provide state funds sufficient to meet all actual education costs. See 1980-1981 Att'y Gen. Ann. Rep., supra note 7, at 82.

You also ask whether establishing certain student/teacher ratios in the Standards would violate the right to an education guaranteed by the Constitution of Virginia. The resolution of this question requires an examination of facts not presented in your inquiry to determine whether such a ratio would act to deprive Virginia schoolchildren of the education to which they are entitled. Such a factual inquiry is beyond the scope of an official Opinion of the Attorney General. See Att'y Gen. Ann. Rep.: 1987-1988 at 422, 423; 1986-1987 at 252; 1977-1978 at 31.

CONSTITUTION OF VIRGINIA: EDUCATION — LEGISLATURE — BILL OF RIGHTS.

State transportation of students to sectarian schools not violative of U.S. Constitution if part of general transportation program for all students in Commonwealth; nonreligious purposes must be documented and implemented so as to avoid entangling government in religious affairs of sectarian schools. Public provision of free transportation of students to sectarian schools unconstitutional under Virginia Constitution. Legislative determination that use by sectarian school pupils of public school transportation on public safety grounds justified, independent of any benefit to sectarian schools, requirement that transportation be made available to both sectarian and nonsectarian private school students, and requirement that full cost of transportation be reimbursed by parents all necessary for legislation to survive judicial scrutiny under Virginia Constitution religion clauses.

January 16, 1991

The Honorable Richard L. Saslaw
Member, Senate of Virginia

You ask whether it would be constitutionally permissible for the Commonwealth to require local public school boards to make transportation to and from school available, at cost, to students of parochial and other sectarian private schools.

I. Applicable Constitutional Provisions

The establishment clause of the First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion."
Article I, § 16 of the Constitution of Virginia (1971) provides, in part:

No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.... 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.

Additionally, Article IV, § 16 provides:

The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association.

Further, Article VIII, § 10 provides, with certain exceptions applicable only to nonsectarian private schools and institutions of learning, that "[n]o appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof."

Article VIII, § 11 authorizes state loans and grants to or on behalf of students "attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education."

II. Establishment Clause of First Amendment Does Not Prohibit State Transportation of Students Attending Sectarian Schools

The establishment clause of the First Amendment to the Constitution of the United States generally requires that governmental action related to religion (1) have a clear secular purpose; (2) have a principal or primary effect which neither advances nor inhibits religion; and (3) avoid "excessive entanglement" with religion. Hunt v. McNair, 413 U.S. 734 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

In applying this test to educational activities, the Supreme Court of the United States has not required an absolute separation between church and state. See, e.g., Westside Community Schools v. Mergens, 495 U.S. ___, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (permitting equal access by student religious groups to public school facilities); Widmar v. Vincent, 454 U.S. 263 (1981) (requiring college to allow student use of college facilities for religious purposes where facilities were generally dedicated for student activities, and benefit to religion was indirect and insubstantial); Committee for Public Education v. Nyquist, 413 U.S. 756, 781-82 (1973) (recognizing that "services such as police and fire protection, sewage disposal, highways, and sidewalks" may be provided to parochial schools in common with other institutions because this type of assistance is

In contrast, the Court has held state programs created with the specific purpose of aiding religion in public schools to be invalid. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (legislated moment of silence in schools invalid because of underlying religious purpose); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments in public school had no secular purpose and entangled government in religion).

The Court also has held that the establishment clause is not offended by government transportation of parochial students to school as part of a general transportation program for all students in a state. *Everson v. Board of Education*, 330 U.S. 1 (1947). The Court recognized in *Everson* the clear secular purpose of providing safe transportation to children and held that such transportation has no independent religious significance:

> The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.


In the cases cited above, the Court focused on the fact that the programs at issue were created with a clear and overriding secular purpose, that they were directly designed to benefit all children, irrespective of whether they attended public or private schools, and that any resulting aid to religion was both indirect and insubstantial. For example, in upholding the loan of public textbooks, the Court stated:

> Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.


Based on the above, it is my opinion that state transportation of students to sectarian schools would not violate the establishment clause of the First Amendment if provided as a part of a general transportation program for all students in the Commonwealth, including students attending private nonsectarian schools, and if the nonreligious purposes of such a program are properly documented and implemented in a manner that avoids entangling government in the religious affairs of the sectarian schools.

### III. Constitution of Virginia More Restrictive Than Establishment Clause of First Amendment

Like the establishment clause, the Constitution of Virginia also requires governmental neutrality with respect to religion, guaranteeing the free exercise of religion while prohibiting governmental establishment of religion. Art. 1, § 16. Unlike the establishment clause, however, the Constitution of Virginia also explicitly and flatly prohibits
any appropriation of public funds or personal property to any church or sectarian society, and to any sectarian school or educational institution. See Art. IV, § 16; Art. VIII, § 10. Existing Virginia case law makes it clear that the combination of these state constitutional provisions imposes greater restrictions than the establishment clause on governmental action that aids religion or church-sponsored education. 2

In *Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955), the Supreme Court of Virginia held that the predecessor provision to Article VIII, § 10 prohibited appropriations to Virginia war veterans to help defray tuition and related education expenses of their children attending sectarian schools. In reaching its decision, the Court in *Almond* explicitly rejected the "child benefit" theory that the Supreme Court of the United States had adopted in *Everson*. Instead, the *Almond* Court held that the tuition grants afforded "direct and substantial aid" to the sectarian schools despite the fact that the payments were made directly to the parents of the students. The Court found that the tuition grant program "affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery." 197 Va. at 430, 89 S.E.2d at 858 (quoting *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948)). The Court, in *Almond*, also rejected the argument that Virginia's Constitution only prohibited direct appropriations to sectarian organizations.

Prior Opinions of this Office consistently have concluded that *Almond* prohibits state legislation providing free transportation and other forms of aid for students of sectarian schools. See 1966-1967 Att'y Gen. Ann. Rep. 264, 265; see also 1962-1963 Att'y Gen. Ann. Rep. 238; id. at 239. No provision that would change the *Almond* result was included in the 1971 revision of Virginia's Constitution. 3 Accordingly, it is my opinion that public provision of free transportation of students to sectarian schools would be unconstitutional under the Constitution of Virginia.

The Supreme Court of Virginia has not specifically addressed the constitutionality of a transportation program, like that contemplated by Senate Bill No. 444, under which parents of sectarian (as well as nonsectarian) school pupils would reimburse the school division at a per pupil cost not to exceed the actual cost of transportation. The constitutionality of such a proposal is suspect, however, since it would permit reimbursement by parents of students attending sectarian schools of less than the full public costs of the transportation, thereby authorizing a partial government subsidy of the transportation of students to attend religious schools. To the extent that legislation is designed to aid the religious schools, rather than to protect the safety and welfare of children irrespective of where they attend school, the legislation will likely be found unconstitutional. If, however, the General Assembly determines that there is a factual basis justifying the use by sectarian school pupils of public school transportation on public safety grounds, independent of any benefit to the sectarian schools themselves, if the transportation is made available to students of both sectarian and nonsectarian private schools, and if the legislation requires parental payment of the full cost of such transportation, the likelihood of the legislation surviving judicial scrutiny under the religion clauses of Constitution of Virginia will be greatly improved. 4

1 An example of such proposed transportation legislation is Senate Bill No. 444, introduced in the 1990 Session of the General Assembly. This bill, popularly referred to as "Share the Ride" legislation, would require local school boards to enter into agreements with eligible nonpublic schools to provide transportation for pupils of the latter schools at a per pupil cost not to exceed the actual cost to the school division of furnishing that transportation.

2 See generally, Annotation, *Constitutionality, Under State Constitutional Provision Forbidding Financial Aid to Religious Sects, of Public Provision of Schoolbus Service for Private School Pupils*, 41 A.L.R.3d 344 (1972) (collecting cases in which state courts have
considered public funding for transportation of sectarian school students to be prohibited by state constitutional provisions, although permitted under the First Amendment).

The applicable provision in Almond, Art. IX, Sec. 141 of the Constitution of Virginia (1902), as amended in 1952, provided: "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof . . . ." Id. at 423, 89 S.E.2d at 854. Existing Article VIII, § 10 is based upon this provision. See 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 948-57 (1974).

Cases such as Almond v. Day are a reminder that state courts are free to give stricter readings to the religion clauses of state constitutions than might be required even under the First Amendment. So many of the milestones of religious liberty, such as Jefferson's Bill for Religious Liberties and Madison's Memorial and Remonstrance, have sprung from Virginian sources that it is not surprising if the Virginia courts see Virginia's religious guarantees as having a vitality independent of the Federal Constitution." 1 A.E. Dick Howard, supra note 3, at 303.

The 1971 revisions to the Constitution of Virginia authorized state support of students attending nonprofit institutions of higher learning in the Commonwealth whose primary purpose is not religious. Such grants and loans have subsequently been upheld by the Supreme Court of Virginia. See Miller v. Ayers, 214 Va. 171, 198 S.E.2d 634 (1973) (students attending sectarian private institutions of higher learning must repay their loans by money or public employment); Miller v. Ayers, 213 Va. 251, 191 S.E.2d 261 (1972). No similar constitutional provision, however, exists concerning transportation or other support for students attending private primary or secondary schools in the Commonwealth.

See, e.g., Rhoades v. School District of Abington Township, 424 Pa. 202, 226 A.2d 53, appeal dismissed, 389 U.S. 11 (1967) (statistics showing that a person is five times as safe in a school bus as in a car supported finding that transportation aid was necessary for public health, welfare and safety). Funding of such transportation on a fee basis arguably does not entail an "appropriation" of public funds as did the legislation invalidated in Almond. See, e.g., Miller v. Ayers, 213 Va. at 251, 191 S.E.2d at 261 (upholding loans to students attending private colleges, including sectarian institutions); Att'y Gen. Ann. Rep.: 1984-1985 at 163 (legislative resolution encouraging State Library to lend educational films to all students, including those in private sectarian schools, is constitutional); 1979-1980 at 286 (private sectarian schools must purchase at cost test booklets for state minimum competency tests); 1975-1976 at 94 (county may rent space from church for senior citizen's center for all county residents without violating Virginia Constitution); 1974-1975 at 369 (county school board may rent kindergarten space from church assuming leased property and instruction on that property is under secular control). Cf. Op. to Hon. Jane H. Woods, H. Del. Mbr. (Aug. 10, 1990) (school board regulation gradually increasing rental rate for church use of school facilities strikes balance between constitutional aims of allowing free exercise of religion and avoiding public support or establishment thereof).

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

Constitution specifies qualifications required to hold elective office; implied prohibition against legislative interference to change qualifications. Constitutional amendment necessary to permit additional statutory qualification limiting members of county boards of supervisors to two terms.

May 3, 1991
You ask whether a statute limiting members of county boards of supervisors to two terms would be invalid under the provisions of Article II, § 5 of the Constitution of Virginia (1971).

I. Applicable Constitutional Provision

Article II, § 5 sets forth the qualifications required to hold elective office in the Commonwealth:

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

(a) the General Assembly may impose more restrictive geographical residence requirements for election of its members, and may permit other governing bodies in the Commonwealth to impose more restrictive geographical residence requirements for election to such governing bodies, but no such requirements shall impair equal representation of the persons entitled to vote;

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

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

II. Constitution Prescribes Qualifications Required to Hold Office; Proposed Statute Imposing Additional Qualifications Unconstitutional

Article II, § 5 states that the only qualification to hold any office of the Commonwealth or its governmental units is that a person must have been a resident of the Commonwealth for one year and be qualified to vote for that office. Article II, § 5 further provides three specific exceptions under which the General Assembly may impose additional qualifications to hold elective office. Limiting the number of terms of office of members of boards of supervisors does not fall within any of those exceptions.

The Supreme Court of Virginia has long held that when the Constitution specifies qualifications for an office, that specification is an implied prohibition against legislative interference to change those qualifications. *Black v. Trower & als.*, 79 Va. 123, 125 (1884) (statute requiring that members of electoral boards be freeholders held unconstitutional). The General Assembly cannot, directly or indirectly, enact qualifications in addition to those prescribed in Article II, § 5. *Pearson v. Supervisors, &c.*, 91 Va 322, 331, 21 S.E. 483, 484 (1895) (while General Assembly is to provide method of voting and may adopt reasonable rules and regulations, statute imposing qualifications for voting in addition to those prescribed in Constitution is unconstitutional and void); see also *Dean v. Paolicelli*, 194 Va. 219, 233-35, 72 S.E.2d 506, 515-16 (1952); 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 394-96 (1974).
It is my opinion that a statute limiting a member of a board of supervisors to two terms would impose an additional qualification—not having previously served two terms—for the office of supervisor not imposed by Article II, § 5. Based on the above, therefore, it is further my opinion that a constitutional amendment would be necessary to permit such a statutory limitation.  

1A prior Opinion of this Office concludes that a city charter provision requiring a city council member to resign that office in order to run for mayor did not impose an additional qualification in violation of Article II, § 5, because it did not disqualify a council member from running for mayor, but only forced him to make a choice. 1986-1987 Att'y Gen. Ann. Rep. 36, 38. In contrast, the statute you describe would disqualify any county supervisor who has served two terms from offering for re-election.

CONSTITUTION OF VIRGINIA: LEGISLATURE.

Constitutional provision prohibiting Commonwealth's attorney from serving concurrently as member of either house of General Assembly applicable also to assistant; assistant who qualifies as member of General Assembly vacates former office.

October 17, 1991

The Honorable Glenn B. McClanahan
Member, House of Delegates

You ask whether an assistant Commonwealth's attorney may serve concurrently as a member of the General Assembly.

I. Applicable Constitutional Provision

Article IV, § 4 of the Constitution of Virginia (1971) describes the qualifications necessary to be elected to the General Assembly, and provides, in part:

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

II. Constitutional Provision Applicable to Commonwealth's Attorney Also Applicable to Assistant; Assistant's Membership in Either House of General Assembly Prohibited

Prior Opinions of this Office consistently conclude that the deputies of officers are themselves officers and are subject to the same requirements and disabilities as the principal officer. Att'y Gen. Ann. Rep.: 1979-1980 at 282 (deputy clerk may not serve as member of city council); 1975-1976 at 50 (deputy commissioner of revenue must meet residency requirement); 1974-1975 at 384 (deputy sheriff must meet age and residency requirements).

Other prior Opinions consistently conclude that provisions and prohibitions applicable to a Commonwealth's attorney also apply to his deputies and assistants. Att'y Gen. Ann. Rep.: 1980-1981 at 282, 283 (assistant prohibited from serving as member of board of zoning appeals); 1973-1974 at 71 (assistant prohibited from holding, at same time,
office of county attorney); 1970-1971 at 317 (assistant may not serve as member of parks commission).

Article IV, § 4 clearly prohibits an attorney for the Commonwealth from serving concurrently as a member of the General Assembly. Based on the above, it is my opinion that this constitutional prohibition also applies to an assistant Commonwealth's attorney, and that an assistant Commonwealth's attorney who qualifies as a member of the General Assembly vacates the former office.

CONSTITUTION OF VIRGINIA: LEGISLATURE.

MOTOR VEHICLES: REGULATION OF TRAFFIC.

Plenary power of General Assembly to enact legislation prohibiting through truck traffic on Route 5 between Williamsburg and Richmond.

May 30, 1991

The Honorable George W. Grayson
Member, House of Delegates

You ask whether the General Assembly has the authority to restrict "through trucks" on State Route 5 between Richmond and Williamsburg.

I. Applicable Constitutional Provisions

Article IV, § 1 of the Constitution of Virginia (1971) vests the legislative power of the Commonwealth in the General Assembly. Article IV, § 14 provides that this legislative power shall extend to all subjects of legislation not forbidden or restricted by the Constitution and details 20 instances in which the General Assembly is prohibited from enacting a local or special law.

II. General Assembly Has Authority to Restrict Through Truck Traffic

Prior Opinions of this Office consistently conclude that the Constitution of Virginia vests plenary legislative power in the General Assembly. See Att'y Gen. Ann. Rep.: 1989 at 46, 49; 1987-1988 at 33, 94. None of the 20 prohibitions on local or special acts in Article IV, § 14 of the Constitution restricts the General Assembly's authority to regulate truck traffic. Indeed, the General Assembly has exercised this control in § 46.2-809 of the Code of Virginia by establishing a process for restricting through truck traffic on secondary highways. The Supreme Court of Virginia also has recognized the broad powers of legislative bodies to regulate the use of public highways. See Funeral Directors' Ass'n v. Groth, 202 Va. 792, 120 S.E.2d 467 (1961) (prohibition of parking on public streets to facilitate operation of funeral home); Town of Leesburg v. Tavenner, 196 Va. 80, 82 S.E.2d 597 (1954) (prohibition of parking on public street to allow space for common carriers to receive and discharge passengers); Polglaise's Case, 114 Va. 850, 76 S.E.2d 897 (1913) (regulation of tire width for commercial haulers of railroad ties and lumber).

It is my opinion, therefore, that the General Assembly has the authority to restrict through truck traffic on Route 5 between Williamsburg and Richmond.

1Based upon telephone conversations between you and a member of my staff, I understand that you use the term "through truck" to include any truck larger than a four-tire
COSTS, FEES, SALARIES AND ALLOWANCES: FEES.

No defendant charged with multiple traffic infractions arising from single incident shall be assessed fee to be paid to district court clerk more than once when defendant has submitted payment of fee for at least one, but fewer than all, of charges in advance of trial.

June 6, 1991

The Honorable J. Allen Walker
Judge, Loudoun County General District Court

You ask whether the fee required by § 14.1-123(3a)(i) or (iii) of the Code of Virginia must be assessed against a defendant charged with multiple traffic infractions arising from a single incident in which the defendant, in advance of trial, submitted payment of the fee required by § 14.1-123(3a)(ii) for at least one, but fewer than all, of such charges.

I. Applicable Statutes

Section 14.1-123(3a) details fees to be paid to district court clerks in misdemeanor or traffic cases:

For processing a case of a misdemeanor or a traffic violation, including a case in which there has been written appearance and waiver of court hearing, and including swearing witnesses and taxing costs, twenty-two dollars.

Assessment of this fee shall be based on:

(i) An appearance for court hearing in which there has been a finding of guilty; or

(ii) A written appearance with waiver of court hearing and entry of guilty plea; or

(iii) For a defendant failing to appear, a trial in his or her absence resulting in a finding of guilty. In addition to any other fee prescribed by this subsection, a fee of five dollars shall be taxed as costs whenever a defendant, charged with a traffic infraction, fails to appear, unless, after a hearing requested by such person, good cause is shown for such failure to appear. No defendant with multiple charges arising from a single incident shall be taxed the fee provided in this subsection more than once for a single appearance or trial in absence related to that incident. A defendant with charges which arise from separate incidents shall be taxed a fee for each incident even if the charges from the multiple incidents are disposed of in a single appearance or trial in absence; or

(iv) An appearance for court hearing in which the court requires that the defendant successfully complete traffic school or a driver improvement clinic, in lieu of a finding of guilty.

Section 14.1-92 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.

II. No Defendant with Multiple Charges Arising from Single Incident Shall Be Taxed Fee Provided in § 14.1-123 More than Once

Section 14.1-123(3a)(iii) provides that no defendant with multiple charges arising from a single incident shall be taxed the fee provided in that subsection more than once for a single appearance or trial in his absence related to that incident. Section 14.1-123, however, does not address whether the fee required by § 14.1-123(3a)(i) or (iii) must be assessed against a defendant charged with multiple traffic infractions arising from a single incident when the defendant has submitted payment of the fee required by § 14.1-123(3a)(ii) for at least one, but not for all, of these charges in advance of trial.

In analogous circumstances, a prior Opinion of this Office construing § 14.1-92 concludes that, as a general rule, clerk's fees "may be charged for each indictment." 1982-1983 Att'y Gen. Ann. Rep. 251, 252. Section 14.1-92, however, provides that multiple fees are not authorized 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. A prior Opinion of this Office also concludes that this general rule and exception apply to § 14.1-123. See 1990 Att'y Gen. Ann. Rep. 68, 70-71. To assess such an additional fee would unfairly penalize a defendant who has chosen to prepay fines and fees for some of the charges and would encourage defendants to address all charges at the time of trial to avoid the additional fee.

It is my opinion, therefore, that multiple fees should not be assessed pursuant to § 14.1-123(3a)(i) or (iii) against a defendant charged with multiple traffic infractions arising from a single incident when the defendant has submitted payment of the fee required by § 14.1-123(3a)(ii) in advance of trial for at least one, but not for all, of such charges.

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

Full-time Commonwealth's attorney may serve simultaneously as part-time city attorney, as long as part-time duties not carried out during hours engaged in duties as Commonwealth's attorney.

June 14, 1991

The Honorable C. Hardaway Marks
Member, House of Delegates

You ask whether the Commonwealth's Attorney for the City of Hopewell may serve simultaneously as the part-time City Attorney.
I. Facts

According to the 1990 census, the City of Hopewell has a population of 23,101. On July 26, 1977, the City Council of the City of Hopewell unanimously adopted a resolution stating, in part:

[The City Council by this Resolution expresses its approval of a full-time Commonwealth's Attorney for the City of Hopewell, effective January 1, 1978, and hereby requests the concurrence of the Compensation Board and requests the Compensation Board to take whatever action is required to establish a full-time Commonwealth's Attorney . . . .]

On September 28, 1977, the Compensation Board approved the designation of Hopewell's Commonwealth's Attorney as full-time effective January 1, 1978.

On March 13, 1990, the City Council unanimously adopted a motion to retain the person currently serving as the elected Commonwealth's Attorney for Hopewell, as interim part-time City Attorney. That motion provided that the part-time City Attorney's salary assumes a work commitment of approximately 20 hours per week. The Commonwealth's Attorney states that he performs his work as part-time City Attorney primarily in the evening and on weekends.

II. Applicable Statutes

Section 15.1-50 of the Code of Virginia provides:

A. 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 councillor shall hold any other office mentioned in Article VII of the Constitution at the same time, except:

(1) That of a county, city or town attorney, notary public, commissioner in chancery, commissioner of accounts, local registrars of deaths and births, or member of any commission or board appointive by the Governor . . . .

Section 15.1-821 provides for attorneys for the Commonwealth for cities, and provides, in part:

In cities having a population of more than 35,000, attorneys for the Commonwealth . . . shall devote full time to their duties, and shall not engage in the private practice of law; however, this provision shall not apply in cities reaching a population of more than 35,000, which had a population of 35,000 or less immediately prior to the commencement of the term for which the attorney for the Commonwealth sought office. In cities having a population of more than 17,000 and less than 35,000, attorneys for the Commonwealth . . . shall devote full time to their duties, and shall not engage in the private practice of law, if the council of the city and the Compensation Board all concur that he shall so serve.

III. Section 15.1-50(A)(1) Authorizes Simultaneous Service as Commonwealth's and City Attorney; Full-Time Commonwealth's Attorney Not Barred from Additional Part-Time Employment

Section 15.1-50(A)(1) provides that a Commonwealth's attorney may not hold any other office mentioned in Article VII of the Constitution of Virginia (1971) at the same
time, except for several specified offices, including the office of county, city or town attorney. It is my opinion, therefore, that § 15.1-50(A)(1) authorizes simultaneous service as an attorney for the Commonwealth and as a city attorney.

Section 15.1-821 provides that in cities with a population of between 17,000 and 35,000, attorneys for the Commonwealth must devote full time to their duties and not engage in the private practice of law if the city council and Compensation Board so concur. In the facts presented, both Hopewell's City Council and the Compensation Board agreed that the Commonwealth's Attorney should serve on a full-time basis. The term "full time" is not defined in § 15.1-821, 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); 1990 Att'y Gen. Ann. Rep. 92, 93. In ordinary usage "full time" refers to employment "for or involving a standard number of hours of working time." The American Heritage Dictionary 538 (2d ed. 1985).

The primary object of statutory construction is to ascertain and give effect to legislative intent. See Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); 1989 Att'y Gen. Ann. Rep. 325, 326. The primary legislative intent expressed in § 15.1-821 is to prevent a Commonwealth's attorney from engaging in the private practice of law when the city council and Compensation Board have concurred that he shall serve on a full-time basis.

To interpret § 15.1-821 as prohibiting all other forms of employment by a Commonwealth's attorney arguably would conflict with the express provision in § 15.1-50(A)(1) that a Commonwealth's attorney simultaneously may hold the office of county, city or town attorney. Under recognized principles of statutory construction, statutes dealing with the same subject must be construed in conjunction with one another to produce a harmonious result. Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953); Att'y Gen. Ann. Rep.: 1990 at 15, 16; 1989 at 253, 254.

I am advised by the Compensation Board staff that the Board traditionally has interpreted the full-time designation under § 15.1-821 as disqualifying a Commonwealth's attorney only from the private practice of law and not from service as a county, city or town attorney, or from other types of additional employment. The interpretation given to a statute by the 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); Att'y Gen. Ann. Rep.: 1990 at 175, 176; 1989 at 354, 356.

Based on the above, it is my opinion that the full-time Commonwealth's Attorney for the City of Hopewell may also serve as part-time City Attorney, as long as his duties as part-time City Attorney are carried out primarily during hours other than those during which he usually is engaged in his duties as Commonwealth's Attorney.

In practice, the same individuals often serve as both elected Commonwealth's attorney and appointed city, county or town attorney, either in the same jurisdiction or in other jurisdictions. See Va. Rev. Directory State & Local Gov't Officials (Co. Publications, Inc. 5th ed. 1990). This Office has confirmed that this is or has been true of individuals whose Commonwealth's attorney position has been designated as full time.
June 20, 1991

The Honorable W. Tayloe Murphy Jr.
Member, House of Delegates

You ask whether a Virginia town that is dissatisfied with the service and rates of its current cable television franchisee may operate the cable television system itself.

I. Applicable State and Federal Statutes

Section 15.1-23.1 of the Code of Virginia provides for the licensing and regulation of cable television systems by local governments, and provides, in part:

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

***

The governing body may regulate such systems, including the establishment of fees and rates, the assignment of channels for public use, the operation of such channels assigned for public use, and the placement of restrictions or conditions on the scope of the business activities engaged in by such systems with regard to the sale, lease, rental or repair of television receivers or repair of video cassette and disc recorders and players, or provide for such regulation and operation by such agents as the governing body may direct.

Section 15.1-307 establishes general requirements for the granting of any franchise, including one for cable television, by a city or town, and provides, in part:

Such grant, and any contract in pursuance thereof, may provide that upon the termination of the grant the plant as well as the property, if any, of the grantee in the streets, avenues and other public places shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation thereof, be and become the property of the city or town; but the grantee shall be entitled to no payment by reason of the value of the franchise; and any such plant or property acquired by a city or town may be sold or leased or, if authorized by law, maintained, controlled and operated by such city or town. Every such grant shall specify the mode of determining any valuation therein provided for and shall make adequate provision by way of forfeiture.
of the grant or otherwise to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant.

The Federal Cable Communications Policy Act of 1984, 47 U.S.C.A. §§ 521 through 559 (West 1991) (the "Cable Act"), provides:

The purposes of [the Cable Act] are to

(1) establish a national policy concerning cable communications;

* * *

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems . . . .


Section 533(e) of the Cable Act provides, in part:

(1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.

(2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority.

47 U.S.C.A. § 533(e).

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

Section 556(c) of the Cable Act provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with [this Act] shall be deemed to be preempted and superseded." 47 U.S.C.A. § 556(c).

II. Town Authorized to Acquire and Operate Cable Television System upon Termination of Existing Franchise

The plain language of § 15.1-23.1 provides authority for a town to grant a franchise to a cable television system. Section 15.1-307 expressly authorizes a town to provide in the franchise or "any contract in pursuance thereof" for the town's acquisition of the "plant" and "property" of the franchisee, and further provides for the municipality to maintain, control and operate that "plant or property" where "authorized by law."

Based on the above, it is my opinion that Virginia towns are "authorized by law"—the Cable Act—to own cable television systems. It is further my opinion, therefore, that if the town in question has provided in the current cable television franchise or contract for municipal ownership upon termination of the franchise, it may proceed to acquire and operate the cable television system pursuant to § 15.1-307 when that termination occurs.

1 Article X, § 10 of the Constitution of Virginia (1971) prohibits the Commonwealth and its localities from becoming "interested in the stock or obligations of any company, association, or corporation." This provision presumably would prohibit partial municipal ownership of a cable television business. I assume, however, that your question relates to a town's being the sole owner of the cable system.

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

Determination whether developer's proffers of cash and off-site road improvements qualify for statutory protections depends on evaluation of facts and surrounding circumstances, including (1) whether proffered conditions of rezoning application require "substantial" contributions of cash, real property or public improvements, based on evaluation of total size and cost of project; and (2) whether need for proffered conditions for off-site road improvements created solely by rezoning, based on evaluation of other area projects and their impact on traffic volume. Conditions proffered to satisfy county formula utilized in evaluating rezoning applications for projects exceeding base level density allowed by comprehensive plan determined by whether particular need generated solely by rezoning.

August 19, 1991

The Honorable Vincent F. Callahan Jr.
Member, House of Delegates

You ask whether certain proffers of cash and off-site road improvements by a Fairfax County developer qualify for the protections of § 15.1-491(al) of the Code of Virginia.

I. Facts

In December 1990, the Board of Supervisors of Fairfax County approved a rezoning in the Fairfax Center area of the County for a 24-acre office development project. Written conditions proffered by the developer at the time of the rezoning included (1) certain off-site road improvements with an estimated cost of $3,028,000, and (2) a $500,000 cash contribution to be used by Fairfax County for other specified off-site improvements (the "proffers"). Performance of the proffers is tied to the progress of the development. The $500,000 cash contribution is payable in quarterly installments beginning in March 1991, before the developer submitted site plans.

You indicate that the developer made the proffers to satisfy a formula utilized by Fairfax County staff in evaluating rezoning applications for projects exceeding the base level density allowed by the County's comprehensive plan. This formula, known as the Fairfax Center Area Roadway Contribution Formula (the "Formula"), is included in Procedural Guidelines for the Annual Review Process: Fairfax Center Area (the "Guidelines") that the County adopted in 1982 as part of its annual comprehensive plan review process. These Guidelines establish the Formula to determine the proportionate share of transportation improvements in the Fairfax Center area that should be provided by the
private sector. This Formula includes an inflation-sensitive multiplier and allows developers a cash credit for the dedication and construction of qualifying off-site road improvements. The Guidelines also provide that the Formula does not relate to "on-site" road improvements, which are the sole responsibility of the developer.

As applied to the office development in question, the Formula currently requires a total cash contribution of $3,699,603. The proffered off-site road improvements and cash contribution, which together total $3,528,000, will be credited as provided by the Formula.

II. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498. Section 15.1-486 authorizes local governing bodies to enact zoning ordinances classified the territory under their jurisdiction into districts and regulating the use of land within those districts.

As a county with the urban county executive form of government, Fairfax County is authorized to enact conditional zoning provisions pursuant to § 15.1-491(a). Conditional zoning is intended to provide a flexible mechanism to permit differing land uses and to recognize the effects of changing land use patterns, while protecting the community by permitting zoning reclassifications subject to conditions proffered by a zoning applicant that are not generally applicable to other land similarly zoned. See §§ 15.1-491.1, 15.1-430(q).

Section 15.1-491(a) provides that a zoning ordinance may include "reasonable" regulations and provisions for the adoption, in counties ... wherein the urban county executive form of government is in effect ... as part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions.

In 1990, the General Assembly amended § 15.1-491(a) to restrict a county governing body's ability to change the applicable zoning regulations once qualifying proffered contributions of cash, property or public improvements have been provided in compliance with a statutorily prescribed timetable. See Ch. 868, 1990 Va. Acts 1501, 1502 (Reg. Sess.). As a result, § 15.1-491(a) is now modified by § 15.1-491(a1) and (a2), as follows:

(a1) In the event proffered conditions include a requirement for the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.
(2) Any landowner who has prior to July 1, 1990, proffered the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, but who has not substantially implemented such proffers prior to July 1, 1990, shall advise the local governing body by certified mail prior to July 1, 1991, that he intends to proceed with the implementation of such proffers. Such notice shall identify the property to be developed, the zoning district, and the proffers applicable thereto. Thereafter, any landowner giving such notice shall have until July 1, 1995, substantially to implement such proffers, or such later time as the governing body may allow. Thereafter, the landowner in good faith shall diligently pursue the completion of the development of the property. Any landowner who complies with the requirements of this subdivision shall be entitled to the protection against action initiated by the governing body affecting use, floor area ratio, and density set out in subdivision (a1), unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare, but any landowner failing to comply with the requirements of this subdivision shall acquire no rights pursuant to this section.

III. Qualification for Statutory Protections Requires Evaluation of Facts and Surrounding Circumstances

Section 15.1-491(a1) represents a legislative determination that certain landowners should receive protections comparable to those provided to a landowner who has acquired vested rights to complete a project, notwithstanding later zoning or other legislative changes. See 1989 Att'y Gen. Ann. Rep. 32, 34. Like the determination of the vested rights of a landowner, application of the protections of § 15.1-491(a1) depends upon the facts of each case. See 1989 Att'y Gen. Ann. Rep., supra.

The protections of § 15.1-491(a1) require a threshold determination that the proffered conditions of a rezoning application include a requirement for "substantial" contributions of cash, real property or public improvements, "the need for which is not generated solely by the rezoning itself."

I am unable to determine from the facts presented whether the proffered conditions of the particular rezoning application you describe satisfy the criteria for application of the protections of § 15.1-491(a1). Whether the proffered contributions are "substantial" necessarily depends on an evaluation of all the relevant surrounding facts and circumstances, including the total size and cost of the project. Similarly, whether the need for the proffered contributions for off-site road improvements is created solely by the rezoning also requires an evaluation of the attendant facts and circumstances, including other projects in the area and their likely impact on traffic volume. Expert testimony on complex urban planning and economic issues may be needed to apply these statutory tests properly.

Conditions proffered to satisfy the Formula may or may not satisfy needs generated solely because of the rezoning, depending on the surrounding facts and circumstances. For example, to satisfy the Formula, a developer might offer to upgrade traffic signals at a nearby intersection as a condition of rezoning for a shopping center or office project. Whether the need for the upgrading was generated solely by the rezoning would be a factual determination to be made on a case-by-case basis. It is my opinion, however, that the mere fact that conditions are proffered to satisfy a formula adopted by the Fairfax County Board of Supervisors and used by the County staff in evaluating rezoning applications is not, by itself, determinative.

Section 15.1-430(q) defines "conditional zoning," "as part of classifying land within a governmental entity into areas and districts by legislative action," to mean "the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of[,] the regulations provided for a particular zoning district or zone by the overall zoning ordinance."


Subdivision (a3) of § 15.1-491 provides that subdivisions (a1) and (a2) apply prospectively only and do not affect zoning ordinance amendments enacted before March 10, 1990, or litigation pending before July 1, 1990.

Section 15.1-491(a2) imposes further requirements for the implementation of proffers made before July 1, 1990, that have not been substantially implemented before that date. A landowner who made such a proffer must timely notify the locality by July 1, 1991, of his intent to proceed and must actually implement the proffer by July 1, 1995, unless the governing body allows an extension. You indicate that the conditions in question were proffered in December 1990, at the time the rezoning application was approved, which would render § 15.1-491(a2) inapplicable.

Any administrative determination in accepting or interpreting a particular proffer would be subject to judicial review, of course, in the event a dispute arises requiring a binding adjudication whether an owner has acquired a vested right in a land use. See Holland v. Johnson, 241 Va. 553, 403 S.E.2d 358 (1991) (adjudication regarding creation, existence or termination of vested right in land use can be made only by court of competent jurisdiction).

As noted, § 15.1-491(a) further contemplates that proffers shall be voluntary. The voluntariness of a particular proffer is also a factual determination to be made on a case-by-case basis. See Rinker, supra note 3 (remanding case for factual determination).

For example, you indicate that the proffers tie performance of the conditions to stages of progress of the office development, a fact that suggests a relationship between the need for the improvements and the development. See 1989 Att'y Gen. Ann. Rep. 96, 98 (off-site water and sewer improvements expressly linked in proffer document to needs generated by proposed development satisfied requirement that improvements be "neces-sitated or required, at least in part, by the proposed development" for purposes of §§ 15.1-491.2 and 15.1-466(A)(j), the latter being now recodified as § 15.1-466(A)(10)).
Locality prohibited from allowing site-built single family home to be located on one-acre lot in agricultural zoning district, or similarly classified district, while requiring multi-section manufactured home, 19 or more feet wide, on permanent foundation, to be sited on 5-acre lot.

July 31, 1991

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

You ask whether § 15.1-486.4 of the Code of Virginia authorizes a county, city or town to provide by local ordinance that site-built single family homes may be built on one-acre lots in agricultural zoning districts while requiring multisection manufactured homes, in excess of nineteen feet in width and placed on a permanent foundation, to be located on lots of at least five acres.

I. Applicable Statute

Section 15.1-486.4 requires uniform regulations for manufactured housing, and provides:

A. Counties, cities, and towns adopting and enforcing zoning ordinances under the provisions of this article [Article 8, Chapter 11 of Title 15.1] shall provide that, in all agricultural zoning districts or districts having similar classifications regardless of name or designation where agricultural, horticultural, or forest uses such as but not limited to those described in § 58.1-3230 are the dominant use, the placement of manufactured houses that are nineteen or more feet in width, on a permanent foundation, on individual lots shall be permitted, subject to development standards that are equivalent to those applicable to conventional, site-built single family dwellings within the same or equivalent zoning district.

B. Counties, cities, and towns adopting and enforcing zoning regulations under the provisions of this article may, to provide for the general purposes of zoning ordinances, adopt uniform standards, so long as they apply to all residential structures erected within the agricultural zoning district or other districts identified in subsection A of this section incorporating such standards. Such standards shall not have the effect of excluding manufactured housing.

C. Local zoning ordinances adopting provisions consistent with this section shall not relieve lots or parcels from the obligations relating to manufactured housing units imposed by the terms of a restrictive covenant.

II. Manufactured Houses 19 Feet or More in Width, on Permanent Foundation, Must Be Permitted in Agricultural Zoning Districts Subject to Same Standards as Applicable to Conventional, Site-Built Single Family Dwellings

Section 15.1-486.4(A) requires local regulations for all agricultural zoning districts or districts having similar classifications for manufactured housing nineteen or more feet in width and on a permanent foundation to be uniform with regulations for conventional, site-built single family dwellings. A locality may adopt uniform standards as long as those standards apply equally to all residential structures in such zoning districts and do not have the effect of excluding manufactured housing. Section 15.1-486.4(B).
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). 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. Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982); Christiansburg v. Montgomery County, 216 Va. 654, 222 S.E.2d 513 (1976); 1990 Att'y Gen. Ann. Rep. 132, 133.

Based on the above, it is my opinion that the plain language of § 15.1-486.4 now prohibits a locality from allowing a site-built home to be located on a one-acre lot in an agricultural zoning district or district having a similar classification, while requiring a multisection manufactured home, in excess of nineteen feet in width and placed on a permanent foundation, to be sited on a five-acre lot.


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

Rezoning function reserved to local governing body; architectural review board may not deny certificate of compatibility on proposed use of building or structure when use permitted by right under zoning ordinance. Applicant who meets statutory standard for granting of variance based on demonstration of hardship entitled to exercise variance as matter of right; architectural review board not empowered to override variance properly granted by board of zoning appeals. Architectural review board without jurisdiction to overrule or modify site plan previously approved by entity designated in local ordinance to perform that function, unless local ordinance provides otherwise.

September 16, 1991

Mr. George R. St. John
County Attorney for Albemarle County

You ask several questions about the scope of authority of an architectural review board created by a locality pursuant to § 15.1-503.2 of the Code of Virginia. Specifically, you ask whether such a board may deny approval to a proposed building or structure submitted for its review on the grounds that its proposed use is not "compatible" with the district under the architectural review board's control when the use is one permitted as a matter of right in that district under the locality's zoning ordinance. You also ask whether the architectural review board has the authority to deny a property owner applying for approval of a project the right to use a variance from applicable setback requirements that has been granted to him by the local board of zoning appeals. Your third question is whether the architectural review board may require an applicant to relocate his proposed building on its site or otherwise alter a site plan previously approved by the local planning commission.

I. Applicable Statute

Section 15.1-503.2 provides, in part:
A. 1. The governing body of any county or municipality may adopt an ordinance setting forth the historic landmarks within the county or municipality as established by the Virginia Landmarks Commission, and any other buildings or structures within the county or municipality having an important historic, architectural or cultural interest, and any historic areas within the county or municipality as defined by § 15.1-430 (b), amending the existing zoning ordinance and delineating one or more historic districts, adjacent to such landmarks, buildings and structures, or encompassing such historic areas, or encompassing parcels of land contiguous to arterial streets or highways (as designated pursuant to Title 33.1, including § 33.1-41.1 of that title) found by the governing body to be significant routes of tourist access to the county or municipality or to designated historic landmarks, buildings, structures or districts therein or in a contiguous county or municipality. Such amendment of the zoning ordinance and the establishment of such district or districts shall be in accordance with the provisions of Article 8 (§ 15.1-486 et seq.) of this chapter [Chapter 11 of Title 15.1]. The governing body may provide for an architectural review board to administer such ordinance. Such ordinance may include a provision that no building or structure, including signs, shall be erected, reconstructed, altered or restored within any such historic district unless the same is approved by the architectural review board or, on appeal, by the governing body of such county or municipality as being architecturally compatible with the historic landmarks, buildings or structures therein.

2. Subject to the provisions of subdivision 3 hereof the governing body may provide in such ordinance that no historic landmark, building or structure within any such historic district shall be razed, demolished or moved until the razing, demolition or moving thereof is approved by the architectural review board, or, on appeal, by the governing body after consultation with such architectural review board.

3. The governing body shall provide by ordinance for appeals to the circuit court for such county or municipality from any final decision of the governing body pursuant to subdivisions 1 and 2 hereof and shall specify therein the parties entitled to appeal such decisions, which such parties shall have the right to appeal to the circuit court for review by filing a petition at law, setting forth the alleged illegality of the action of the governing body, provided such petition is filed within thirty days after the final decision is rendered by the governing body. The filing of the said petition shall stay the decision of the governing body pending the outcome of the appeal to the court, except that the filing of such petition shall not stay the decision of the governing body if such decision denies the right to raze or demolish a historic landmark, building or structure. The court may reverse or modify the decision of the governing body, in whole or in part, if it finds upon review that the decision of the governing body is contrary to law or that its decision is arbitrary and constitutes an abuse of discretion, or it may affirm the decision of the governing body.

II. Architectural Review Board May Not Base Denial on Proposed Use of Building or Structure if Use Allowed by Right Under Zoning Ordinance

When statutes on the same subject are construed, each section must be considered in conjunction with every other section to produce a harmonious result. Commonwealth v. Jones, 194 Va. 727, 74 S.E.2d 817 (1953); 1987-1988 Att'y Gen. Ann. Rep. 271, 273. 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

Chapter 11 of Title 15.1, §§ 15.1-427 through 15.1-503.2, presents such a "connected system" for local government planning, subdivision of land and zoning. Various statutes within Chapter 11 detail the creation, powers and responsibilities of the several bodies and officers charged with carrying out the local land use regulation process, including the local governing body, the planning commission, the zoning administrator, the board of zoning appeals and the architectural review board.

Section 15.1-503.2 contains the only reference to architectural review boards found in the Code. Under that section, such boards have only two specifically designated functions: (1) to review and certify that a proposed building or structure, including signs, is "architecturally compatible" with the historic landmarks, buildings or structures in the district subject to the architectural review board's control; and (2) to review and approve or disapprove the razing, demolition or moving of a historic landmark or building or structure within a historic district.

Prior Opinions of this Office generally conclude that when a function in the overall land use regulation process is assigned by statute to one body, it may not be performed or overridden by another body. See, e.g., Att'y Gen. Ann. Rep.: 1981-1982 at 114 (governing body not authorized to exempt projects of public utility commission from planning commission review); 1977-1978 at 285 (governing body may not insert additional steps not contemplated by statute in zoning approval process); 1976-1977 at 332, 333 (board of zoning appeals, and not planning commission, must rule on special exceptions); 1971-1972 at 485 (planning commission not empowered to issue variances).

The Supreme Court of Virginia has held that both the establishment of a property's original zoning classification and its rezoning to another use classification are legislative functions that must be reserved to the governing body. Laird v. City of Danville, 225 Va. 256, 302 S.E.2d 21 (1983). In holding invalid a section of the Danville city charter that delegated authority for rezonings to the planning commission, the Court found it to be "an overriding requirement of zoning law in Virginia" that "only the governing body of a locality may zone or rezone property and then only by ordinance." Id. at 262, 302 S.E.2d at 24.

By basing its denial of a certificate of compatibility for a proposed building or structure on the use of that building or structure, when the use is one permitted in the zoning district in question, an architectural review board effectively would be assigning the property to a new use classification—a form of rezoning. The decision in Laird makes it clear that this is a function reserved to the local governing body. In my opinion, therefore, an architectural review board may not base its denial of a certificate of compatibility on the proposed use of the building or structure if that use is permitted by right in the zoning district in which the building or structure is proposed to be located.

III. Architectural Review Board Not Empowered to Override Variance Properly Granted by Board of Zoning Appeals

Boards of zoning appeals may grant variances only when the statutory requirements for demonstration of a hardship have been met. Hendricks v. Board of Zoning Appeals, 222 Va. 57, 278 S.E.2d 814 (1981). When the statutory requirements for the granting of a variance based on hardship have been demonstrated by the applicant, the board of zoning appeals is obligated to grant the variance. Tidewater Utilities v. Norfolk, 208 Va. 705, 712, 160 S.E.2d 799, 804 (1968). Failure to grant a variance under such circumstances is an abuse of discretion. Azalea Corp. v. City of Richmond, 201 Va. 636, 112 S.E.2d 562 (1960).
These cases, in my opinion, dictate the conclusion that an applicant who has met the statutory standard to receive a variance is entitled to exercise that variance as a matter of right. It is further my opinion, therefore, that an architectural review board may not condition its approval of a certificate of compatibility for a building or structure under its jurisdiction on the applicant's foregoing his right to exercise such a variance.

IV. Architectural Review Board Without Jurisdiction over Site Plan Unless Local Ordinance Provides Otherwise

Your third question differs from the first two because Chapter 11 of Title 15.1 does not specifically assign site plan review and approval to any particular body. In practice, local zoning ordinances variously assign site plan review functions to the locality's planning staff or zoning administrator, to the planning commission or to the local governing body itself.

Because no such statutory assignment of site plan review exists in the state enabling legislation, it is my opinion that a local governing body could define the architectural review board's evaluation of architectural compatibility to include a review of a proposed building or structure's location on its site plan. In the absence of such a specific assignment of site plan evaluation to the architectural review board in the local zoning ordinance, however, that board would lack authority to overrule or modify a site plan previously approved by the entity designated in the local ordinance to perform that function.

1 See, e.g., § 15.1-485 (governing body to adopt subdivision ordinance); § 15.1-486 (governing body may adopt zoning ordinance).
2 See, e.g., §§ 15.1-470 to 15.1-472 (planning commission to prepare and recommend subdivision ordinance and amendments thereto to governing body); § 15.1-491(g) (planning commission to make recommendations on amendments to zoning ordinance).
3 Section 15.1-491.3 (zoning administrator vested with enforcement authority on behalf of local governing body).
4 See, e.g., § 15.1-494 (creation of board of zoning appeals); §§ 15.1-495 to 15.1-496.1 (board of zoning appeals to hear appeals of decisions of zoning administrator and applications for variances).
5 Section 15.1-495(e) makes it clear that the board of zoning appeals may not use its authority over variances or special exceptions to rezone property.
6 Section 15.1-491(h) allows a zoning ordinance to include provisions "[f]or the submission and approval of a plan of development prior to the issuance of building permits to assure compliance with regulations contained in such zoning ordinance." This "plan of development" is commonly referred to as a "site plan."
Town charter and general law authorize extraterritorial enforcement of criminal ordinances; effect of ordinances does not extend beyond town's corporate limits. Charter authorizes town to enact and enforce ordinances regulating cemeteries and combustibles within one-mile area outside town's corporate limits; county authorities not required to obtain town's approval before exercising county's concurrent regulatory jurisdiction in affected area. Charter supersedes general law in authorizing town to enact ordinances effective within contiguous ten-mile area outside town's corporate limits for prevention of water pollution and injury to waterworks. Charter requires approval of town council before circuit court clerk accepts for recordation subdivision plat dedicating property one mile outside town's corporate limits to town; subdivision plat recorded without town council's prior approval, when required, ineffective to create vested rights or other liabilities enforceable against town.

September 20, 1991

The Honorable William A. Truban
Member, Senate of Virginia

You ask a series of questions concerning the scope of the extraterritorial powers granted to the Town of Stephens City (the "Town") under its Charter. Specifically, you ask whether the Town may (1) enforce Town ordinances providing criminal penalties within one mile outside the Town's corporate limits; (2) require the planning commission and the Board of Supervisors of Frederick County to give the Town notice and obtain the Town Council's approval before making any decision regarding the storage of combustible materials or fuels or taking any action regarding cemeteries in or within one mile outside the Town limits; (3) regulate activities capable of causing water pollution or injury to the Town's water supply or waterworks, within the area up to ten miles outside of the Town limits; and (4) require that the Town Council review and approve any proposed subdivision within one mile outside of the Town limits. You also ask whether the clerk of the Frederick County Circuit Court may accept and record plats of subdivisions within one mile of the Town limits that have not been approved by the Town Council, and whether such subdivision plats recorded without Council's approval are invalid. Finally, you ask whether the provisions of the Town's Charter granting it extraterritorial powers are constitutional.

I. Applicable Constitutional and Statutory Provisions


The relevant provisions of the Charter currently provide:

§ 9. The jurisdiction of the corporate authorities of the town in all criminal matters and for imposing and collecting license taxes on shows, performances and exhibitions, shall extend one mile beyond the corporate limits of the Town of Stephens City as provided by general law.


Section 17. In addition to the powers conferred by other general statutes, the council of the town shall have the power to... regulate the keeping of gun
powder or other combustibles within the corporate limits and beyond within one mile thereof; to regulate the keeping of gasoline, kerosene and other combustible oils within the town or out of the town near the corporate limits, and may prohibit the keeping of more than certain fixed quantities of gasoline and other such combustible or explosive products at certain places and within fixed areas and permit the storage of larger quantities at other places within and beyond the limits of the town; to provide, permit or prohibit the establishment of cemeteries or places of interment of the dead in or within one mile of the town, and to regulate the same . . . to prevent the pollution of water and injuries to water works and electric light plants and their appurtenances for which purposes the council shall have jurisdiction for ten miles beyond the limits of the town in like manner as if the works, plants and other such property of the town were within the town . . . .


§ 19. No street, road, or alley shall be deemed dedicated to the town until it shall have first been accepted as such by an affirmative vote of the town council. All plats and replats hereafter made subdividing any land within the corporate limits of the town, or one mile thereof, into streets, alleys, roads, lots or tracts, shall be submitted for approval by the council before such plats or replats may be filed for record or recorded in the office of the clerk of the circuit court of Frederick County, Virginia, and the streets, roads, or alleys so designated shall not be deemed and held to be a dedication to the town until they shall be accepted by an affirmative vote of the council.


Article VII, § 2 authorizes the General Assembly to enact general laws providing for the organization and powers of local governments. Pursuant to Article VII, § 2, § 19.2-250 of the Code of Virginia extends the criminal jurisdiction of cities and towns one mile beyond their boundaries:

Notwithstanding any other provision of [Article 2, Chapter 15 of Title 19.2], the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the Commonwealth 1 mile beyond the corporate limits of such town or city; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 30 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town.

Section 15.1-14 provides that cities and towns may:

(6) Regulate the keeping of gunpowder or other combustibles . . . ;

(7) Provide places for the interment of the dead in or near the city or town;

(8) Regulate the transportation of hay, coal, gasoline, explosives, or other articles through the streets of the city or town . . . .

Section 15.1-865 authorizes municipal corporations to "regulate or prohibit . . . the manufacture, storage, transportation, possession and use of any explosive or inflamable substance; and the use and exhibition of fireworks and discharge of firearms." Section
1991 REPORT OF THE ATTORNEY GENERAL

15.1-860 provides that "[a] municipal corporation may regulate and inspect cemeteries," and § 15.1-883 provides that a city or town may operate cemeteries "within or without the municipal corporation."

Section 57-26(1) further provides that no cemetery may be established within a county or the corporate limits of a city or town unless authorized by that locality's zoning ordinance and prohibits the establishment of a cemetery or burial within 300 yards of property containing wells used for the public water supply.

The general powers of local governments to acquire and operate public utilities, including public waterworks, are detailed in § 15.1-292. Under § 15.1-292, a locality's power to prevent water pollution and injury to waterworks extends to "five miles about the same."

Virginia's subdivision enabling statutes are detailed in Article 7, Chapter 11 of Title 15.1, §§ 15.1-465 through 15.1-485. Section 15.1-475 generally requires developers to submit proposed subdivision and site plans to the local commission or designated agent of the county or municipality for review and approval according to a statutorily prescribed procedure. Section 15.1-475 further specifies that, "[w]hen the land involved lies wholly or partly within an area subject to the joint control of more than one political subdivision, the plat shall be submitted to the local commission or other designated agent of the political subdivision in which the tract of land is located."

Section 17-59 provides that once a writing or deed "is accepted for record and spread on the deed books, it shall be deemed to be validly recorded for all purposes."

II. Charter and General Law Authorize Extraterritorial Enforcement of Criminal Ordinances

The guiding principle governing the construction of charter provisions and general statutes is that conflicts between the two should be avoided if reasonably possible. See 1986-1987 Att'y Gen. Ann. Rep. 40, 41.

Concerning the Town's extraterritorial exercise of criminal jurisdiction, there is no conflict between the Charter and general law. Section 9 of the Town Charter extends the Town's criminal jurisdiction for enforcement of its ordinances "one mile beyond the corporate limits ... as provided by general law." 1982 Va. Acts, supra, at 219. The general law that gives municipalities this same extraterritorial power for enforcement of the laws of the Commonwealth is § 19.2-250. The Supreme Court of Virginia has upheld the validity of this general provision for municipal extraterritorial criminal jurisdiction. Murray v. Roanoke, 192 Va. 321, 328-27, 64 S.E.2d 804, 808 (1951); see also Squire v. Commonwealth, 214 Va. 260, 281, 199 S.E.2d 534, 536 (1973), cert. denied, 417 U.S. 909 (1974). These cases further hold, however, that the provision now found in § 19.2-250 does not extend the effect of municipal ordinances beyond corporate limits, but only authorizes town authorities to engage in law enforcement within the one-mile area specified for acts committed within the corporate limits. Murray, 192 Va. at 326-27, 64 S.E.2d at 808; see also 1986-1987 Att'y Gen. Ann. Rep., supra (construing § 19.2-250).

It is my opinion, therefore, that § 9 of the Town Charter validly grants to Town authorities the jurisdiction to go one mile beyond the corporate limits to make arrests for violations of Town ordinances that have occurred within the Town limits. It is further my opinion, however, that § 9 does not extend the effect of Town ordinances themselves beyond the corporate limits to areas within that one-mile area.
III. Charter Authorizes Enactment of Ordinances Regulating Combustibles and Cemeteries with Limited Extraterritorial Effect; Does Not Require Town's Approval Before County May Act


Section 17 of the Charter, however, is an express statutory authorization extending the Town's jurisdiction to regulate cemeteries and the storage of combustible materials or fuels within a limited area immediately outside of the Town's corporate limits. The Supreme Court of Virginia has recognized that the General Assembly "has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation." Light v. City of Danville, 168 Va. 181, 205, 190 S.E. 276, 285 (1937); see also Murray, 192 Va. at 326, 64 S.E.2d at 808. The Charter provision, however, does not remove the affected area from the regulatory jurisdiction of Frederick County, nor does it require the County board to obtain the Town Council's approval before the County may exercise its regulatory authority. Rather, the grant of limited extraterritorial jurisdiction to the Town results in the governing bodies' having concurrent jurisdiction over the area. If the Town Council chooses to extend its regulation of cemeteries in the area one mile beyond its limits, persons and businesses in this area must comply with both county and town regulatory requirements. See, e.g., § 57-26(1) (cemetery located within county, city or town must comply with that locality's zoning ordinance).

Based on the above, I am of the opinion that § 17 of the Town Charter authorizes the Town to enact ordinances regulating cemeteries and combustibles that are effective within the affected area immediately outside of the Town's corporate limits. I am further of the opinion that § 17 is a valid exercise of the General Assembly's power to provide for the organization, government and powers of local governments. There is, however, no requirement that Frederick County authorities obtain the Town's approval before exercising the County's concurrent regulatory jurisdiction in the affected area.

IV. Charter Extends Regulatory Jurisdiction to Prevent Water Pollution and Injury to Waterworks to Contiguous Ten-Mile Area

Unlike the general enabling statutes granting localities authority to regulate explosive or inflammable materials and cemeteries, § 15.1-292 specifies that the regulatory jurisdiction of local governing bodies to prevent water pollution and injury to waterworks "shall extend to five miles about the same." Section 17 of the Town Charter goes further and provides that the jurisdiction of the Town Council to prevent water pollution and injury to waterworks extends "for ten miles beyond the limits of the town in like manner as if the works ... were within the town." 1948 Va. Acts, supra, at 464. Section 17 was enacted in 1948. See id. at 463-65. Present § 15.1-492 derives from former § 3031 of the Code of 1919.

Both of these provisions constitute express statutory authorization for the Town to enact ordinances effective beyond its corporate limits for specified purposes. See Light v. City of Danville, 168 Va. at 205, 190 S.E. at 285.

While these provisions do not conflict, § 17 does extend the territorial scope of the Town's jurisdiction for purposes of preventing water pollution and injuries to waterworks from the five miles allowed by § 15.1-292 to ten miles. By enacting § 17, the General Assembly appears to have determined that extending the Town's jurisdiction for additional five miles was necessary for the provision of water and electric utility services in
this territory. When a general statute and a subsequently enacted special local law provide different rules, the latter will control as the more specific expression of legislative intent. See 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 809 (1974); see also § 15.1-840 (codifying general principle that charter controls); 1972-1973 Att'y Gen. Ann. Rep. 463, 465 (provision in Ashland town charter authorizing town to operate water system outside town limits supersedes conflicting general statutes).

I am of the opinion, therefore, that § 17 of the Charter authorizes the Town to enact ordinances effective within a contiguous ten-mile area outside the Town corporate limits for purposes of preventing water pollution and injury to waterworks. I am further of the opinion that § 17 is a presumptively valid exercise of the General Assembly's power to provide for the powers of local governments.

V. Charter Requires Approval of Town Council Before Subdivision
Dedicating Property to Town May Be Recorded;
Dedications Lacking Required Approval Unenforceable Against Town

Virginia's subdivision enabling statutes delegate to localities a portion of the Commonwealth's police power. Although these statutes vest localities with considerable discretion, the powers exercised must be authorized by statute. 1987-1988 Att'y Gen. Ann. Rep. 197, 198.


Section 19 of the Town Charter, requiring the approval of Town Council before recordation of plats or replats subdividing land within the corporate limits of the Town or one mile beyond, was last amended in 1960. 1980 Va. Acts, supra, at 331. Section 19 is an apparent conflict with the 1979 and 1980 amendments to § 15.1-467, because the Charter provision requires the approval of Town Council for proposed subdivisions in an area that now falls outside the scope of the Town's subdivision jurisdiction under the general statute. See 1987-1988 Att'y Gen. Ann. Rep., supra. This apparent conflict, however, may be avoided by restricting the one-mile extension provision of § 19 to subdivisions within one mile of the Town that include a dedication of streets, roads or alleys to the Town. This construction comports with the strong presumption that general legislation enacted after special legislation on the same subject does not repeal the special act by implication. See 1986-1987 Att'y Gen. Ann. Rep. 46, 41; 2 A.E. Dick Howard, supra Pt. IV. This construction also avoids conflicts with other general law provisions and fully accomplishes the purpose of the prior approval requirement, which is to protect the locality against imposition of liability without its knowledge or consent. See Brown v. Tazewell County Auth., 226 Va. 125, 306 S.E.2d 889 (1983) (approval before recordation required because recordation operates to vest title in governing body); see also Town of Stephens City v. Russell, 241 Va. 160, 399 S.E.2d 814 (1991) (site plan and plat lacking required approval ineffective to create vested right enforceable against town).

Based on the above, it is my opinion that § 19 of the Charter requires the approval of the Town Council of a plat subdividing property within one mile outside of the Town's corporate limits only if the plat includes a dedication of property to the Town. So construed, § 19 does not conflict with general law and is an otherwise valid exercise of the General Assembly's power to define and regulate the powers of local governments. I am further of the opinion that, when the approval of Town Council is required, the circuit court clerk should not accept a subdivision plat lacking that approval for recordation. A
subdivision plat that has been recorded without the prior approval of the Town Council when required is ineffective to create vested rights or other liabilities enforceable against the Town. See Town of Stephens City v. Russell; Brown v. Tazewell County Auth. The plat would otherwise be validly recorded, however, as provided in § 17-59.

1That area encompasses parts of the Counties of Frederick, Clarke, Warren and Shenandoah and the City of Winchester.

2Under § 17, the Town's jurisdiction to regulate cemeteries and the keeping of combustibles extends one mile beyond the Town's corporate limits; the Town has jurisdiction to regulate the keeping of combustible fuels "out of the town near the corporate limits" and to permit storage of larger quantities "within and beyond the limits of the town." Ch. 229, 1948 Va. Acts 460, 464.

3Extraterritorial taxation, however, has been held invalid. See Charlottesville v. Marks' Shows, 179 Va. 321, 18 S.E.2d 890 (1942) (statute invalid to extent it authorized imposition of license tax on events outside city to defray general expenses of city government). Compare Langhor'e & Scott v. Robinson, 61 Va. (20 Gratt.) 681 (1871) (upholding statute authorizing town to impose tax with limited extraterritorial effect to finance railroad).

4See § 15.1-475 (proposed subdivision in area subject to joint control of multiple political subdivisions shall be submitted to planning commission or designated agent of political subdivision wherein development is located); § 15.1-838 (municipal corporation authorized to act outside its boundaries must comply with applicable zoning regulations of political subdivision where power is sought to be exercised). See also City of Richmond v. County Board, 199 Va. 679, 101 S.E.2d 641 (1958) (city authorized to construct jail outside its limits must comply with applicable county zoning ordinances); Att'y Gen. Ann. Rep.: 1983-1984 at 111; 1972-1973 at 463, 465 (grant of extraterritorial jurisdiction to town did not oust county regulatory authority).

5The fact that this surrounding territory within ten miles of the Town limits includes parts of several counties and a city results in concurrent jurisdiction or joint control over the area involved. See supra note 1. The authorization in § 17 of the Town Charter for the Town Council to "prevent the pollution of water and injuries to water works" in my opinion does not empower the Council to review proposed land development in the contiguous ten-mile area that may affect the Town's water supply. 1948 Va. Acts, supra note 2. As discussed in Part V, the Town's power to review proposed subdivisions of land outside its corporate limits is more limited.

6Under former § 15.1-467(c), incorporated towns were authorized to extend their subdivision jurisdiction two miles beyond their corporate limits. See Ch. 251, 1979 Va. Acts 324, 325. Former §§ 15.1-467, 15.1-468 and 15.1-469 further provided a procedure for the exercise of concurrent subdivision jurisdiction under which the locality adopting subdivision regulations was required to give the contiguous locality prior notice and an opportunity to review the proposed regulations. See id.

7See § 15.1-475 (plat affecting land in area subject to joint control of multiple political subdivisions shall be submitted to local commission or other designated agent of political subdivision where tract is located).

COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND SEWER AUTHORITIES ACT.

When regional sewer authority's articles of incorporation refer broadly to sewer projects and member jurisdictions have not limited authority to specific projects, authority has all powers granted by Act regarding sewer projects. Authority does not exceed statutory power or its articles by studying water systems in watershed affecting operation and capacity of wastewater facilities. Because articles of incorporation do not mention water facilities, authority may not acquire, operate or maintain such facilities without approval from governing bodies of member jurisdictions.
The Honorable Kevin G. Miller  
Member, Senate of Virginia  

You ask whether the Harrisonburg-Rockingham Regional Sewer Authority (the "Authority") may conduct a study of the water facilities of its member jurisdictions and other similar facilities in the watershed area of the North River, on which the Authority's wastewater treatment plant is located, without obtaining specific approval of the study project from the governing body of each member jurisdiction.

I. Facts

The Authority was incorporated in 1970 and has five members: the City of Harrisonburg, Rockingham County, and the Towns of Bridgewater, Dayton and Mt. Crawford.

The Authority operates an eight-million gallon per day wastewater treatment plant on the North River. Member jurisdictions also operate water treatment plants, some of which are located on the North River. The Authority's wastewater treatment plant is now at capacity and several of the member jurisdictions have exceeded their allocations of treatment capacity.

The Authority's consulting engineers last year made a facility expansion and improvement study, which found that improvements can be made to the Authority's wastewater treatment plant that will expand the plant's capacity to twelve to fourteen million gallons per day. The study also found that this expansion will serve the wastewater treatment needs of the member jurisdictions only until the year 2003, and that further expansion of the plant will be difficult unless either more water is put in the North River or less is withdrawn from it.

Because of this finding, the Authority adopted a resolution on August 5, 1991, directing its chairman to appoint a "blue ribbon" committee to study the water and sewer facilities of its member jurisdictions and any other similar facilities in the North River watershed. The Authority also adopted a resolution on that date redefining the word "project" in its currently outstanding bond resolution to include this study of regional water and sewer facilities and sources of water for domestic use.

II. Applicable Statutes

The Virginia Water and Sewer Authorities Act (the "Act") is contained in Chapter 28 of Title 15.1 of the Code of Virginia, consisting of §§ 15.1-1239 through 15.1-1270. Section 15.1-1241 authorizes the governing bodies of two or more political subdivisions to create a water and sewer authority. Section 15.1-1247 provides for the specification of projects by an authority, and provides:

Having specified the initial purpose or purposes of the authority and insofar as practicable, any project or projects to be undertaken by the authority, the governing bodies of any of the political subdivisions organizing such authority may, from time to time by subsequent ordinance or resolution, after public hearing, and with or without referendum specify further projects to be undertaken by the authority, and no other projects shall be undertaken by the authority than those so specified. If the governing bodies of the political subdivisions organizing the authority fail to specify any project or projects to be undertaken, then the authority shall be deemed to have all the powers granted by this chapter.
The powers that authorities may exercise are detailed in § 15.1-1250, and include the power "[t]o acquire, purchase, lease as lessee, construct, reconstruct, improve, extend, operate and maintain any water system, or sewer system, or sewage disposal system," as well as "[t]o combine any water system, sewer system, sewage disposal system ... as a single system for the purpose of operation and financing." Section 15.1-1250(f), (h). Section 15.1-1250(l) provides that an authority may "make and enter into all contracts or agreements, as the authority may determine, which are necessary or incidental to the performance of its duties and to the execution of the powers granted by this chapter . . . ."

III. Authority Vested with All Powers Set Forth in Act with Regard to Sewer Projects


The purposes of the Authority specified in the Authority's articles of incorporation are stated in very broad terms and do not describe any particular project or projects. The 1980-1981 Report of the Attorney General, cited above, further concludes that, when the local governing body has referred to a water and sewer authority's future projects in the authority's charter in very broad terms, the last sentence of § 15.1-1247 gives the authority all the powers set forth in the Act, and specific approval by the governing body of new or expanded projects is not required. 1980-1981 Att'y Gen. Ann. Rep., supra, at 402. It is my opinion, therefore, that because of the broad statement of purpose concerning sewer projects, the Authority's articles of incorporation and the absence of any past resolutions of the member jurisdictions limiting the Authority to specific projects, the Authority has all the powers granted by the Act with respect to sewer projects.

IV. Authority Empowered to Study Water Systems in Watershed Affecting Operation and Capacity of Wastewater Facility

The purposes stated in the Authority's articles of incorporation include only sewer systems and do not mention water facilities. Nevertheless, as the Authority's consulting engineers have pointed out, the future operation and capacity for expansion of the Authority's existing wastewater treatment plant are linked inextricably to the capacity and operation of both water and sewer plants located in the North River watershed. In my opinion, therefore, the Authority would not exceed either its statutory powers or the stated purposes of its articles of incorporation by studying the capacity and operation of these water plants. It is further my opinion, however, that because water facilities are not mentioned in those articles of incorporation, the Authority may not acquire, operate or maintain any such water facilities without further approval from the governing bodies of its member jurisdictions.

1The stated purposes are "[t]he acquisition, construction, operation and maintenance of sewer systems and sewerage disposal systems for the collection and treatment of sewage within the Authority's designated service area." Articles of Incorporation of Harrisonburg-Rockingham Regional Sewer Authority ¶ 3 (July 2, 1970).

2Another prior Opinion of this Office concludes that, in the absence of any statutorily prescribed procedure for amendment of a water and sewer authority's articles of incorporation, the local governing body or bodies may expand an authority's purposes to include...
others permitted under the Act by adoption of a subsequent ordinance or resolution, and that such action need not be submitted to the State Corporation Commission. 1967-1968 Att'y Gen. Ann. Rep. 298 (board of supervisors could authorize authority to establish garbage collection project by ordinance or resolution, without Commission approval).

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COURTS NOT OF RECORD: DISTRICT COURTS.

RULES OF SUPREME COURT OF VIRGINIA: GENERAL DISTRICT COURTS — DISCOVERY — CRIMINAL PRACTICE AND PROCEDURE.

Rules do not provide for discovery in criminal proceedings in juvenile courts; discovery in such proceedings against juvenile offenders limited solely to constitutional requirement that Commonwealth provide defense with exculpatory evidence material either to guilt or to punishment.

April 5, 1991

The Honorable Everett P. Shockley
Commonwealth's Attorney for Pulaski County

You ask whether the Rules of the Supreme Court of Virginia concerning discovery in criminal cases apply to criminal proceedings in juvenile and domestic relations district courts ("juvenile courts").

I. Applicable Statute and Rules of Court

Section 16.1-69.5 of the Code of Virginia provides, in part:

(b) "General district courts" shall mean all courts not of record, except juvenile and domestic relations district courts in counties and cities heretofore designated as county and municipal courts ....

Discovery procedures generally are established by the Rules of the Supreme Court of Virginia. Rule 3A:11 is the general provision for discovery in criminal cases, but, by its own terms, "[t]his Rule applies only to prosecution for a felony in a circuit court." Va. Sup. Ct. R. 3A:11(a). Rule 7C:5 provides for limited discovery in misdemeanor cases punishable by confinement in jail and in preliminary hearings for felony cases; however, Rule 7C:1, which defines the scope of Part Seven C of the Rules, provides that "[t]hese rules shall apply to all criminal and traffic cases [infractions and others] in the General District Courts."

II. Discovery in Criminal Cases Limited by Rules of Court; No Rule Applicable to Criminal Cases in Juvenile Courts

No general constitutional right to discovery exists in criminal cases in Virginia, although "due process requires that the prosecution produce evidence favorable to the accused upon request when that evidence is material either to guilt or to punishment." Keener v. Commonwealth, 8 Va. App. 208, 212, 380 S.E.2d 21, 23 (1989); see also U.S. v. Larouche, 896 F.2d 815 (4th Cir. 1990); MacKenzie v. Commonwealth, 8 Va. App. 238, 380 S.E.2d 173 (1989). The Rules, however, do provide for discovery of matters in addition to exculpatory evidence, but only within prescribed limits and in certain types of cases.
By its plain language, Rule 3A:11 applies only to felony cases in circuit courts. Discovery under Rule 7C:5 is similarly limited, by its own terms and those of Rule 7C:1, to misdemeanor cases punishable by jail terms and felony preliminary hearings in general district courts. In its present form, the definition of "general district courts" in § 16.1-69.5 clearly excludes juvenile courts. If the Supreme Court had intended Rule 7C:5 to apply to juvenile court proceedings, presumably it would have used either the term "juvenile and domestic relations district courts" expressly, or the term "district courts," which § 16.1-69.5(d) defines to include both types of district courts.

It is my opinion, therefore, that the Rules make no provision for discovery in criminal proceedings in juvenile courts, and that discovery in such proceedings against juvenile offenders is limited solely to the constitutional requirement that the Commonwealth provide to the defense exculpatory evidence material either to guilt or to punishment.

Before 1973, the statutory definition of "general district courts" included juvenile courts. The phrase, "except juvenile and domestic relations district courts," was added to that definition at the 1973 Session of the General Assembly. Ch. 546, 1973 Va. Acts 1250, 1253.

Discovery procedures may be available, however, when an adult is being tried in a juvenile court under § 16.1-241(I) for "ill-treatment, abuse, abandonment or neglect" of the juvenile, or under § 16.1-241(J) for an offense by one family member against another. Section 16.1-259(A) provides that "the procedure and disposition applicable in the trial of such cases in general district court shall be applicable to trial in juvenile court." Arguably that provision makes Rule 7C:5 discovery available in such cases in juvenile courts.

December 5, 1991

The Honorable J. Allen Walker
Judge, Loudoun County General District Court

You ask whether a district court may issue a subpoena duces tecum in a criminal or traffic case to obtain records or other items from a public agency in the following situations:
1. Records requested from an agency of the Commonwealth in a prosecution.

2. Items requested from an agency of a county, city or town, in a prosecution by the Commonwealth.

3. Items requested from an agency of the Commonwealth in a prosecution by a county, city or town.

4. Items requested from an agency of a county in a prosecution by a city or town.

You also ask whether a subpoena may issue to a custodian of public records, whether or not the custodian is a party to the case, whose records are exempt under The Virginia Freedom of Information Act.

I. Applicable Statutes and Rules

Section 16.1-69.25 of the Code of Virginia provides:

Except as otherwise provided by general law, a judge of a district court may, within the scope of his general jurisdiction within the area which his court serves, issue warrants, summons, and subpoenas, including subpoenas duces tecum or other process, in civil and criminal cases, to be returned before his court, and may also issue fugitive warrants and conduct proceedings thereon in accordance with the provisions of §§ 19.2-99 through 19.2-104.

The last sentence of § 16.1-131 provides that "[t]he provisions of Rule 3A:12 of the Rules of the Supreme Court shall apply to the issuance of a subpoena duces tecum and punishment for failure to comply."

Rule 3A:12(b) of the Rules of the Supreme Court of Virginia provides:

Upon notice to the adverse party and on affidavit by the party applying for the subpoena that the requested writings or objects are material to the proceedings and are in the possession of a person not a party to the action, the judge or the clerk may issue a subpoena duces tecum for the production of writings or objects described in the subpoena. Such subpoena shall command either (1) that the individual to whom it is addressed shall appear in person and with the items described either before the court or the clerk or (2) that such individual shall deliver the items described to the clerk. The subpoena may direct that the writing or object be produced at a time before the trial or before the time when it is to be offered in evidence.

Rule 3A:11 governs discovery by the accused and the Commonwealth in felony cases in circuit courts. Rule 3A:11(b)(1) establishes procedures for the accused to discover:

(i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.
II. Status of Agency as Party to Prosecution Is Determined by Its Involvement in Case, Not by Identity of Level of Government Prosecuting Offense

A subpoena duces tecum is available to compel the production of material evidence from someone who is not a party to the legal action. Va. Sup. Ct. R. 3A:12(b); Patterson v. Commonwealth, 3 Va. App. 1, 8, 348 S.E.2d 285, 289 (1986). The disclosure of evidence possessed by parties is controlled by the rules concerning discovery. Va. Sup. Ct. R. 7C:5. In each of the situations about which you ask, the common issue is whether the agency having custody of the records or other items sought is a "party" to the criminal prosecution.

The prosecutor in a criminal case clearly is a party. See Va. Sup. Ct. R. 7A:14(e) ("parties" who must agree to continuance in criminal or traffic cases defined as "the prosecution and the defendant"). The prosecuting attorney is the Commonwealth's attorney or city, county or town attorney, who is responsible for prosecuting the case. Va. Sup. Ct. R. 7C:5(b).

With the exception of prosecuting attorneys, however, the parties to a case ordinarily are considered to be the persons whose names are designated on the record as plaintiffs or defendants. See 1990 Att'y Gen. Ann. Rep. 191, 192 ("party" distinguished from attorney acting as representative). A "party" is defined as "[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually." Black's Law Dictionary 1122 (6th ed. 1990).

I am not aware of any statute or rule of law that automatically would make every government agency a party to every criminal prosecution brought by the government of which that agency is a part. There are, however, occasions when a government agency that is distinct from the office of the Commonwealth's attorney or other prosecutor may be considered part of the prosecution. A law enforcement agency or an agency providing services to the prosecution or police may have sufficient involvement in the prosecution of a criminal matter that it becomes, in effect, a party to the case.

For example, the Department of State Police, an independent agency of the Commonwealth established under § 52-1, is charged with an affirmative obligation to conduct investigations upon the request of a Commonwealth's attorney, sheriff or chief of police. Section 52-8.1. The Division of Forensic Science also is required by law to provide forensic laboratory services to prosecutors and police upon request in any criminal matter. Section 2.1-434.1. When these agencies are involved with the investigation and presentation of particular criminal cases, in my opinion, they clearly act as part of the prosecution.

The materials discoverable by the accused in a felony case under Rule 3A:11(b)(1) include forensic services that these agencies perform for the prosecution. That rule clearly contemplate, therefore, that information held by either agency is subject to disclosure in the circuit court, because it is within the possession, custody or control of the Commonwealth. While Rule 3A:11 does not, by its own terms, apply to district court proceedings, it supports the conclusion that the State Police and the Division of Forensic Science may be considered as part of the prosecution in district court cases as well.

Courts recognize the role of an investigative agency as an "arm of the prosecutor" by imputing the agency's knowledge of facts to the prosecutor for purposes of discovery requirements. See, e.g., United States v. Jackson, 780 F.2d 1305, 1308 n.2 (7th Cir. 1986); Wedra v. Thomas, 671 F.2d 713, 717 n.1 (2d Cir.), cert. denied, 458 U.S. 1109 (1982) (prosecutor has constructive knowledge of information in hands of police); cf. United States v. Walker, 720 F.2d 1527, 1535 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (knowledge of state official not imputed to federal prosecutor). If the material sought is
of such a character that the prosecutor is charged with constructive knowledge of the information, the agency or individual possessing that material stands in the position of a party to the prosecution. That determination cannot be made simply by reference to whether the prosecutor and agency serve the same governmental entity.

Based on the above, it is my opinion that a district court must consider the circumstances presented in each case to determine whether an agency is characterized properly as a party to a pending criminal prosecution for discovery purposes. A state agency is not a party solely because the prosecution is brought in the name of the Commonwealth, nor is a local agency excluded automatically as a party because the case is prosecuted by the Commonwealth. The converse is also true: a local agency is not necessarily a party, and a state agency also may be a party to a purely local prosecution. If an agency, state or local, possessing the records or other items sought by the defense, participates in the investigation or presentation of a prosecution, that involvement makes the agency part of that prosecution. If it is a party, the agency is obligated to disclose relevant evidence through the prosecuting attorney under the discovery rules, and is not subject to a subpoena ducem tecum as a nonparty.

III. Subpoena May Issue to Custodian of Records Not Party to Case, Notwithstanding Exclusion from Disclosure Under Virginia Freedom of Information Act

The Virginia Freedom of Information Act (the "Act"), §§ 2.1-340 through 2.1-346.1, does not limit courts' subpoena powers. The Act provides a means of citizen access to records in the custody of public officials, but exempts certain categories of records from mandatory disclosure. See § 2.1-342. While the Act authorizes custodians of records in those exempt categories to refuse citizen requests for disclosure, it does not prohibit the disclosure of any record. Section 2.1-342(B). Nothing in the Act places any records beyond the reach of a court's subpoena. In my opinion, therefore, an otherwise appropriate subpoena ducem tecum should not be refused solely because the records subpoenaed would be exempt from mandatory disclosure under the Act.


2 Of course, the public policy implied by an exception to the Act's disclosure provisions may be considered by a court reviewing a request for, or motion to quash, a subpoena ducem tecum.

COURTS NOT OF RECORD: JURISDICTION AND PROCEDURE IN CIVIL MATTERS.

Appeal bond required in support enforcement case in which arrearage more than $50, even when sanction against appellant for contempt of court involved.

January 18, 1991

The Honorable Jerry Hendrick Jr.
Judge, Juvenile and Domestic Relations District Court

You ask two questions about prior Opinions of this Office concluding that §§ 16.1-106 and 16.1-107 of the Code of Virginia do not require an appeal bond for appeals from a juvenile and domestic relations district court ("juvenile court") to a
circuit court in cases involving child custody, visitation, protective orders and similar domestic matters. Specifically, you ask whether those Opinions are superseded by the decision of the Court of Appeals of Virginia in *Scheer v. Isaacs*, 10 Va. App. 338, 392 S.E.2d 201 (1990), and whether, under the ruling in *Scheer*, an appeal bond would be required in a case for nonpayment of support obligations in which a juvenile court has both awarded a money judgment greater than fifty dollars and imposed sanctions for contempt of court.

I. Applicable Statutes

Section 16.1-106 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, or of the enforcement of rights and privileges conferred by the Virginia Freedom of Information Act (§ 2.1-340 et seq.), 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 16.1-107 provides:

No such appeal shall be allowed unless and until the party applying for the same or someone for him shall give bond, in an amount and with sufficient surety approved by the judge or by his clerk if there be one, to abide by such judgment as may be rendered on appeal if such appeal be perfected, or if not so perfected, then to satisfy the judgment of the court in which it was rendered; provided, however, that no appeal bond shall be required of the Commonwealth and when such appeal is proper to protect the estate of a decedent, an infant, a convict, an insane person, or the interest of a county, city or town, no bond shall be required. If such bond is furnished by or on behalf of any party against whom judgment has been rendered for money or property or both, the bond shall be conditioned for the performance and satisfaction of such judgment or order as may be entered against such party on appeal, and for the payment of all costs and damages which may be awarded against him in the appellate court. If the appeal is by a party against whom there is no recovery except for costs, the bond shall be conditioned for the payment of such costs and damages as may be awarded against him on the appeal.

In addition to the foregoing, the party applying for appeal shall, within thirty days from the date of the judgment, pay to the clerk of the court from which the appeal is taken the amount of the writ tax of the court to which the appeal is taken and costs as required by subsection (17) of § 14.1-112.

II. Appeal Bond Required in Support Enforcement Case Involving More than Fifty Dollars, Even If Contempt Sanction Also Involved; Prior Opinions Distinguished

Prior Opinions of this Office conclude that the bond, writ tax and costs provisions of § 16.1-107 apply only to appeals of civil nonsupport, custody, child protective and similar domestic matters that are "otherwise appealable under § 16.1-106"—that is, only those civil cases in which the matter in controversy also involves an amount of money greater than fifty dollars, or the validity or constitutionality of statutes or ordinances, or
The Scheer decision involved an appeal of a juvenile court order granting an ex-wife a judgment for $67,805 against her ex-husband for arrearages in support payments. The court of appeals held that the ex-husband lost his appeal rights by failing to post the appeal bond required by § 16.1-107 within the thirty-day period for perfecting the appeal. 10 Va. App. at 339-41, 392 S.E.2d at 201-03; see also Godlewski v. Gray, 221 Va. 1092, 277 S.E.2d 213 (1981).

As the court of appeals recognized, Scheer clearly was a civil case in which the matter in controversy was of greater than fifty dollars. It is my opinion, therefore, that it falls squarely within the category of cases that the prior Opinions discussed above acknowledge require an appeal bond pursuant to § 16.1-107. In answer to your first inquiry, I find nothing in Scheer that would change the conclusion of those prior Opinions that no such bond is required for the appeal of cases involving child custody, protective orders, visitation and similar domestic matters that do not also involve an amount of money greater than fifty dollars, the validity or constitutionality of a statute or ordinance, or The Virginia Freedom of Information Act.

The answer to your second question is found in the Scheer opinion, which indicates that Mr. Scheer had likewise been found in contempt by the juvenile court. The court of appeals nevertheless stated:

We entertain no doubt that this case started as a civil action, having as its primary object the ascertainment of support arrearages and the securing of a judgment therefor. The fact that appellant also was found in civil contempt of court, and a sanction was imposed, does not alter the fundamental nature of the relief sought by Ms. Isaacs. The case was treated as a civil proceeding in the juvenile and domestic relations court and the appeal to the circuit court was, therefore, civil in nature.


The appeal bond requirement in § 16.1-107 is designed to protect the judgment rights of a successful litigant while the unsuccessful party appeals. See Greer v. Dillard, 213 Va. 477, 479, 193 S.E.2d 668, 670-71 (1973). The need for that protection in a support enforcement case is in no way altered by the fact that the defendant also has been found in contempt of court.

Based on the above, it is my opinion that, in a support enforcement case in which the alleged arrearage is greater than fifty dollars, the requirement that a bond be posted for an appeal to the circuit court is not altered by the fact that the order appealed from also involves a sanction against the appellant for contempt of court.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Juvenile court alone, in direct placement adoption, has power to select person to be appointed guardian ad litem for child; court free to reject or accept suggestion of guardian offered by parties.

August 28, 1991
The Honorable Michael J. Valentine
Judge, Fairfax Family Court

You ask if a court, in a direct placement adoption, is required to accept the appearance of a guardian ad litem who has been selected by counsel for the parent and adoptive parents.

I. Applicable Statutes

The appointment of a guardian ad litem in direct adoption proceedings in juvenile and domestic relations district courts and family courts ("juvenile courts") is controlled by § 16.1-266(A) of the Code of Virginia, which provides:

Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition terminating residual parental rights or is otherwise before the court pursuant to subdivision A 4 of § 16.1-241, the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child.

II. Court Alone Has Power to Select Guardian ad Litem

It is a general rule of statutory construction that words in a statute are to be given their usual, commonly understood meaning. See Att'y Gen. Ann. Rep.: 1987-1988 at 276, 277. Ordinarily, the word "appoint" means to designate some person to hold an office and involves a matter of choice in the selection of that person. State v. Zellar, 7 Ohio St. 2d 109, 113, 218 N.E.2d 729, 732 (1966). See also 6 C.J.S. Appoint 100 (1975) ("'appoint' means "'to ... designate; to choose or select'"). Accordingly, I am of the opinion that, while the parties to a direct placement adoption may suggest a person to serve as guardian ad litem for the child, the juvenile court alone has the power to select the person to be appointed and is free to reject or accept the suggestion offered by the parties as the sound discretion of that court may direct.

March 27, 1991

The Honorable J. Davis Reed III
Judge, Juvenile and Domestic Relations District Court

You ask whether § 16.1-290 of the Code of Virginia authorizes a juvenile and domestic relations district court ("juvenile court") to adopt a policy requiring the parents
or legal guardian of a juvenile placed in temporary shelter care to contribute a reason-
able sum toward the cost of that care. You indicate that legal custody of juveniles nor-
mally is not changed when they are placed in temporary shelter care. If § 16.1-290 does not authorize the adoption of such a policy, you ask whether any other provision of law allows the juvenile court to require such contributions. Finally, you ask whether, if such a policy is authorized, the juvenile court may impose a standard amount in every case, without conducting a hearing to determine the reasonableness of the charge.

I. Applicable Statute

Section 16.1-290(A) provides:

Whenever legal custody of a child is vested by the court in someone other than his parents, after due notice to the parents or other persons legally obligated to care for and support the child, and after an investigation and hearing, the court shall order and decree that the parent or other legally obligated person shall pay, in such a manner as the court may direct, a reasonable sum commensurate with the ability to pay, that will cover in whole or in part the support and treatment of the child after the decree is entered. If the parent or other legally obligated person willfully fails or refuses to pay such sum, the court may proceed against him for contempt, or the order may be filed and shall have the effect of a civil judgment.

II. Payment by Parents for Support of Child Pursuant to § 16.1-290

Limited to Cases Where Custody of Child Vested in Others

By its own terms, § 16.1-290 applies "[w]henever legal custody of a child is vested by the court in someone other than his parents." If the language of a statute is unambigu-
ous, its plain meaning controls, and resorting to rules of construction or legislative history is both unnecessary and improper. Marsh v. City of Richmond, 234 Va. 4, 11, 360 S.E.2d 153, 167 (1987). It is my opinion, therefore, that § 16.1-290 authorizes a juvenile court to order parental payments for children in temporary shelter care whose legal custody has been transferred to a person or institution other than the parents, but does not provide authority for the court to order such payments from parents who retain legal custody of their children in temporary shelter care.

III. Absent Statutory Authorization to Require Payment for Temporary Shelter Care, Juvenile Court Must Apply Common Law Principles Requiring Parental Support on Case-by-Case Basis

The Supreme Court of Virginia has long recognized that a parent owes a minor child a common law duty of support. See generally 14A M.J. Parent and Child §§ 17-19 (1989). In discussing that duty, the Court has held that,

[w]here the child is living away from the father, the question of his liability will depend upon the circumstances of the case. If he abandons the child, or drives him from home, he is liable to any person who furnishes necessary support; but the person furnishing it must bear the burden of proving that there was an unjustified abandonment, that the support furnished was necessary, and that the credit of the father was, in contemplation of law, the basis of the advances.

Mihalcoe v. Holub, 130 Va. 425, 430, 107 S.E. 704, 706 (1921). In another case the Court noted:
To say the least of it, [a father] has the right at common law to maintain [his children] in his own home, and he cannot be compelled against his will to do so elsewhere, unless he has refused or failed to provide for them where he lives.


The parents' common law obligation for support extends only to necessaries. *Dept. Mental Hygiene v. Shepard*, 212 Va. 843, 846, 188 S.E.2d 99, 101 (1972). The Court also has extended the common law obligation of parental support to apply to the parent of an adult child who is mentally incapacitated. See *id.* at 846, 188 S.E.2d at 101; *Indemnity Company v. Nalls*, 160 Va. 246, 248, 168 S.E. 346 (1933). In *Shepard* the Court even imposed this support obligation on the 80-year old mother of a mentally incompetent son, who was herself mentally incompetent, but who had income-producing assets held by a committee. That decision, however, was based in part upon the provisions of a specific statute, § 37.1-105, requiring the person legally liable for a mental patient's support also to be liable for the cost of such patient's care, treatment and maintenance in a state hospital. 212 Va. at 847, 188 S.E.2d at 102.

In contrast to *Shepard*, I am not aware of any statute specifically making a custodial parent liable for the cost of his or her child's placement in temporary shelter care. Based on the common law principles discussed above, however, it is my opinion that, when a juvenile court has ordered that a child be placed in temporary shelter care, (1) such care is a "necessary" within the common law principles governing the obligation of parents to support their child, and (2) a juvenile court may order parents retaining custody of their child to contribute to the reasonable cost of that care.

It is further my opinion that a juvenile court may not order a standard contribution in every case but that, consistent with the statutory standard set forth in § 16.1-290(A), any contribution ordered by the court must be a reasonable amount, commensurate with the parents' ability to pay, and may be ordered only after notice to the parents and a hearing to determine the reasonableness of the charge.

1The proposed policy you attach to your request would allow any family claiming to be financially unable to pay the fee to obtain court review of the charge. That policy also automatically would excuse families receiving public assistance from such payment.

2Section 20-61 also provides, in appropriate cases, for criminal penalties, including fines, forfeitures and imprisonment, for a parent's desertion and nonsupport of a minor or incapacitated child. I assume, for purposes of this Opinion, that your inquiry is not directed at cases to which these provisions would apply.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

DOMESTIC RELATIONS: DIVORCE, AFFIRMATION AND ANNULMENT.

Circuit court has no power to award exclusive use and possession of marital residence as order of disposition; only while divorce suit pending. Juvenile court has no power to award exclusive possession of family residence as part of disposition of child custody proceeding. Limited circumstances in which juvenile court authorized to award possession of marital residence (spouse abuse case) and to enter pendente lite awards.

October 30, 1991
The Honorable Paul D. Greer
Judge, Smyth County Juvenile & Domestic Relations District Court

You ask whether a juvenile and domestic relations court ("juvenile court") has jurisdiction to award the custodial parent the exclusive use and possession of the family residence during the pendency of a case involving custody, visitation or support of a child.

I. Applicable Statutes

Section 16.1-278.15(A) of the Code of Virginia provides that,

In cases involving the custody, visitation or support of a child, [a juvenile]
court may make any order of disposition to protect the welfare of the child
and family as may be made by the circuit court ....

Section 16.1-278.17 provides that a juvenile court may enter support orders in pendente lite proceedings.

Section 16.1-279.1(A)(3) provides that, in cases of spouse abuse, a juvenile court
may issue an order of protection granting possession of the residence to the petitioner, to
the exclusion of the abusing spouse.

Section 20-103 provides:

The [circuit] court may, at any time pending the suit, in the discretion of
such court, make any order that may be proper ... (vi) for the exclusive use
and possession of the family residence during the pendency of the suit ....

II. Juvenile Courts Not Authorized to Award Exclusive Use of Residence in Case Involving Custody, Visitation or Support of Child

Circuit courts have the statutory authority, while a divorce suit is pending, to compel one spouse to maintain the other spouse and the children of the marriage and enable the other spouse to carry on the suit. 

Case law may be relevant. See, e.g., Cralle v. Cralle, 81 Va. 773, 775 (1886) (interpreting statutory predecessor to § 20-103). Section 20-103 gives the circuit court the power to ensure adequate maintenance of the parties during the time that the court is in the process of dissolving the marriage and resolving the issues in the divorce suit. The power of the circuit court to issue temporary orders under § 20-103 derives from the pendency of the divorce action and does not depend upon a need to provide support for the children of the marriage. In a recent case, for example, the Court of Appeals of Virginia affirmed a circuit court's order granting a wife possession of the marital residence solely because her husband was unwilling or unable to maintain it. 


Section 20-103 grants the circuit court the power to make temporary provisions for the parties, their children and their property pending the ultimate resolution of the issues raised in a divorce case. In contrast, § 16.1-278.15(A) gives juvenile courts the power to enter any order of disposition that may be made by a circuit court. A circuit court has no power to award the exclusive use and possession of the marital residence as an order of disposition under § 20-103. It may do so only as a pendente lite award. In my opinion, therefore, § 16.1-278.15(A) does not give a juvenile court the power to award exclusive possession of the family residence as part of the disposition of a child custody proceeding.

This conclusion is supported by the fact that the General Assembly has given juvenile courts specific authority both to award possession of the marital residence and to
enter their own *pendente lite* awards in other limited circumstances. Section 16.1-279.1(A)(3), for example, provides that a juvenile court may grant possession of the residence in a spouse abuse case, and § 16.1-278.17 authorizes juvenile courts to enter *pendente lite* support awards. Under accepted rules of statutory construction, the mention of particular items in a statute implies the exclusion of other items. See *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); 1990 Att'y Gen. Ann. Rep. 175, 176.

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1A prior Opinion of this Office concludes that when a circuit court enters an order granting temporary custody of the minor children in a pending divorce proceeding, the juvenile court is divested of jurisdiction over the custody matter. 1981-1982 Att'y Gen. Ann. Rep. 211, 212.

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**COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS - IMMEDIATE CUSTODY, ARRESTS, DETENTION AND SHELTER CARE.**

Statutory powers granted to juvenile court judges, intake officers and clerks may not be expanded by court order or policy; judges may not order temporary detention of juveniles in any circumstances except those expressly provided by statute.

September 13, 1991

The Honorable Michael J. Valentine
Judge, Fairfax Family Court

You ask whether a judge of a juvenile and domestic relations district court ("juvenile court") may issue a standing order providing that a child may be brought to and detained at a police station while the police await authority from an intake officer to take the child to the detention home. If so, you ask how long the child may be held at the police station awaiting approval from an intake officer and whether the child may be interrogated by the police during that wait.

I. Applicable Statutes

Section 16.1-246 of the Code of Virginia provides:

No child may be taken into immediate custody except:

A. With a detention order issued by the judge, the intake officer or the clerk, when authorized by the judge, of the juvenile and domestic relations district court in accordance with the provisions of this law or with a warrant issued by a magistrate; or

B. When a child is alleged to be in need of services or supervision and (i) there is a clear and substantial danger to the child's life or health or (ii) the assumption of custody is necessary to ensure the child's appearance before the court; or

C. When, in the presence of the officer who makes the arrest, a child has committed an act designated a crime under the law of this Commonwealth, or an ordinance of any city, county, town or service district, or under federal law and the officer believes that such is necessary for the protection of the public interest; or
C1. When a child has committed a misdemeanor offense involving (i) shoplifting in violation of § 18.2-103 (ii) assault and battery or (iii) carrying a weapon on school property in violation of § 18.2-308.1 and, although the offense was not committed in the presence of the officer who makes the arrest, the arrest is based on probable cause on reasonable complaint of a person who observed the alleged offense; or

D. When there is probable cause to believe that a child has committed an offense which if committed by an adult would be a felony.

Section 16.1-247 provides, in part:

B. A person taking a child into custody pursuant to the provisions of subsection B, C or D of § 16.1-246, during such hours as the court is open, shall, with all practicable speed, and in accordance with the provisions of this law and the orders of court pursuant thereto:

1. Release the child to such child's parents, guardian, custodian or other suitable person able and willing to provide supervision and care for such child and issue oral counsel and warning as may be appropriate; or

2. Release the child to such child's parents, guardian, legal custodian or other person standing in loco parentis upon their promise to bring the child before the court when requested; or

3. If not released, bring the child to the judge or intake officer of the court and, in the most expeditious manner practicable, give notice of the action taken, together with a statement of the reasons for taking the child into custody, in writing to the judge or intake officer, and the judge, intake officer or arresting officer shall give notice of the action taken orally or in writing to the child's parent, guardian, legal custodian or other person standing in loco parentis. Nothing herein shall prevent the child from being held for the purpose of administering a blood or breath test as provided in § 18.2-268 to determine the alcoholic content of his blood where the child has been taken into custody pursuant to § 18.2-266.

E. A person taking a child into custody pursuant to the provisions of subsections B, C or D of § 16.1-246 during such hours as the court is not open, shall:

1. Release the child pursuant to the provisions of subsection B 1 or B 2, hereof; or

2. Release the child on bail or recognizance pursuant to Chapter 9 (§ 19.2-119 et seq.) of Title 19.2; or

3. Place the child taken into custody pursuant to § 16.1-246 B in shelter care after the issuance of a detention order pursuant to § 16.1-255; or

4. Place the child taken into custody pursuant to subsections C or D of § 16.1-246 in shelter care or in a detention home after the issuance of a warrant by a magistrate; or
5. Place the child in a jail subject to the provisions of § 16.1-249 after the issuance of a warrant by a magistrate; or

6. In addition to any other provisions of this subsection, detain the child for a reasonably necessary period of time in order to administer a breath or blood test as provided in § 18.2-268 to determine the alcoholic content of his blood, if such child was taken into custody pursuant to § 18.2-266.

II. Powers Granted to Judges and Intake Officers in §§ 16.1-246 and 16.1-247 May Not Be Expanded by Court Order or Policy


Based on the above, it is my opinion that juvenile court judges may not order the temporary detention of juveniles in any circumstances except those expressly provided in § 16.1-246. As a result, it is not necessary to address your remaining questions concerning detention of juveniles in specific situations.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS — DISTRICT COURTS.

CRIMINAL PROCEDURE: ARREST.

Criminal proceedings against husband or wife for assault and battery upon spouse may be initiated by filing of juvenile court petition; charged spouse may not be arrested pursuant to such petition but intake officer may direct charging spouse, when arrest and detention appropriate, to obtain arrest warrant from judge or magistrate.

May 30, 1991

The Honorable Everett A. Martin Jr.
Judge, Norfolk Juvenile and Domestic Relations District Court

Although a juvenile and domestic relations district court ("juvenile court") intake officer under § 16.1-253.1 of the Code of Virginia may authorize the filing of a petition alleging spouse abuse and seeking a protective order, you note that the abused spouse in such cases often also will request a magistrate to issue an arrest warrant for assault and battery. The practical effect of this dual authority is that the parties ordinarily appear
for two separate, but nearly identical, proceedings in the juvenile court on different
days. To eliminate this inefficiency, you ask whether an intake officer has the authority
to issue a petition that charges a person with assault and battery upon his or her spouse.

I. Applicable Statutes

Section 16.1-241(J) vests exclusive original jurisdiction in the juvenile court over
offenses in which one family member is charged with committing a crime against another
family member.

Section 16.1-259 provides:

A. In cases where an adult is charged with violations of the criminal law pur-
suant to subsections I or J of § 16.1-241, the procedure and disposion appli-
cable in the trial of such cases in general district court shall be applicable to
trial in juvenile court. The provisions of this law shall govern in all other
cases involving adults.

B. Proceedings in cases of adults may be instituted on petition by any inter-
ested party, or on a warrant issued as provided by law, or upon the court's
own motion.

Section 16.1-260(A) provides that all matters alleged to be within the jurisdiction of
the juvenile court shall be commenced by filing a petition, except as provided in
§ 16.1-259, and except for certain other instances detailed in § 16.1-260(E) not relevant
to your inquiry. Section 16.1-260(A) further provides that "[o]mplaints, requests and the
processing of petitions to initiate a case shall be the responsibility of the intake officer." Section 16.1-260(A) further requires that these petitions must be in the form described in
§ 16.1-262, but the latter section also authorizes the Supreme Court of Virginia to for-
mulate additional rules for the form and content of petitions concerning various juvenile
court matters for which the § 16.1-262 form is not appropriate, including, among other
things, protection of an adult.

In addition to their authority to conduct criminal proceedings in spouse abuse cases,
juvenile courts have authority under § 16.1-253.1 to issue protective orders. The proce-
dure for issuance of a protective order begins with the filing of a petition. See
§ 16.1-253.1(A). Once a petition has been filed, the juvenile court is authorized, under
§ 16.1-263, to issue summons for the appearance of all necessary parties.

Section 19.2-71 provides that "[p]rocess for the arrest of a person charged with a
criminal offense may be issued by the judge, or clerk of any circuit court, any general
district court, any juvenile and domestic relations district court, or any magistrate ... ."

II. Criminal Proceedings Against Husband or Wife for Assault
and Battery Upon Spouse May Be Initiated by Filing of Petition

A prior Opinion of this Office acknowledges that both a petition for the civil remedy
afforded by a protective order and a criminal charge may arise out of the same
spouse abuse situation, but concludes that the bringing of the criminal charge against the
abusing spouse is not a prerequisite to initiation of the petition for a protective order
address whether the criminal charge in such an instance may be instituted by a petition
processed through the intake officer, but the clear language of § 16.1-258(H) provides
that all "proceedings" against adults in juvenile courts may be instituted either by peti-
tion or on a warrant. Juvenile court matters initiated by petition must be either in the
form described in § 16.1-262 or in another form promulgated by the Supreme Court under
the rule-making authority delegated to the Court in that section. No form petition has yet been promulgated by the Court for a juvenile court petition charging an adult with a criminal assault and battery on a spouse or other family member. In my opinion, however, the Court is authorized to promulgate such a form, with the concurrence of the Committee on District Courts. See § 16.1-69.51; see also 1986-1987 Att'y Gen. Ann. Rep. 151.

III. Charged Spouse May Not Be Arrested Pursuant to Juvenile Court Petition

Section 19.2-71 expressly provides that process for the arrest of a person charged with a criminal offense may be issued by a judge, clerk of court or magistrate, but does not mention a juvenile court intake officer. After a juvenile court petition is filed, § 16.1-263 provides that the juvenile court may direct that a summons issue. Although an intake officer may direct the immediate, temporary detention of a juvenile under § 16.1-246, he has no comparable express statutory authority with respect to adults. In my opinion, therefore, an adult charged with assault and battery of a spouse or other family member on a juvenile court petition may not be arrested under that petition. In situations in which the immediate arrest and detention of the adult are appropriate, therefore, the intake officer should direct the charging spouse or other family member to obtain an arrest warrant from a judge or magistrate.

1 As a result of new legislation adopted by the General Assembly, effective July 1, 1991, "assault and battery against a family or household member" will become a separately defined offense, punishable as a Class 1 misdemeanor, and on a third or subsequent conviction, as a Class 6 felony. Ch. 238, 1991 Va. Acts 337 (Reg. Sess.) (adding Va. Code Ann. § 18.2-57.2).

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON - CRIMINAL SEXUAL ASSAULT.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS - CRIMINAL PROSECUTIONS.

Rape victim may be subpoenaed by defendant to testify about prior sexual acts between them, provided statutory criteria for admissibility of evidence of prior sexual conduct reviewed at initial evidentiary hearing. Trial court may order victim to testify about such past sexual acts; victim may assert constitutional privilege against self-incrimination.

February 28, 1991

The Honorable Eddie R. Vaughn Jr.
Commonwealth's Attorney for Hanover County

You ask whether, in view of the provisions of the "rape shield" statute, § 18.2-67.7 of the Code of Virginia, the defendant in a rape case may subpoena the rape victim as his witness, without her consent, to testify about her prior sexual acts with him. You also ask whether the trial court may require the rape victim to testify for the defendant about prior sexual acts with the defendant, without the consent of the victim.

I. Applicable Statutes

Section 18.2-67.7 provides:

A. In prosecutions under this article [Article 7, Chapter 4 of Title 18.2], general reputation or opinion evidence of the complaining witness's unchaste
character or prior sexual conduct shall not be admitted. Unless the com-
ingling witness voluntarily agrees otherwise, evidence of specific instances
of his or her prior sexual conduct shall be admitted only if it is relevant and
is:

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2. Evidence of sexual conduct between the complaining witness and the
accused offered to support a contention that the alleged offense was not
accomplished by force, threat or intimidation or through the use of the com-
ingling witness's mental incapacity or physical helplessness, provided that
the sexual conduct occurred within a period of time reasonably proximate to
the offense charged under the circumstances of this case . . . .

**

C. Evidence described in subsection[ ] A . . . of this section shall not be
admitted and may not be referred to at any preliminary hearing or trial until
the court first determines the admissibility of that evidence at an eviden-
tiary hearing to be held before the evidence is introduced at such prelimi-
nary hearing or trial . . . . If the court determines that the evidence meets
the requirements of subsection[ ] A . . . of this section, it shall be admissible
before the judge or jury trying the case in the ordinary course of the prelim-
nary hearing or trial.

II. Rape Victim May Be Subpoenaed and Called to Testify Concerning Prior
Sexual Acts with Defendant Assuming Statutory Requirements Are Met

Section 18.2-67.7 represents a balance between the need to exclude irrelevant and
highly prejudicial evidence of a victim's past sexual history and the defendant's Sixth
Amendment right of the Constitution of the United States to present evidence in his own
behalf and to confront and cross-examine witnesses against him. See Winfield v. Com-
monwealth, 225 Va. 211, 217-18, 301 S.E.2d 15, 19 (1983); see also H. Lane Kneedler,
Sexual Assault Law Reform in Virginia—A Legislative History, 68 Va. L. Rev. 459, 485
(1982).

In furtherance of this balance, § 18.2-67.7 excludes general reputation or opinion
evidence concerning a rape victim's unchaste character or prior sexual conduct. That
section, however, allows the admission of evidence of specific instances of the victim's
prior sexual conduct with the defendant, as long as that evidence is relevant, is offered
to support the defendant's contention that the offense for which he is being tried was not
accomplished through the use of force, threat or intimidation, or through misuse of the
victim's mental capacity or physical helplessness, and is related to sexual conduct that
occurred within a period of time "reasonably proximate" to the offense. Unless the evi-
dence of the prior sexual conduct is reviewed at an initial evidentiary hearing and found
to meet each of these three criteria, no such evidence may be admitted either at the pre-
liminary hearing or at trial.

If there is evidence that the victim previously engaged in consensual sex with the
defendant, such evidence could be relevant to a defense of consent for the current
offense. Relevance is then determined, as for any other evidence, by balancing its proba-
tive value against its prejudicial impact upon the trier of fact. See generally Evans-

Section 18.2-67.7 provides, however, that such prior sexual acts are admissible only
to support a defense of consent to the current offense; evidence of these acts must be
excluded if offered for any other purpose.
A further restriction on the admissibility of the victim's alleged prior sexual acts with the defendant is that they must have occurred within a period of time "reasonably proximate" to the current offense. This reasonable proximity is determined by examining the totality of the circumstances of the case, including, but not limited to, the amount of time between the prior acts and this offense, the nature of any prior relationship and any prior sexual conduct, whether the relationship was a continuing one, and the circumstances surrounding the current offense. *League v. Commonwealth*, 9 Va. App. 199, 207-08, 385 S.E.2d 232, 237-38 (1989), aff'd on reh'g, 10 Va. App. 426, 392 S.E.2d 510 (1990) (en banc).

It is my opinion, therefore, that a defendant charged with an offense in Article 7, Chapter 4 of Title 18.2, § 18.2-61 through 18.2-67.10, may subpoena and call the victim, as he would any other adverse witness, to testify about prior sexual acts between them, but only if a prior evidentiary hearing has been held in which the court determines that the evidence of those acts meets the statutory criteria for admissibility discussed above.

### III. Court May Order Victim to Testify; Where Applicable, Victim May Assert Constitutional Privilege Against Self-Incrimination

In general, any competent individual may be summoned as a witness in a criminal case by either the Commonwealth or the defendant. See Charles E. Friend, *The Law of Evidence in Virginia* § 10 (3d ed. 1988). The Supreme Court of Virginia has stated that

> the duty of a witness to attend the trial and testify is a duty created by law and arises out of necessity in the administration of justice. A witness ... when properly served with subpoena must attend the trial or be subject to punishment for contempt of court.


When the court has determined at the initial evidentiary hearing that evidence of the sexual assault victim's past sexual acts with the defendant meets the criteria established by § 18.2-67.7 and discussed in Part II above, therefore, it is my opinion that the court may order the victim to answer questions about such past sexual acts. If those past sexual acts themselves constitute crimes, however, the victim is entitled, if she chooses, to assert her privilege against self-incrimination, guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by Article I, § 8 of the Constitution of Virginia, and to refuse to answer such questions. See generally Charles E. Friend, supra, § 69.

**CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC. WHILE INTOXICATED.**

Enhanced license revocation sanctions apply only if defendant charged and convicted on process alleging second, third or subsequent offense of driving while intoxicated.

**August 13, 1991**

The Honorable Franklin J. Jenkins
Judge, Goochland County General District Court

You ask whether a court may impose a three-year license revocation pursuant to § 18.2-271 of the Code of Virginia on a defendant convicted of a first offense of driving under the influence, in violation of § 18.2-266, in each of the following factual situations:
(1) The process alleges a first offense of violating § 18.2-266, and the defendant is so convicted, but his driving record from the Department of Motor Vehicles shows a conviction of a violation of § 18.2-266 within the past ten years.

(2) The process alleges a second offense, but the prosecution fails to introduce evidence of the previous conviction, so that the defendant's conviction is for a first offense.

(3) The process alleges a second offense, but the prosecution fails to produce evidence that the defendant was represented by counsel, or waived his right to counsel, at the trial of the earlier offense, making the conviction record of the earlier offense inadmissible under Sargent v. Commonwealth, 5 Va. App. 143, 360 S.E.2d 895 (1987), so that the defendant's conviction is for a first offense.

I. Applicable Statute

Section 18.2-271 provides, in part:

A. Except as provided in § 18.2-271.1, the judgment of conviction if for a first offense under § 18.2-266 or for a similar offense under any county, city, or town ordinance, or for a first offense under subsection A of § 46.2-341.24, shall of itself operate to deprive the person so convicted of the privilege to drive or operate any motor vehicle, engine or train in the Commonwealth for a period of six months from the date of such judgment.

B. If a person is tried on a process alleging a second offense of violating § 18.2-266 or subsection A of § 46.2-341.24 within ten years of a first offense for which the person was convicted under § 18.2-266 or subsection A of § 46.2-341.24 and is convicted thereof, such person's license to operate a motor vehicle, engine or train shall be revoked for a period of three years from the date of the judgment of conviction. Any such period of license suspension or revocation, in any case, shall run consecutively with any period of suspension for failure to permit a blood or breath sample to be taken as required by § 18.2-268 or § 46.2-341.26. If any person has heretofore been convicted or found not innocent in the case of a juvenile of violating any similar act in the Commonwealth or any other state and thereafter is charged with a second violation of § 18.2-266 or subsection A of § 46.2-341.24 and convicted of violating the provisions of § 18.2-266 or subsection A of § 46.2-341.24, such conviction or finding shall, for the purpose of this section and § 18.2-270, be a subsequent offense and shall be punished accordingly.

C. If a person is tried on a process alleging a third or subsequent offense of violating § 18.2-266 or subsection A of § 46.2-341.24 and convicted thereof, such person shall not be eligible for participation in a program pursuant to § 18.2-271.1 and shall have his license revoked as provided in subsection B of § 46.2-391. The court trying such case shall order the surrender of the driver's license of the person so convicted, to be disposed of in accordance with § 46.2-398, and shall notify such person that his license has been revoked indefinitely.

II. Enhanced Sanctions for Second, Third or Subsequent Offense Apply Only if Defendant Is Charged and Convicted on Process Alleging Second, Third or Subsequent Offense

The provisions in § 18.2-271(B)-(C), relating to enhanced license revocation sanctions for a person convicted of a second, third or subsequent offense of violating
$18.2-266, apply only when the defendant, in fact, has been tried and convicted on a process alleging that it is a second, third or subsequent offense. See 1987-1988 Att'y Gen. Ann. Rep. 427, 428. If the process does not allege a second, third or subsequent offense, or if it does so allege but the Commonwealth fails to carry its burden of proving the earlier conviction(s) and the defendant's subsequent conviction, therefore, is for a "first offense" of violating $18.2-266, then the provisions of $18.2-271(A) ("first offense"), quoted above, apply. In these instances, the provisions of $18.2-271(B)-(C) do not apply, notwithstanding the actual number of violations of $18.2-266 or similar ordinances or laws of other states for which the defendant may have been convicted.

The Court of Appeals of Virginia has held that the Commonwealth has the burden of alleging and proving every material fact necessary to establish an offense and justify the application of a statute providing an enhanced penalty, including proving the existence of the required prior convictions and proving that the defendant had or waived counsel for those earlier convictions. Sargent v. Commonwealth 5 Va. App. at 148-50, 360 S.E.2d at 898-99; see also 1990 Att'y Gen. Ann. Rep. 143, 147.

Based on the above, it is my opinion that the three-year license revocation in $18.2-271 may not be imposed in any of the three factual situations you describe. In all three situations, the defendant has been convicted only of a first violation of $18.2-266, and not of any second, third or subsequent offense.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

No statutory requirement for court to refer defendant to Virginia Alcohol Safety Action Program following conviction of driving under influence; mandate to court to consider VASAP referral when there has been no previous referral. Statutory language does not preclude court's consideration of second VASAP referral. Defendant convicted of third DUI conviction ineligible for VASAP referral.

September 18, 1991

The Honorable Joseph D. Morrissey
Commonwealth's Attorney for the City of Richmond

You ask whether a defendant who has been convicted of driving under the influence of alcohol in violation of §18.2-266 of the Code of Virginia and ordered to attend a Virginia Alcohol Safety Action Program ("VASAP") is eligible to be referred to VASAP again, pursuant to §18.2-271.1 upon a second conviction.

I. Applicable Statute

Section 18.2-271.1(A) provides:

Any person convicted of a violation of §18.2-266 (i), (ii), (iii) or (iv), or any ordinance of a county, city, or town similar to the provisions thereof, or provisions of subsection A of §46.2-341.24, or any second offense thereunder, may, with leave of court or upon court order, enter into [VASAP] in the judicial district in which such charge is brought or in any other judicial district upon such terms and conditions as the court may set forth. . . . In the determination of the eligibility of such person to enter [VASAP], the court shall consider his prior record of participation in any other alcohol rehabilitation
program. If such person has never entered into an alcohol safety action program, in keeping with the procedures provided for in this section, and upon motion of the accused or his counsel, the court shall give mature consideration to the needs of such person in determining whether he be allowed to enter such program.

II. Legislative and Case History of § 18.2-271.1 Requires "Mature Consideration" of VASAP Referral; Does Not Forbid Second VASAP Referral

In your inquiry, you suggest that the last two sentences of § 18.2-271.1(A) should be interpreted to mean that a defendant is eligible to enter VASAP if, and only if, that person has never previously entered into an alcohol safety action program. The legislative history of § 18.2-271.1, however, demonstrates that this statutory language was not intended to forbid a second referral to VASAP, but was intended as a mandate to a court at least to consider referring a defendant convicted of driving under the influence to VASAP if the defendant has never entered VASAP before. The statute does not mandate such consideration for a defendant who has previously entered VASAP, but it does not forbid such consideration.

A review of the history of the last two sentences of § 18.2-271.1(A) reveals that they were enacted at different times and for different purposes. The next-to-last sentence was enacted in 1976, while the last sentence was enacted four years later. Both were enacted at a time when courts in the Commonwealth were divided on the wisdom of referrals to VASAP at all, with some courts referring virtually every defendant and others referring no one. The primary benefit presently available to a VASAP participant is the availability of a restricted driver's license, granted pursuant to § 18.2-271.1(E), which provides, in part:

Whenever a person enters a certified 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 [specifically enumerated] purposes .... Such restricted license shall be conditioned upon enrollment within fifteen days in, and successful completion of, [VASAP].

Before July 1, 1982, the successful completion of VASAP pursuant to § 18.2-271.1 could be accepted by the court in lieu of convicting the defendant of driving under the influence. During this period, a VASAP participant not only could continue to drive, but was not even convicted of the underlying offense.

Because there was no "driving under the influence" conviction for a defendant referral to VASAP before 1982, it was possible for someone repeatedly to violate the law but still to have a driving record that gave no indication to the courts of his prior violations. In order to alert courts to this problem, the General Assembly amended § 18.2-271.1 in 1976 to add the next to last sentence in current § 18.2-271.1 requiring a court to consider a defendant's prior record of VASAP participation in determining whether the defendant should be allowed to participate again in VASAP and avoid again being convicted for driving under the influence.

The 1980 amendment to § 18.2-271.1(A) was designed to address a different problem—the fact that some courts had never referred anyone to VASAP, even after five years of VASAP operation. The 1980 amendment mandated that a court give "mature consideration" to sending a defendant to VASAP "[i]f such person has never entered into" VASAP. 1980 Va. Acts, infra note 2. The 1980 amendment does not mandate that a court refer a defendant to VASAP, but it does require that the court consider such a referral.
The mandate to the court to consider VASAP referral is limited to those defendants who have never been referred to VASAP. It is my opinion, however, that this language does not limit a court's authority to consider referral of those defendants who previously have been referred to VASAP.

The legislative purpose for the language in the last sentence of § 18.2-271.1(A) is reflected in the cases decided by the Supreme Court of Virginia interpreting that section. In Midkiff v. Commonwealth, 223 Va. 1, 3, 286 S.E.2d 150, 151 (1982), the court summarized the defendant's arguments:

It was stipulated below, the defendant points out, that "there was an active alcohol safety action program and an alcohol rehabilitation program operating in Henry County." Yet, the defendant asserts, the records of the trial court show that "no person convicted [in that court] of driving under the influence has ever been placed or assigned to [such] a program." Indeed, the defendant notes, the trial judge announced at a docket call in July, 1980, that "no one convicted of driving under the influence would be assigned to an alcohol rehabilitation program."

The defendant maintains that these facts indicate the trial court did not give "good faith consideration" to his request for assignment to an alcohol program. Thus, the defendant concludes, the trial court's refusal of his motion "does not really involve an abuse of discretion," but a "failure to exercise any discretion" at all.

We agree with the defendant that the 1980 amendment imposes upon a court in a drunk-driving case the duty to give "good faith consideration" to a motion to assign the accused to an alcohol program authorized by Code § 18.2-271.1.

In Blevins v. Town of Marion, 226 Va. 200, 203, 308 S.E.2d 105, 106 (1983), the Court, citing Midkiff concerning the duty imposed on a trial court, held:

[The 1980 amendment] requires the court to give good faith consideration to such a motion made by any convicted defendant who is a first or second offender and who has not previously entered a similar program. The ultimate decision rests in the trial court's discretion, but that discretion may only be exercised after the court gives "mature consideration to the needs of such person."

Both Midkiff and Blevins refer to the language of the 1980 amendment as imposing a duty on the court to consider VASAP referral. These cases make no suggestion that the 1980 amendment limits the authority of the court to make such referrals, nor do they read the 1976 amendment and the 1980 amendment together to create such a limitation. There is no language in § 18.2-271.1 that requires a court to refer a defendant to VASAP following a first or second conviction of driving under the influence. The statute, however, does require a court to consider a VASAP referral if there has been no previous referral. Based on the above, it is my opinion that § 18.2-271.1 does not prohibit a court from referring a defendant to VASAP solely because the defendant previously has been referred to VASAP. This conclusion is supported by the fact that a defendant who has been convicted of a third violation of § 18.2-266 is expressly ineligible for VASAP referral. See § 18.2-271(C).

1See Ch. 691, 1976 Va. Acts 1036, 1037.
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

MOTOR VEHICLES: LICENSURE OF DRIVERS - SUSPENSION AND REVOCATION OF LICENSES, GENERALLY; ADDITIONAL PENALTIES.

Failure to comply with Virginia Alcohol Safety Action Program requirements results in license revocation either for six months if first offense conviction, or for three years if second offense conviction. Legislative intent that individual who fails successfully to complete VASAP shall suffer full revocation period as if no program had been entered. Revocation commences upon receipt by Commissioner of Department of Motor Vehicles of court's order revoking restricted license privilege.

March 25, 1991

The Honorable J. Allen Walker
Judge, Loudoun County General District Court

You ask what action a court may take with respect to a person convicted of drunk driving whose license has been suspended pursuant to § 18.2-271 of the Code of Virginia, and who has been issued a restricted license pursuant to § 18.2-271.1(E), if the person subsequently has failed to comply with the requirements of the local component of the Virginia Alcohol Safety Action Program ("VASAP").

I. Applicable Statutes

Section 18.2-271.1 discusses various court actions with respect to a person who fails to comply with the requirements of VASAP. Section 18.2-271.1(E) provides, in part, that "[n]o restricted license shall be issued until enrollment in, and unless conditioned upon the successful completion of, [VASAP]."

Section 18.2-271.1(F) further provides:

The court shall have jurisdiction over any person entering [VASAP] under any provision of this section until such time as the case has been disposed of by either successful completion of the program, or revocation due to ineligibility or violation of a condition or conditions imposed by the court, whichever shall first occur. Revocation proceedings shall be commenced by notice to show cause why the court should not revoke the privilege afforded by this section. Such notice shall be made by first-class mail to the last known address of such person, and shall direct such person to appear before the court in response thereto on a date contained in such notice, which shall not be less than ten days from the date of mailing of the notice. Failure to appear in response to such notice shall of itself be grounds for revocation of such privilege. Notice of revocation under this subsection shall be sent forthwith to the Commissioner of the Department of Motor Vehicles.

Section 18.2-271.1(C) provides, in part:

If the court finds ... subsequently that such person has violated, without good cause, any of the conditions set forth by the court in entering [VASAP], the court shall dispose of the case as if no program had been entered, in which event the revocation provisions of § 46.2-389 and subsection A of § 46.2-391 shall be applicable to the conviction. The court shall, upon final disposition of the case, send a copy of its order to the Commissioner of the Department of Motor Vehicles.
Section 46.2-389 provides:

The Commissioner [of the Department of Motor Vehicles] shall forthwith revoke, and not thereafter reissue for one year, except as provided in § 18.2-271 or § 18.2-271.1, the driver's license, registration card, and license plates of any resident or nonresident on receiving a record of his conviction or a record of his having been found guilty in the case of a juvenile of any of the following crimes, committed in violation of either a state law or a valid county, city, or town ordinance paralleling and substantially conforming to a like state law and to all changes and amendments of it:

2. Violation of § 18.2-266, § 18.2-272, subsection A of § 46.2-341.24 or violation of a valid local ordinance paralleling and substantially conforming to § 18.2-266 or § 18.2-272 . . . .

Section 46.2-391(A) provides, in part:

The Commissioner [of the Department of Motor Vehicles] shall forthwith revoke and not thereafter reissue for three years the driver's license of any person on receiving a record of the conviction of any person who is adjudged to be a second offender in violation of the provisions of subsection A of § 46.2-341.24 pertaining to driving a commercial motor vehicle under the influence of drugs or intoxicants, or of § 18.2-266 pertaining to driving under the influence of drugs or intoxicants or of § 18.2-272 pertaining to driving while the driver's license has been forfeited for a conviction under § 18.2-266, or on receiving a record of conviction as a second offender for a violation of a federal law or a law of any other state or a valid ordinance of any county, city, or town of the Commonwealth or of any other state similar to subsection A of § 46.2-341.24 pertaining to driving a commercial motor vehicle under the influence of drugs or intoxicants, or of § 18.2-266 or § 18.2-272, if the subsequent violation adjudication as a second offender is within ten years from the prior violation.

Section 46.2-398 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 of Motor Vehicles], or (ii) until an appeal is effected and proper bond posted, at which time it shall be returned to the accused.

II. Statutes Relating to Inquiry Should Be Read Together,
Outline Various Options in Facts Presented

Although the statutes quoted above are located throughout the lengthy provisions of § 18.2-271.1 as well as in Title 46.2, all concern the issue you raise, and should be read together in order to ascertain the intent of the General Assembly. See Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1975); 1989 Att'y Gen. Ann. Rep. 189, 190-91. When these statutes are read together, it is my opinion that
(1) a court must make successful completion of VASAP a condition of the issuance of a restricted license (§ 18.2-271.1(E));

(2) a person who fails to comply with the requirements of VASAP has breached that condition, if the person's failure to comply will prevent the successful completion of VASAP;

(3) a person who allegedly has failed to comply with VASAP requirements is entitled to a show cause hearing to determine whether those requirements, in fact, have been violated (§ 18.2-271.1(F));

(4) if a court finds, following the show cause hearing, that the person has violated the condition of successful completion of VASAP, the revocation provisions of §§ 46.2-389 and 46.2-391(A) become applicable to the conviction pursuant to § 18.2-271.1(C);

(5) the court may order the surrender of the restricted license issued to the person, and forward the restricted license and a copy of its order to the Commissioner of the Department of Motor Vehicles ("DMV") pursuant to § 46.2-398; and

(6) on receiving the court's order revoking the privilege afforded by § 18.2-271.1 to the person, the Commissioner of DMV immediately shall revoke the person's license for a period of six months if the conviction is for a first offense of drunk driving, or three years if the conviction is for a second offense. See §§ 46.2-389, 46.2-391(A).

III. License Revocation Under §§ 46.2-389 and 46.2-391(A)
Commences upon Receipt of Court's Order by Commissioner of DMV

The final conclusion reached above requires explanation, since it involves more than a straightforward reading of the statutes. As you note in your letter, an argument can be made that a license revocation imposed on a person pursuant to § 18.2-271 continues to run during the period that a restricted license has been granted pursuant to § 18.2-271.1, so that an individual who drops out of VASAP after several months may have little or none of the initial revocation period remaining when the show cause hearing under § 18.2-271.1(F) is held. As a result, the only sanction available to a court is the revocation of the restricted license of the person during the remainder, if any, of the initial revocation period.

While I agree that the revocation period imposed on a person pursuant to § 18.2-271 continues to run while the individual has a restricted license, it is my opinion that the General Assembly did not intend that courts be limited to revoking the restricted license of a person who fails to complete VASAP. In my opinion, the sanction available to a court is the revocation of the privilege afforded by § 18.2-271.1, so that the person is treated "as if no [VASAP] had been entered, in which event the revocation provisions of § 46.2-389 and subsection A of § 46.2-391 shall be applicable." Section 18.2-271.1(C).

The privilege afforded by § 18.2-271.1 is the privilege to have a restricted license during all or a part of the license revocation period imposed pursuant to §§ 18.2-271, 46.2-389 and 46.2-391. A person who does not enter VASAP is not afforded that privilege and, therefore, must spend the entirety of the revocation period with no driving privilege at all. As a result, the only way that a person who obtains a restricted license but then fails successfully to complete VASAP can be treated "as if no [VASAP] had been entered" upon revocation of "the privilege afforded by [§ 18.2-271.1]" is for an entirely new revocation period to be imposed upon him, to be served without benefit of a restricted driving privilege. Section 18.2-271.1(C), (F).
If a new revocation period is not imposed, the person you describe will not have been treated "as if no [VASAP] had been entered." Section 18.2-271.1(C). In fact, because he will have benefited from the privilege of having a restricted license during all or part of the license revocation period, the person will have been treated as if he had successfully completed VASAP, not as if he had never entered VASAP.

It is my opinion, therefore, that subsections C and F of § 18.2-271.1, when read together, demonstrate a legislative intent that an individual who fails successfully to complete VASAP shall have his license revoked by the Commissioner of DMV pursuant either to § 46.2-389 or to § 46.2-391(A), whichever applies, so that the person will be required to suffer a full revocation period "as if no [VASAP] had been entered." Section 18.2-271.1(C).

Before its amendment in 1989, § 18.2-271.1(E) provided that "[a] restricted license shall not be provided during any period for which the revocation or suspension of the person's license has been suspended pursuant to § 18.2-271 or this section." This language implies that the restricted license was to be issued during a period of license revocation or suspension and that the revocation or suspension was not suspended during the restricted license period.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRUG PARAPHERNALIA.

COUNTIES, CITIES AND TOWNS: GENERAL.

Commonwealth's attorney may not order local merchants to stop selling tobacco accessories that can also be used by purchaser as drug paraphernalia; may prosecute merchant for sale or intended sale of drug paraphernalia and may institute proceedings to have items seized. Prosecution of merchant depends on available evidence of design and intended use seller intends purchasers to make of item; sufficiency of evidence determined by Commonwealth's attorney, judge or jury hearing case.

February 28, 1991

The Honorable Shirley F. Cooper
Member, House of Delegates

You ask whether a Commonwealth's attorney has the power to order local stores to stop selling items marketed as "tobacco accessories" that can also be used as "drug paraphernalia."

I. Applicable Statutes

Section 18.2-265.1 of the Code of Virginia defines "drug paraphernalia" as

all equipment, products, and materials of any kind which are either designed for use or which are intended by the person charged with violating § 18.2-265.3 for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, strength testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana or a controlled substance.
Section 18.2-265.1 further details a nonexclusive list of items that may be considered as drug paraphernalia, if so designed or intended "by the person charged with violating § 18.2-265.3."

Section 18.2-265.2 provides that,

In determining whether an object is drug paraphernalia, the court may consider, in addition to all other relevant evidence the following:

1. Constitutionally admissible statements by the accused concerning the use of the object;
2. The proximity of the object to marijuana or controlled substances, which proximity is actually known to the accused;
3. Instructions, oral or written, provided with the object concerning its use;
4. Descriptive materials accompanying the object which explain or depict its use;
5. National and local advertising within the actual knowledge of the accused concerning its use;
6. The manner in which the object is displayed for sale;
7. Whether the accused is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
8. Evidence of the ratio of sales of the objects defined in § 18.2-165.1 to the total sales of the business enterprise;
9. The existence and scope of legitimate uses for the object in the community;
10. Expert testimony concerning its use or the purpose for which it was designed;
11. Relevant evidence of the intent of the accused to deliver it to persons who he knows, or should reasonably know, intend to use the object with an illegal drug. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this article (Article 1.1, Chapter 7 of Title 18.2) shall not prevent a finding that the object is intended for use or designed for use as drug paraphernalia.

Section 18.2-265.3 provides:

A. Any person who sells or possesses with intent to sell drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it is either designed for use or intended by such person for use to illegally plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body marijuana or a controlled substance, shall be guilty of a Class 1 misdemeanor.

B. Any person eighteen years of age or older who violates subsection A hereof by selling drug paraphernalia to a minor who is at least three years junior to the accused in age shall be guilty of a Class 6 felony.
C. Any person eighteen years of age or older who distributes drug paraphernalia to a minor shall be guilty of a Class 1 misdemeanor.

Section 18.2-265.4 provides for the seizure and forfeiture of drug paraphernalia:

All drug paraphernalia as defined in this article shall be forfeited to the Commonwealth and may be seized and disposed of in the same manner as provided in § 18.2-253 of the Code, subject to the rights of an innocent lienor, to be recognized as under § 4-56.

II. Commonwealth's Attorney May Not Order Local Stores to Stop Selling Tobacco Accessories That Can Also Be Used as Drug Paraphernalia; May Prosecute for Sale of Drug Paraphernalia and May Seize Such Merchandise

While I am not aware of any provision of Virginia law authorizing a Commonwealth's attorney to order local merchants to stop selling products characterized and marketed as tobacco accessories that can also be used by the purchaser as drug paraphernalia, Commonwealth's attorneys are authorized, of course, to prosecute criminal offenses occurring within their respective jurisdictions. See § 15.1-8.1(B).

Section 18.2-265.3 makes sale of, or possession with intent to sell, drug paraphernalia a crime punishable as either a Class 6 felony or Class 1 misdemeanor. One who sells or possesses with intent to sell drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it is either designed for use or intended by such person for use to illegally ... inject, ingest, inhale, or otherwise introduce into the human body marijuana or a controlled substance, shall be guilty of a Class 1 misdemeanor.

Section 18.2-265.3(A). Consequently, if a merchant is selling items that are "drug paraphernalia" within the meaning of § 18.2-265.1, the Commonwealth's attorney may prosecute the merchant under § 18.2-265.3 for the sale or intended sale of such.

In addition to prosecuting a local merchant for the sale or intended sale of drug paraphernalia, the Commonwealth's attorney may institute proceedings to have the items seized, as provided in § 18.2-265.4.

III. Prosecution Under § 18.2-265.3 Dependent on Item Being Designed or Intended by Seller for Use as Drug Paraphernalia


Because it would be impossible to include in a statute every item that could, under certain circumstances, be used as drug paraphernalia, and because some items frequently used as drug paraphernalia also have legitimate uses, the seller's intended use of the item is a key element of § 18.2-265.3. As one commentator notes:

No item is per se made illegal by § 18.2-265.3—the sale of an item becomes illegal only when it is sold with the intent that it be used with controlled
substances. The statute requires that the intent be that of the person charged with the offense. In order to charge a merchant with selling drug paraphernalia, the statute requires that the merchant himself possess the necessary intent. By focusing on the intent of the person charged with a violation, the statute avoids the infirmity of some drug paraphernalia laws which do not clearly state whose intent, if anyone's, is relevant.


Section 18.2-265.2 details 11 types of evidence "[a] court may consider, in addition to all other relevant evidence," in determining whether a particular item is drug paraphernalia. All of these categories of evidence relate to the design of the object or the use that the seller intends purchasers to make of the item.

Whether the items stocked by a particular merchant will subject that merchant to prosecution under § 18.2-265.3, therefore, will depend on the available evidence of the design and intended use of those items, as described in § 18.2-265.2. The sufficiency of that evidence is a factual issue to be determined on a case-by-case basis, in the first instance by the Commonwealth's attorney, and ultimately by the judge or jury hearing the case. See Op. to Hon. John E. Greenbacker Jr., Halifax Co. Commw. Att'y (June 21, 1990).

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRUGS.

CRIMINAL PROCEDURE: FORFEITURES IN DRUG CASES.

Virginia drug forfeiture action in rem brought against offending property civil in nature; separate from criminal action. Forfeiture dependent on Commonwealth's proof, by preponderance of evidence, that property used or exchanged in, or derived from, violation of drug distribution statutes, regardless of statute under which owner or user of property in related criminal case charged.

August 27, 1991

The Honorable Charles W. Jackson
Sheriff for Westmoreland County

You ask whether property seized pursuant to the drug forfeiture statute, § 18.2-249 of the Code of Virginia, can be forfeited even though the owner of the property is charged under the conspiracy provision of § 18.2-256, rather than under the drug distribution statutes in §§ 18.2-248 and 18.2-248.1.

I. Applicable Statutes

Section 18.2-248, a portion of Article 1, Chapter 7 of Title 18.2, §§ 18.2-247 through 18.2-264.1 ("Article 1"), entitled "Drugs," makes it a criminal offense to manufacture, sell or distribute controlled substances or to possess them with intent to distribute. Section 18.2-248.1 does the same for marijuana. Section 18.2-256 criminalizes a conspiracy to violate any provision of Article 1, including §§ 18.2-248 and 18.2-248.1.

Section 18.2-249 provides:
A. The following property shall be subject to lawful seizure by any officer charged with enforcing the provisions of this article: (i) all money, medical equipment, office equipment, laboratory equipment, motor vehicles, and all other personal and real property of any kind or character, used in substantial connection with the illegal manufacture, sale or distribution of controlled substances in violation of § 18.2-248 or of marijuana in violation of § 18.2-248.1, except real property shall not be subject to lawful seizure unless the minimum prescribed punishment for the violation is a term of not less than five years; (ii) everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of § 18.2-248 or of marijuana in violation of § 18.2-248.1; and (iii) all moneys or other property, real or personal, traceable to such an exchange, together with any interest or profits derived from the investment of such money or other property.

B. All seizures and forfeitures under this section shall be governed by the procedures contained in Chapter 22.1 of Title 19.2 of this Code.

Chapter 22.1 of Title 19.2 includes §§ 19.2-386.1 through 19.2-386.18. The trial of a forfeiture case is governed by § 19.2-386.10(A), which provides, in part:

If any party defendant appears in accordance with § 19.2-386.9, the court shall proceed to trial of the case, unless trial by jury is demanded by the Commonwealth or any party defendant. At trial, the Commonwealth has the burden of proving that the property is subject to forfeiture under this chapter. Upon such a showing by the Commonwealth, the claimant has the burden of proving that the claimant's interest in the property is exempt under subdivision 2, 3 or 4 of § 19.2-386.8. The proof of all issues shall be by a preponderance of the evidence.

Section 19.2-386.10(B) further provides:

The information and trial thereon shall be independent of any criminal proceeding against any party or other person for violation of law. However, upon motion and for good cause shown, the court may stay a forfeiture proceeding that is related to any indictment or information.

II. Virginia Drug Forfeiture Procedures Civil in Nature and Separate from Any Criminal Action

A forfeiture under § 18.2-249 is a civil procedure accomplished through an action "in rem" brought against the offending property. Section 19.2-386.10(B) makes it clear that this proceeding in rem is "independent of any criminal proceeding against any party or other person for violation of law."

This statutory language simply recognizes well-established common law. See generally Oliver Wendell Holmes, The Common Law 10-12 (1938). "Most forfeiture penalties are incurred through a violation of the criminal law, as the derivation of the word forfeit suggests. However, while most forfeiture statutes are in substance criminal law enforcement measures, they are usually implemented through a civil in rem procedure ...." 1 Prosecution & Def. Forf. Cas. (MB) ¶ 2.01, at 2-1 (1991). "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." Various Items v. United States, 282 U.S. 577, 581 (1931).

Because forfeiture actions are civil in nature and brought against the property itself rather than against the person who owns or illegally uses the property, it is immaterial to the forfeiture whether any criminal proceedings also are instituted. "It is the
illegal use that is the material consideration, it is that which works the forfeiture, the
guilt or innocence of its owner being accidental." Goldsmith-Grant Co. v. United States,
254 U.S. 505, 513 (1921). Even if the owner or user of the property has been acquitted in
a related criminal prosecution, the property still may be forfeitable because of the lower
standard of proof that applies in civil cases.

The Supreme Court of the United States has eliminated any doubt about whether
the forfeiture proceeding is dependent on the criminal prosecution. "The time has come
to clarify that neither collateral estoppel nor double jeopardy bars a civil, remedial for-
feiture proceeding initiated following an acquittal on related criminal charges." United
States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); see also Dowling v.

Virginia's forfeiture procedure is similar to most other statutory forfeiture
schemes. The Supreme Court of Virginia has recognized that it is not criminal in nature:
"The proceeding to forfeit property is against the property and not against the owner of
the property or any other person. It is not a criminal proceeding. It is a civil case." Common

III. Forfeiture Dependent on Proof of Elements of § 18.2-249,
Regardless of Statute Under Which Owner of Property Charged

Section 18.2-249 details three instances in which property will be subject to for-
feiture: if it has been "used in substantial connection" with criminal violations of
§ 18.2-248 or § 18.2-248.1; if it has been "furnished, or intended to be furnished," in
exchange for drugs or marijuana in violation of § 18.2-248 or § 18.2-248.1; or if it is
"traceable to such an exchange." Because, as discussed in Part II above, forfeiture cases
are independent of any related criminal cases and their outcomes, the statute under
which the property owner is charged is irrelevant to the forfeitability of the property. To
enforce a forfeiture of property under § 18.2-249, the Commonwealth must prove, by a
preponderance of the evidence, that the property was used or exchanged in, or derived
from, a violation of either § 18.2-248 or § 18.2-248.1. If the Commonwealth proves the
required connection between the property and a violation of either § 18.2-248 or
§ 18.2-248.1, therefore, it is my opinion that the forfeiture action will be successful,
regardless of whether the owner or user of the property has been charged with conspiracy
or the substantive offense. If the Commonwealth's proof only establishes, however, that
the property was used in a conspiracy to violate these laws, and does not establish that
the property was in any way connected to an actual violation of § 18.2-248 or
§ 18.2-248.1, then, in my opinion, the forfeiture action will fail.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY
- DRUGS.

PRISONS AND OTHER METHODS OF CORRECTION: PROBATION AND PAROLE
- STATE PROBATION AND PAROLE SERVICES.

Written drug test results conducted pursuant to statute admissible at subsequent proba-
tion revocation and sentencing hearings conducted when test results indicate subject in
violation of terms of probation; also admissible in proceeding to revoke suspended sen-
tence. Use of private out-of-state laboratories under contract with Department of Cor-
rections to conduct drug tests does not affect admissibility of test results. Probation
officers not authorized to require drug testing without previous court approval.

May 30, 1991
The Honorable C.M. Callahan Jr.  
Commonwealth's Attorney for Lee County

You ask several questions concerning the admissibility of the results of drug screening tests that have been conducted on persons placed on probation or given suspended sentences under §§ 18.2-251 and 18.2-252 of the Code of Virginia. Specifically, you ask:

1. Are the written results of drug tests conducted on an individual who has been placed on probation under § 18.2-251 admissible in any proceeding thereafter instituted to revoke the individual's probation and impose a new sentence on him?

2. Are the results of drug tests conducted on an individual who has been given a suspended sentence under § 18.2-252 admissible in any further proceeding instituted to revoke the suspension of that individual's sentence?

3. Are the written results of drug tests conducted by private, out-of-state laboratories under contract with the Department of Corrections admissible by authority of either § 18.2-251 or § 18.2-252?

4. Do probation officers have the authority to require an individual to submit to drug testing, without a previous order from the sentencing court?

I. Facts

You indicate that drug screening tests are conducted under § 18.2-251 for individuals who have been charged with a drug violation as a first offense and are placed on probation without an adjudication of guilt, and under § 18.2-252 for individuals who are convicted of drug offenses but receive suspended sentences. Additionally, probation officers have required drug screening tests of probationers in some cases without specific prior authorization from the sentencing court.

You also state that the Division of Consolidated Laboratories does not conduct these drug tests for probationers in your county, but that the Department of Corrections has contracted with a private out-of-state laboratory to test the samples submitted in all of the instances you describe.

You indicate further that you have sought to use the results of these drug tests only in proceedings to revoke probation or a suspended sentence. The admissibility of the results has been challenged in past cases on hearsay grounds and also on the ground that the statutory exception in § 19.2-187 for tests performed by the Division of Consolidated Laboratories is not applicable.

II. Applicable Statutes

Section 18.2-251 provides, in part:

Whenever any person who has not previously been convicted of any offense under [Article 1, Chapter 7 of Title 18.2] or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250 or to possession of marijuana under § 18.2-250.1, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions.
As a term or condition, the court may require the accused to enter a screening, evaluation and education program, if available, such as, in the opinion of the court, may be best suited to the needs of the accused. . . .

As a condition of probation, the court shall require the accused to remain drug free during the period of probation and may require the defendant to submit to such tests during that period as may be necessary and appropriate to determine if the accused is drug free. Such testing may be conducted by personnel of any screening, evaluation and education program to which the person is referred. . . .

Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him.

Section 18.2-252 provides:

Notwithstanding any other provision of law to the contrary, the trial judge or court trying the case of any person found guilty of violating any law concerning the use, in any manner, of drugs, controlled substances, narcotics, marijuana, noxious chemical substances and like substances, may condition any suspended sentence by first requiring such person to agree to undergo periodic medical examinations and tests to ascertain any use or dependency on the substances listed above and like substances. The frequency and completeness of such examinations and tests shall be in the discretion of such judge or court, and the results of the examinations and tests given to the judge or court as ordered. . . . The judge or court, in his or its discretion, may enter such additional orders as may be required to aid in the rehabilitation of such convicted person.

Section 53.1-145 provides, in part:

In addition to other powers and duties prescribed by [Article 2, Chapter 4 of Title 53.1], each probation and parole officer shall:

1. Investigate and report on any case pending in any court or before any judge in his jurisdiction referred to him by the court or judge;

2. Supervise and assist all persons within his territory placed on probation, and furnish every such person with a written statement of the conditions of his probation and instruct him therein;

4. Arrest and recommit to the place of confinement from which he was released, or in which he would have been confined but for the suspension of his sentence or of its imposition, for violation of the terms of probation or parole, any probationer or parolee under his supervision, or as directed by the Chairman [of the Virginia Parole Board], [Parole] Board member or the court, pending a hearing by the Board or the court, as the case may be; and

5. Keep such records, make such reports, and perform other duties as may be required of him by the Director [of the Department of Corrections] or by the rules and regulations prescribed by the Board of Corrections, and the court or judge by whom he was appointed.
III. Written Results of Drug Tests Conducted Under § 18.2-251
Admissible in Probation Revocation Proceedings

Section 18.2-251 provides for an individual to be placed on probation only after the court is already satisfied that a finding of guilt is justified. In the facts you present, the results of drug testing conducted under § 18.2-251 will be used only for postsentencing decisions. The drug testing ordered under that section is a condition of probation, and is not used in determining guilt of the underlying offense. When a person on probation under § 18.2-251 violates a condition of probation, the court may make an immediate adjudication of guilt and proceed to sentence the offender.

In determining sentence, a trial court is not bound by strict evidentiary or procedural limitations, but may exercise wide discretion in the sources and types of evidence it uses to assist in the determination of punishment. *Williams v. New York*, 337 U.S. 241, 244-45 (1949). Specifically, a court is permitted to consider hearsay at sentencing. See *O'Dell v. Commonwealth*, 234 Va. 672, 701, 364 S.E.2d 491, 508, cert. denied, 488 U.S. 871 (1988); see also *U.S. v. Bowman*, 936 F.2d 380, 381 (4th Cir. 1991); *United States v. Shepherd*, 739 F.2d 510 (10th Cir. 1984).¹

A probation revocation proceeding is even more removed from the original trial than is sentencing. A summary hearing, free of strict evidentiary rules, is sufficient to determine whether probation should be revoked. *Cook v. Commonwealth*, 211 Va. 290, 176 S.E.2d 815 (1970).

Section 18.2-251 imposes the requirement that the probationer remain drug free as a necessary condition of his probation and authorizes the court to impose the additional requirement of drug testing. By providing that "[u]pon violation of a term or condition, the court may enter an adjudication of guilt," § 18.2-251 clearly contemplates that the trial court will be advised when the drug testing it has ordered reveals a violation of the terms of probation. Section 18.2-251 provides inherent authority, therefore, for the results of such drug testing to be admitted in evidence at probation revocation hearings and subsequent sentencing proceedings. See *O'Dell*, 234 Va. at 701-02, 364 S.E.2d at 508 (statute authorizing probation officer's report on history of accused and other relevant facts implicitly authorizes sentencing court to consider hearsay).

It is my opinion, therefore, that the written results of drug tests conducted pursuant to § 18.2-251 are admissible at probation revocation and subsequent sentencing hearings conducted when the test results indicate the test subject has violated the terms of his probation.

IV. Results of Drug Tests Conducted Pursuant to § 18.2-252
Admissible in Proceeding to Revoke Suspension of Sentence

Section 18.2-252 permits the sentencing court to require drug testing as a condition of any suspended sentence imposed for a drug-related conviction and explicitly provides that the results of these tests are to be given to the court, if it so orders.

Based on the discussion in Part III above, and because the statute specifically provides that drug test results be provided to the court, I am of the opinion that the results of drug tests conducted under § 18.2-252 are admissible in a proceeding to revoke a suspended sentence under that section.

V. Use of Private Out-of-State Laboratories Under Contract with Department of Corrections to Conduct Drug Tests Does Not Affect Admissibility of Results

Neither § 18.2-251 nor § 18.2-252 specifies that the drug testing conducted under those sections must be conducted by any particular laboratory. On the contrary,
§ 18.2-251 provides that "testing may be conducted by personnel of any screening ... program to which the person is referred." Similarly, § 18.2-252 gives the court broad discretion concerning the "frequency and completeness" of medical examinations or tests to determine drug usage. Neither the authority for the testing nor the admissibility of the results depends on the identity or location of the laboratory.

Based on these permissive statutory provisions, it is my opinion that the Department of Corrections has the authority to contract with private out-of-state laboratories to conduct drug testing under §§ 18.2-251 and 18.2-252.

It is further my opinion, therefore, that the use of such private out-of-state laboratories under contract with the Department of Corrections does not affect the admissibility of the drug test results as discussed in Parts III and IV, above.

VI. Probation Officers Not Authorized to Require Drug Testing Under §§ 18.2-251 and 18.2-252 Without Court Order

Section 18.2-251 provides specifically that "the court ... may require the defendant to submit to such [drug] tests" during his probation. Section 18.2-252 also is specific in its requirement that the court suspending a sentence determine whether the defendant must undergo periodic medical examinations and tests to ascertain drug use or dependency, and that the "frequency and completeness of such examinations and tests" is within the discretion of the court. While § 53.1-145 gives probation officers broad general authority to supervise individuals referred to them by the courts, nothing in that section specifically grants those officers authority to require drug testing without a court order.

It is a recognized principle of statutory construction that when a statute specifies how something is to be done, it evinces the intent of the General Assembly that it not be done another way. Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); see also Att'y Gen. Ann. Rep.: 1990 at 105, 107; 1989 at 144, 147. An equally well-recognized rule is that "when a statute creates a specific grant of authority, the authority exists only to the extent plainly granted by the statute." 1989 Att'y Gen. Ann. Rep. 252, 253 (when statute authorizes compensation for special justices in designated types of cases, no authority exists for compensation in type of case not so designated).

Based on these principles, I am of the opinion that §§ 18.2-251 and 18.2-252 grant the authority to order drug tests only to the courts, and that no authority exists for probation officers to require drug tests in the situations described in those sections, without previous court approval. A probation officer who believes that a person under his supervision may be using drugs in violation of his probation or suspended sentence may, of course, request the court to order drug testing if the court has not previously done so.

1The question of admissibility is distinct from the issue of what weight the court may choose to give the evidence. Generally, the defendant is entitled to adequate notice of hearsay evidence to be used at a sentencing hearing and an opportunity to rebut or explain the information. See U.S. v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990).

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - OTHER ILLEGAL WEAPONS.

COUNTIES, CITIES AND TOWNS: GENERAL.
Local ordinance requiring waiting period for firearm purchases without requiring check of purchaser's criminal history record not more stringent than statutory requirement; statutory requirements remain applicable to firearm transactions in locality having ordinance imposing waiting period but not requiring criminal record check.

June 7, 1991

The Honorable William Roscoe Reynolds
Member, House of Delegates

You note that § 18.2-308.2:2 of the Code of Virginia, which generally requires an immediate criminal record check to be performed before the sale of a firearm, contains an exception for such transactions occurring in counties, cities or towns that have more stringent local ordinances. You ask whether that exception applies in a locality that previously has adopted an ordinance requiring a waiting period of specified duration before purchase of a firearm, but not specifically requiring a criminal record check.

As an example, you present an ordinance, adopted by the Board of Supervisors of Brunswick County on January 28, 1963 (the "Brunswick Ordinance"), that requires a person intending to purchase a pistol or revolver in the county to notify the county sheriff of that intention at least 30 days before the purchase. The Brunswick Ordinance does not require the sheriff to conduct a criminal record check after receiving this notice. You ask whether the Brunswick Ordinance is "more stringent" than § 18.2-308.2:2, as described in the exception in that section.

I. Applicable Statutes

Section 18.2-308.2:2 requires any person purchasing certain firearms from a dealer in Virginia to consent in writing to an immediate check of his or her criminal history record with the Department of State Police (the "State Police") and details the procedure by which the dealer initiates and obtains that record by telephone before selling the firearm. Section 18.2-308.2:2(G) defines a "firearm" to which this requirement is applicable as any (i) handgun or pistol having a barrel length of less than five inches which expels a projectile by action of an explosion or (ii) semiautomatic center-fire rifle or pistol which expels a projectile by action of an explosion and is provided by the manufacturer with a magazine which will hold more than twenty rounds of ammunition or designed by the manufacturer to accommodate a silencer or bayonet or equipped with a bipod, flash suppresser or folding stock.

Section 18.2-308.2:2(1)(iv) exempts certain firearms sales from this record check requirement, including transactions in any county, city or town that has a local ordinance adopted prior to January 1, 1987, governing the purchase, possession, transfer, ownership, conveyance or transportation of firearms which is more stringent than this section.\[2\]

II. Local Ordinance Requiring Waiting Period for Firearm Purchaser Without Requiring Criminal History Record Check Not "More Stringent" than § 18.2-308.2:2

Section 18.2-308.2:2 does not contain any specific definition of what constitutes a "more stringent" local ordinance that would cause firearm sales in a locality to be excepted from the general requirement for a record check imposed by that section. It is


In my opinion, a reading of § 18.2-308.2:2 dictates the conclusion that the General Assembly intended that statute to insure that firearms of the types described in § 18.2-308.2:2(G) would not be sold to persons with known criminal records disqualifying them from firearm ownership. A local ordinance that imposes a statutory waiting period on prospective firearm sales without also requiring the local sheriff or the seller to obtain a criminal history record check on the prospective purchaser obviously would not achieve this statutory objective. The Brunswick Ordinance, moreover, applies only to pistols and revolvers, while the definition of "firearm" in § 18.2-308.2:2(G) is considerably more inclusive.

Based on the above, it is my opinion that neither the Brunswick Ordinance nor other local ordinances that impose waiting periods for firearm purchases without also requiring a check of the purchaser's criminal history record can be considered "more stringent" than the requirements of § 18.2-308.2:2, as that term is used in § 18.2-308.2:2(l)(iv). It is further my opinion, therefore, that the requirements of § 18.2-308.2:2 remain applicable to firearm transactions in a county, city, or town having an ordinance imposing such a waiting period but not requiring a criminal record check.3

1As your letter notes, this record check is obtained from the State Police within an average of 1.5 minutes. Section 18.2-308.2:2, therefore, is popularly referred to as the "instantaneous check" law.
2January 1, 1987, was the effective date of § 15.1-29.15, which prohibited local regulation of firearms sales, but excepted previously adopted local ordinances from that general prohibition.
3Under § 15.1-29.15, if its local ordinance was adopted before January 1, 1987, a locality still may enforce such a waiting period; however, the requirements of § 18.2-308.2:2 also will apply.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES.

Blind bowlers association ineligible to obtain bingo permit because active members direct participants in, and beneficiaries of, association's recreational activities; does not operate exclusively for religious, charitable, community or educational purposes. Organization eligible to obtain permit may donate bingo proceeds to association if organization's members do not actually participate in association's bowling tournaments.

March 22, 1991

The Honorable Clifton A. Woodrum
Member, House of Delegates
You ask several questions concerning the right of the Roanoke Valley Blind Bowlers Association, Inc. to obtain a bingo permit and to use bingo proceeds for certain administrative expenses and organizational activities.

I. Facts

The Roanoke Valley Blind Bowlers Association, Inc. (the "Association") is a nonprofit corporation whose purpose is to improve physical and social rehabilitation for blind individuals in the Roanoke Valley area by promoting an interest in bowling and to affiliate with similar groups. The Association consists of two classes of members. The first, and numerically predominant, class is comprised of "active members" who are totally blind or have substantial visual impairment. The second class of "auxiliary members" is comprised of fully sighted individuals interested in promoting the organization's purposes. These auxiliary members help the active members travel to bowling tournaments and otherwise assist the active members' participation in the organization. The auxiliary members also assist in administering the business of the Association.

II. Applicable Statutes

In Article 1.1, Chapter 8 of Title 18.2, §§ 18.2-340.1 through 18.2-340.14 of the Code of Virginia, the General Assembly has set forth the basis on which certain enumerated kinds of organizations may obtain a permit for, and may conduct, bingo games and raffles.

Section 18.2-340.1(1)(b) defines an "organization" eligible to obtain permits for bingo games and raffles as, among other things, "[a]n organization operated exclusively for religious, charitable, community or educational purposes...

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.

E. Except for persons employed as clerical assistants by organizations composed of or for deaf or blind persons, only bona fide members of any such organization who have been members of such organization for at least ninety days prior to such participation shall participate in the management, operation or conduct of any bingo game or raffle. Persons employed by organizations composed of or for deaf or blind persons may receive remuneration not to exceed thirty dollars per event for providing clerical assistance in the conduct of bingo games or raffles only for such organizations.

III. Association Not Operated Exclusively for Allowable Purposes Not Qualified for Bingo Permit

Only those groups defined in § 18.2-340.1(1)(b) are eligible to obtain permits to conduct bingo games and raffles. Under that definition, the Association is a qualified
organization only if it is operated "exclusively for religious, charitable, community or education purposes." (Emphasis added.)

Prior Opinions of this Office conclude that, whether an organization falls within this definition is ultimately a decision to be made by the local official designated under S 18.2-340.2, subject to judicial review. See Att'y Gen. Ann. Rep.: 1987-1988 at 279; 1986-1987 at 166. In giving guidance to local officials in applying §§ 18.2-340.1 through 18.2-340.14 since their adoption in 1979, however, prior Opinions of this Office consistently have interpreted the General Assembly's use of the word "exclusively" to mean that the definition of eligible organizations in § 18.2-340.1 is to be interpreted narrowly and that an organization that is not operated exclusively for one of the purposes enumerated in § 18.2-340.1(1)(b) does not qualify for a permit no matter how laudable or helpful the organization's purposes otherwise may be. For example, when an organization's very nature has demonstrated, on its face, that it does not operate exclusively for the public purposes described in § 18.2-340.1(1)(b), previous Opinions have held that the organization was ineligible to obtain a bingo permit. See Att'y Gen. Ann. Rep.: 1986-1987, supra, at 167 (county political committee); 1979-1980 at 228 (hotel); 1975-1976 at 208 (city or county political committee). Other Opinions, while refraining from any ultimate conclusion as to an organization's eligibility, indicate that the organizations in question do not appear to satisfy the requirement in § 18.2-340.1(1)(b) of operating "exclusively for religious, charitable, community or educational purposes." See Att'y Gen. Ann. Rep.: 1987-1988, supra, at 280 (skating club); 1982-1983 at 31 (softball club); 1981-1982 at 40 (local swimming and recreation club). The rationale underlying the latter Opinions is that the activities of these organizations were, and the proceeds from their bingo games or raffles would be used for, a mixture of public and private purposes, in contravention of § 18.2-340.1(b).

The General Assembly could, of course, expand the definition of organizations eligible to conduct bingo games and raffles, but it has not done so. As a result, it is presumed to have acquiesced in the construction given that definition in the Opinions of a succession of Attorneys General. Deal v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983); see also 1986-1987 Att'y Gen. Ann. Rep. 216, 217 n.1; id. at 292, 293 n.1.

Unquestionably, a substantial portion of the Association's activities may properly be characterized as being for community or educational purposes. The conclusion is inescapable, however, that the members' participation in bowling tournaments is also partly for their own private recreational enjoyment. In the facts you describe, therefore, and based on the interpretation of the term "exclusively" in the previous Opinions of this Office discussed above and the General Assembly's acquiescence in that interpretation, I am compelled to conclude that the Association is, under these circumstances, not eligible to obtain a bingo permit. As stated above, however, the ultimate decision concerning an organization's eligibility must be made on a case-by-case basis by the local official designated under § 18.2-340.2.

Your remaining questions all are based on the assumption that the Association is eligible to obtain a bingo permit. In view of my conclusion that the Association is not so eligible, it is not necessary to address these other questions.

IV. Organization Could Qualify for Bingo Permit if Operated Exclusively to Facilitate Participation in Tournaments by Blind Bowlers Who Are Not Members of That Organization

The rationale underlying my conclusion that the Association itself is ineligible to obtain a bingo permit is that its "active members" are direct participants in, and beneficiaries of, the Association's organizational activities. It is for this reason only that the Association does not operate exclusively for the public purposes recited in...
§ 18.2-340.1(1)(b). If, however, another organization eligible to obtain a bingo permit, whose members do not actually participate in the Association's recreational activities, applied for a bingo permit and then donated the bingo proceeds to the Association, this objection would not apply. An organization such as a church or fraternal organization, or an organization composed solely of the "auxiliary members" of the Association (assuming the bingo proceeds are not used to pay for the auxiliary members to bowl), therefore, could qualify for a bingo permit under the definition set forth in § 18.2-340.1(1)(b) and donate the proceeds to the Association.

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CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES.

Eligible organization whose actual or anticipated gross receipts from bingo exceed $75,000 in calendar year must have federal tax-exempt status before being eligible to obtain local bingo or raffle permit; may receive special permit to conduct extra bingo games more often than two days in one week only while holding carnival, fair or other similar event of limited duration. "Instant bingo" games considered "special bingo games" whose prizes limited to $100 per game card.

November 15, 1991

The Honorable Mark L. Earley
Member, Senate of Virginia

You ask several questions about the proper construction of several sections of the Code of Virginia that govern the operation of bingo games and raffles by eligible non-profit organizations. Your specific questions are:

1. May an eligible organization that receives or expects to receive more than $75,000 in a calendar year from bingo operations obtain a local permit to conduct such bingo games while the organization's application for federal tax-exempt status under § 501(c) of the United States Internal Revenue Code is still pending?

2. For what "other similar events" does § 18.2-340.4 of the Code of Virginia allow an eligible organization to receive a special permit to conduct bingo games more often than two calendar days in one calendar week?

3. What limit, if any, applies to the prize amount that an eligible organization may award for a single winning "instant bingo" game card?

1. Applicable Statutes

Article 1.1, Chapter 8 of Title 18.2, §§ 18.2-340.1 through 18.2-340.14 ("Article 1.1"), details the basis on which certain nonprofit organizations may obtain permits for, and may operate, bingo games and raffles.

Section 18.2-340.1(1) provides that an eligible nonprofit "organization" may be one of the following:

(a) A voluntary fire department or rescue squad or auxiliary unit thereof which has been recognized by an ordinance or resolution of the political subdivision where the voluntary fire department or rescue squad is located as being a part of the safety program of such political subdivision.
An organization operated exclusively for religious, charitable, community or educational purposes; an association of war veterans or auxiliary units thereof organized in the United States, or a fraternal association operating under the lodge system.

Section 18.2-340.1 further provides the following definitions:

2. "Bingo" means a specific game of chance played with individual cards having randomly numbered squares ranging from one to seventy-five, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers selected at random. Such cards shall have five vertical rows headed respectively by the letters B.I.N.G.O., with each row having five randomly numbered squares.

3. "Raffle" means a lottery in which the prize is won by a random drawing of the name or prearranged number of one or more persons purchasing chances. Provided, however, that nothing in this article shall prohibit an organization from using the State Lottery Department's Pick-3 number as the basis for determining the winner of a lottery.

4. "Instant bingo" means a specific game of chance played by the random selection of one or more individually prepacked cards, with winners being determined by the preprinted appearance of the letters B.I.N.G.O. in any prescribed order on the reverse side of such card.

5. "Jackpot" means a bingo card played as a part of a bingo game defined in § 18.2-340.1 (2) in which all numbers on the card are covered, each number being selected at random, and with no free or "wild" numbers.

Section 18.2-340.3(4) places the following requirement on otherwise eligible organizations seeking bingo permits:

Any organization whose gross receipts from all bingo operations exceed or can be expected to exceed $75,000 in any calendar year shall have been granted tax-exempt status pursuant to § 501 (c) of the United States Internal Revenue Code.

The first paragraph of § 18.2-340.4 provides:

No organization may hold bingo games more frequently than two calendar days in any one calendar week, except that a special permit may be granted an organization which entitles the organization to conduct more frequent operations during carnivals, fairs and other similar events at its principal meeting place or any other site selected by such organization which is located in the jurisdiction issuing the permit and which is not in violation of any local zoning ordinance.

Section 18.2-340.5 authorizes eligible organizations to conduct "instant bingo" games, subject to certain restrictions.

Section 18.2-340.9(G) provides:

No organization shall award any bingo prize money or any merchandise valued in excess of the following amounts: (i) no bingo door prize shall exceed $25, (ii) no regular bingo or special bingo game shall exceed $100, and (iii) no bingo jackpot of any nature whatsoever shall exceed $1,000, nor shall the
total amount of bingo jackpot prizes awarded in any one calendar day exceed $1,000.

II. Organization Whose Actual or Anticipated Gross Receipts Exceed $75,000 Must Have Federal Tax-Exempt Status to Obtain Bingo Permit

Section 18.2-340.3 establishes the prerequisites that an eligible organization must satisfy before a locality may issue it an annual permit to conduct bingo games and raffles pursuant to § 18.2-340.2. By its plain language, § 18.2-340.3(4) requires that an organization with gross receipts from bingo exceeding or expected to exceed $75,000 in a calendar year "shall have been granted [federal] tax-exempt status" to be eligible for a permit. (Emphasis added.)

Words in a statute should normally be given their ordinary meaning. See, e.g., Grant v. Commonwealth, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982). In my opinion, the use of the future perfect tense—"shall have been granted"—in § 18.2-340.3(4) means that such an organization must already have received its federal tax-exempt status to be eligible for a local bingo or raffle permit, and may not obtain the permit while its application for the federal tax exemption is still pending.

III. Special Permit for Additional Bingo Games Available Only in Conjunction with Carnivals, Fairs or Other Similar Events

Section 18.2-340.4, while it otherwise prohibits eligible organizations from conducting bingo games more than two calendar days in any one calendar week, permits an eligible organization to obtain a special permit to conduct bingo games more often "during carnivals, fairs and other similar events at its principal meeting place or any other site selected by such organization." (Emphasis added.)

When a particular class of things is enumerated in a statute and is followed by general words, the general words should be construed in a sense analogous to the more specific words. See Cape Henry v. Nati. Gypsum, 229 Va. 596, 603, 331 S.E.2d 476, 481 (1985). Likewise, when general and specific terms are listed together, "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," Martin v. Commonwealth, 224 Va. 298, 302, 295 S.E.2d 890, 893 (1982). The provision in § 18.2-340.4 clearly means an organization may not receive a special permit to hold bingo games more often than two days in one week, except while it is conducting a carnival, fair or other special event of similar character. In my opinion, therefore, an eligible organization may receive a special permit to conduct extra bingo games under this section only while it is holding a carnival, a fair or some comparable public amusement event of limited duration. The ultimate determination of what constitutes such a "similar event," of course, must be made by the Commonwealth's attorney or other local official designated to issue bingo permits for the locality in question.

IV. "Instant Bingo" Prizes Limited to $100 Per Game Card

The only prize limits established by Article 1.1 are those in § 18.2-340.9(C). That statute limits (i) "bingo door prize[s]" to $25, (ii) "regular bingo" and "special bingo" prizes to $100 per game, and (iii) "bingo jackpot[s]" to $1,000 per game or per calendar day.

The definitions in § 18.2-340.1 distinguish between "bingo," which is played by a person matching numbers in a predetermined order on a card to numbers drawn at random by the game operator, and "instant bingo," in which the player randomly selects a card that is a predetermined winner or loser. Compare § 18.2-340.1(2) and (4). "Jackpot"
is a defined form of ordinary bingo in which the first player to match all numbers on his or her card to the numbers drawn at random wins the "jackpot." *Cf.* § 18.2-340.1(5). By its own terms, the definition of "jackpot" applies only to bingo cards played in the ordinary manner of "bingo" described in § 18.2-340.1(2). In my opinion, therefore, the term "jackpot" thus has no application to the "instant bingo" game described in § 18.2-340.1(4).

Although § 18.2-340.1 defines "bingo," "instant bingo" and "jackpot," there is no definition of the term "special bingo game" as used in § 18.2-340.9(G). The various provisions of a statute must be read as a consistent and harmonious whole, with effect given to every part. *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984); see also 1987-1988 Att'y Gen. Ann. Rep. 629. The phrase "special bingo game" in § 18.2-340.9(G)(ii), therefore, must have some meaning. Since "regular" bingo is clearly defined in § 18.2-340.1(2), and "jackpot" bingo as defined in § 18.2-340.1(5) clearly does not include "instant bingo," it is my opinion that the reference to "special bingo game[s]" in § 18.2-340.9(G)(ii) can only mean "instant bingo" games. It is further my opinion, therefore, that § 18.2-340.9(G)(ii) limits "instant bingo" prizes to $100 per game card.

**CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES - GAMBLING.**

Duck race neither "bingo" nor "instant bingo"; does not constitute "raffle." Duck race not excluded from general statutory prohibition on gambling. Whether element of consideration exists sufficient to render charitable organization's fund-raising event form of illegal gambling is decision reserved to Commonwealth's attorney, grand jury and trier of fact; not appropriate issue on which to render Opinion.

August 29, 1991

The Honorable William G. Petty
Commonwealth's Attorney for the City of Lynchburg

You ask whether a certain fund-raising event constitutes gambling and, if so, whether it may be lawfully conducted by organizations authorized to operate bingo games and raffles.

I. Facts

You state that a charitable organization proposes to conduct a fund-raising event known as "The Great Virginia Duck Race." In this event, the organization would release 75,000 plastic, numbered ducks into a local stream. The ducks would then float downstream toward a designated finish line. The contestant holding the ticket that corresponds to the number on the first duck crossing the finish line would win a monetary prize.

The organization's rules and regulations provide that no purchase is required to participate in the duck race. The rules further state that, in exchange for a $5 donation, a ticket may be obtained without condition from various agents of the organization. The rules continue, however, that free tickets "defeat the charitable fund raising purpose of the event and are not encouraged." *Official Rules and Regulations, The Great Virginia Duck Race*, R. 10. Thus, the rules provide that free tickets may be obtained only under certain, more restrictive conditions not applicable to donors. *Id.*
II. Applicable Statutes

Section 18.2-325(1) of the Code of Virginia defines illegal gambling as the making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance. ....

In Article 1.1, Chapter 8 of Title 18.2, §§ 18.2-340.1 through 18.2-340.14 ("Article 1.1"), the General Assembly has provided the basis on which certain organizations may obtain a permit for, and may conduct, bingo games and raffles.

Section 18.2-340.1(3) defines a raffle as "a lottery in which the prize is won by a random drawing of the name or prearranged number of one or more persons purchasing chances."

Section 18.2-340.14 provides that "[Article 1.1] permits organizations to conduct raffles, bingo and instant bingo games. All games not explicitly authorized by this article are prohibited."


As quoted above, § 18.2-340.14 authorizes certain charitable and other organizations "to conduct raffles, bingo and instant bingo games," thereby excluding those activities from the general statutory prohibition on gambling. See also § 18.2-334.2 (parallel statute authorizing organizations defined in § 18.2-340.1(1) to conduct bingo games, instant bingo games and raffles, even though such activities otherwise would be prohibited by § 18.2-325). Section 18.2-340.14, however, requires that the statutory definitions of "raffle," "bingo," and "instant bingo" be strictly construed by providing that "[a]ll games not explicitly authorized by [Article 1.1] are prohibited." (Emphasis added.)

The duck race you describe clearly is neither a "bingo" nor "instant bingo" game, as those terms are defined, respectively, in § 18.2-340.1(2) and (4). In addition, the duck race does not constitute a "raffle" unless it is "a lottery in which the prize is won by a random drawing of the name or prearranged number of one or more persons purchasing chances." Section 18.2-340.1(3). A "raffle" contemplates the purchase of chances by one or more persons for the opportunity to win a prize to be determined by random drawing from some container in which all the chances purchased have been placed. See Att'y Gen. Ann. Rep.: 1989 at 176, 177; 1979-1980 at 51, 52.

In the duck race you describe, the winner is not determined by a drawing at all, but by which duck happens to cross the finish line first. It is my opinion, therefore, that this activity does not constitute a "raffle," as that term is defined in § 18.2-340.1(3). As a result, it is further my opinion that § 18.2-340.14 does not exclude the duck race from the general prohibition on gambling in § 18.2-325.

IV. Whether Consideration Exists Sufficient to Render Duck Race Form of Illegal Gambling is Decision Reserved to Commonwealth's Attorney, Grand Jury and Trier of Fact

Even though the duck race is not a "raffle" that may be conducted by a designated organization under § 18.2-340.14, it may still be conducted lawfully if it does not contain the requisite elements to constitute illegal gambling under § 18.2-325.

It is apparent that the duck race in the facts you present involves the first two elements of prize and chance—the person holding the number of the duck that crosses the finish line first wins a monetary prize, and no skill is necessary to win that prize. The ultimate determination whether this duck race constitutes illegal gambling, therefore, depends on whether the third element—consideration—likewise is present.

The rules and regulations of the duck race, on their face, provide that a numbered duck may be obtained—at no charge, but they also state that "[f]ree entry tickets defeat the charitable fund raising purpose of the event and are not encouraged." Official Rules and Regulations, supra Pt. I. In your inquiry, you note that the rules also place certain restrictive conditions upon the issuance of free entry tickets to this event. See id. The extent to which these conditions exist and whether they result in the element of consideration being present in the duck race require that factual determinations, such as the actual operating hours of the free ticket sales location, whether any obstacles to obtaining a free ticket take place at the location, etc., be made that are not the proper function of an official Opinion of the Attorney General. This Office has declined to render official Opinions when the request involves a question of fact rather than one of law. See, e.g., Att'y Gen. Ann. Rep.: 1987-1988 at 69, 72; 1977-1978 at 31. Further prior Opinions also conclude that the application of various elements of a criminal offense to a specific set of facts is "a function properly reserved to the Commonwealth's attorney, the grand jury, and the trier of fact, and is not an appropriate issue on which to render an Opinion." 1987-1988 Att'y Gen. Ann. Rep., supra. Based on the above, I must decline to render an Opinion on whether the conduct outlined in your request, in fact, constitutes illegal gambling.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - GAMBLING.

TRADE AND COMMERCE: HORSE RACING AND PARI-MUTUEL BETTING.

Narrow construction of statute providing exceptions to illegal gambling laws; only pari-mutuel wagering on horse racing expressly authorized by statute permitted; pari-mutuel wagering on dog racing not authorized.

September 23, 1991

The Honorable Glenn R. Croshaw
Member, House of Delegates

You ask whether dog racing with pari-mutuel wagering is permitted in the Commonwealth in a locality where it has been approved in a referendum.

I. Applicable Statutes

Chapter 8 of Title 18.2 of the Code of Virginia details "crimes involving morals and decency" in the Commonwealth. Section 18.2-325(1), the first statute in Chapter 8, provides:
The making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling.

Section 18.2-334.4 provides that "[n]othing in [the Virginia statutes concerning gambling] shall be construed to make it illegal to participate in any race meeting or pari-mutuel wagering conducted in accordance with Chapter 28 ($ 59.1-353 et seq.) of Title 59.1." 1

Section 59.1-364(A) provides, in part, that "[h]orse racing with pari-mutuel wagering as licensed herein shall be permitted in the Commonwealth."

Section 59.1-365 defines "horse racing" as "a competition on a set course involving a race between horses on which pari-mutuel wagering is permitted." Neither Title 18.2 nor Title 59.1 contains statutes that authorize pari-mutuel wagering on any sport other than horse racing.

Section 59.1-391 requires voter approval by local referendum before the issuance of "any initial license to construct, establish or own a racetrack" for horse racing in each county or city in which such facility is to be located.

II. Exceptions to Illegal Gambling Laws Construed Narrowly

Statutes that impose penalties must be strictly construed. See Harward v. Commonwealth, 229 Va. 363, 330 S.E.2d 89 (1985); Att'y Gen. Ann. Rep.: 1990 at 263; 1987-1988 at 489, 490. It also is a well-recognized rule of statutory construction that exceptions to otherwise applicable statutes should be construed narrowly. See Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982); 1990 Att'y Gen. Ann. Rep. 266, 267. It is my opinion, therefore, that § 18.2-334.4, an exception to the statutes that impose criminal penalties for illegal gambling in the Commonwealth, should be narrowly construed, and that only pari-mutuel wagering expressly authorized by statute—that is, wagering on horse racing allowed under Chapter 29 of Title 59.1—is permitted.

III. Pari-Mutuel Wagering Not Permitted on Dog Racing

In addition to the rules of statutory construction discussed above, the mention of one thing in a statute generally implies the exclusion of another. See, e.g., Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); 1989 Att'y Gen. Ann. Rep. 144, 147. Section 59.1-364 expressly authorizes pari-mutuel wagering on "horse racing" but does not mention any other sport. 2 When the language of a statute is plain and unambiguous, its plain meaning and intent govern without resorting to rules of statutory construction. See Ambrogi v. Koontz, 224 Va. at 386, 297 S.E.2d at 662; 1987-1988 Att'y Gen. Ann. Rep. 125, 126. Based on the above, therefore, it is my opinion that pari-mutuel wagering on dog racing is not authorized under existing Virginia statutes.

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1These statutes actually are contained in Chapter 29, rather than in Chapter 28, of Title 59.1 as § 18.2-334.4 provides. The 1988 Session of the General Assembly passed two Acts designated as Chapter 28 of Title 59.1. Chapter 73 of the 1988 Acts of Assembly, the first act so designated, was codified as Chapter 28 of Title 59.1. See id., 1988 Va. Acts 60. Chapter 855 of the 1988 Acts, the Act referenced in § 18.2-334.4, was designated as Chapter 29 by the Virginia Code Commission. See id., 1988 Va. Acts 1730.
It is further my opinion that a dog is not a horse. See *Mister Ed* theme song ("A horse is a horse, of course, of course"). You do not ask, and this Opinion, therefore, does not address, whether "horse racing," as used in § 53.1-364, includes racing of ungulate animals closely related to horses, such as mules, jackasses, Shetland ponies or zebras.

**CRIMINAL PROCEDURE: ARREST.**

**COUNTIES, CITIES AND TOWNS: COUNTY, CITY AND TOWN OFFICERS GENERALLY—SHERIFFS AND SERGEANTS.**

**CIVIL REMEDIES AND PROCEDURE: PROCESS.**

Sheriff must serve local jail inmate with arrest warrant within reasonable time after receipt from another jurisdiction.

April 29, 1991

The Honorable Gary W. Waters
Sheriff for the City of Portsmouth

You ask whether a sheriff may postpone serving a jail inmate with an arrest warrant from another jurisdiction and maintain the warrant as a detainer until the inmate's sentence in the sheriff's locality is completed.

I. Applicable Statutes

Section 15.1-79 of the Code of Virginia provides, in part, that "[e]very officer to whom any order, warrant, or process may be lawfully directed, shall execute the same within the boundaries of the political subdivision in which he serves . . . ."

Section 19.2-76, which details the procedures for the execution of arrest warrants, provides that "[a] warrant shall be executed by the arrest of the accused . . . ."

II. Arrest Warrant Must Be Served Within Reasonable Time After Receipt

Section 19.2-76, concerning the service of an arrest warrant and a summons, contains no wording comparable to that in § 8.01-297, requiring a civil warrant to be served "forthwith." Both §§ 15.1-79 and 19.2-76 require, however, that an officer receiving an arrest warrant "shall" execute it. The use of "shall" in a statute implies that its provisions are mandatory. Att'y Gen. Ann. Rep.: 1989 at 250, 251-52; 1986-1987 at 154, 155; id. at 300.

The United States Court of Appeals for the Fourth Circuit has held that a criminal warrant should be served within a reasonable time after receipt by the officer to whom it is directed. See *United States v. Payne*, 423 F.2d 1125 (4th Cir.), cert. denied, 400 U.S. 836 (1970); *United States v. Weaver*, 384 F.2d 879 (4th Cir. 1967), cert. denied, 390 U.S. 983 (1968); see also *State ex rel. Berger v. McCarthy*, 113 Ariz. 161, 163, 548 P.2d 1158, 1160 (1976) ("shall" connotes compliance within reasonable time). I am not aware of any statute that authorizes an officer to delay serving a criminal warrant on an inmate whose identity and location are known and to treat the warrant as a detainer.

It is my opinion, therefore, that when a sheriff receives a warrant from another jurisdiction to be served on an inmate in the sheriff's local jail, the warrant must be served on the inmate within a reasonable time after receipt.
CRIMINAL PROCEDURE: ARREST.

GAME, INLAND FISHERIES AND BOATING: GAME WARDENS.

Warrantless arrest or detention of person not rendered invalid by procedural statutory violations. Court's dismissal of charge not required merely by defect attendant to arrest. Class of offense committed and discretion given arresting officer determine whether arrestee must be released on summons or taken before magistrate; person must be released on summons unless arresting officer determines person qualifies for exception(s) to summons procedure. Person arrested for violation of game, inland fish and boating laws may be released on summons, regardless of class of specific offense.

May 17, 1991

The Honorable Franklin J. Jenkins
Judge, Goochland County General District Court

You ask several questions concerning the release following a warrantless arrest of persons accused of various types of offenses. First, you ask whether an arrest is invalid, and a dismissal of the charge is therefore required, if the arresting officer has failed to follow the post-arrest procedures detailed in § 19.2-82 of the Code of Virginia. You also ask whether my answer to this question would change if the person is arrested without a warrant for an offense committed in the officer's presence. Your third question is whether a person arrested without a warrant for a Class 1 or 2 misdemeanor must be released on a summons if the person discontinues the unlawful act, will honor the summons, and will not cause harm to himself or others. Your final question is whether a law enforcement officer who arrests a person for a violation of the game, inland fish and boating laws may release the person on a summons regardless of the class of the offense.

I. Applicable Statutes

Section 19.2-74(A)(1) provides:

Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.
Section 19.2-74(A)(2) concerns the detention of persons for violations of statutes and ordinances involving lesser penalties and provides:

Whenever any person is detained by or is in the custody of an arresting officer for a violation of any county, city, or town ordinance or of any provision of this Code, punishable as a Class 3 or Class 4 misdemeanor or any other misdemeanor for which he cannot receive a jail sentence, except as otherwise provided in Title 46.2, or to the offense of public drunkenness as defined in § 18.2-388, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving of such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Section 19.2-81 provides, in part, that certain law enforcement officers "may arrest, without a warrant, any person who commits any crime in the presence of such officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence."

Section 19.2-82 provides:

A person arrested without a warrant shall be brought forthwith before a magistrate .... If the magistrate ... has lawful probable cause upon which to believe that a criminal offense has been committed, and that the person arrested has committed such offense, he shall issue either a warrant ... or a summons ....

Section 29.1-210 provides, in part:

Any person arrested for a violation of the game, inland fish and boating laws may be committed to jail pending trial or admitted to bail or released on recognizance as provided by general law; or the arresting officer may issue a summons ... if the person gives his written promise to appear ....

Any person refusing to give the written promise ... shall be taken immediately by the arresting or other police officer before the nearest or most accessible judicial officer.

II. Noncompliance with Arrest Procedures Is Not Grounds for Dismissal of Charge

Your initial questions are based on hypothetical facts that involve technical violations, by a law enforcement officer described in § 19.2-81, of the post-arrest procedures detailed in § 19.2-82. The arrest provisions in Chapter 7 of Title 19.2, which includes both §§ 19.2-81 and 19.2-82, have been described by Virginia courts as merely procedural and not mandated by either the Fourth or the Fourteenth Amendment to the Constitution of the United States. Frye v. Commonwealth, 231 Va. 370, 376, 345 S.E.2d 267, 273 (1986) (failure to present defendant promptly to magistrate under § 19.2-82 is mere procedural violation not resulting in exclusion of evidence); accord Horne v. Commonwealth, 230 Va. 512, 518-19, 339 S.E.2d 186, 191 (1986); see also Thompson v. Commonwealth, 10 Va. App. 117, 121-23, 390 S.E.2d 198, 201-02 (1990) (arrest without warrant for misdemeanor not committed in officer's presence is procedural violation of § 19.2-81 not amounting to constitutional error).
Based on these cases, it is clear that procedural violations of § 19.2-82 do not rise to the level of constitutional error. It is my opinion, therefore, that an arrest or detention is not rendered invalid by these procedural statutory violations.

Even an illegal arrest does not void a subsequent conviction, because the power of a court to try a person for a crime is not impaired by an illegal detention. Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (illegal arrest does not void subsequent conviction). It is further my opinion, therefore, that a court's dismissal of the charge is not required merely by a defect attendant to an arrest.

III. Class of Offense Committed and Discretion Given to Arresting Officer Determine Whether Arrested Person Must Be Released on Summons or Taken Before Magistrate

Both §§ 19.2-74 and 19.2-82 contain mandatory language. See § 19.2-74(A)(1) ("shall forthwith release him from custody"); § 19.2-82 ("shall be brought forthwith before a magistrate"). Section 19.2-74, however, deals specifically with arrests for violations of certain specified offenses (misdemeanors and offenses for which a summons may be issued except for those in Title 46.2 or §§ 18.2-266, 18.2-388 and 18.2-407). Section 19.2-82 provides generally for arrests without warrants but does not specify any particular offenses to which its provisions apply. It is a recognized rule of statutory construction that a special or specific statute supersedes a general statute when the two are in conflict. See City of Roanoke v. Land, 137 Va. 89, 119 S.E. 59 (1923); Att'y Gen. Ann. Rep.: 1987-1988 at 276, 277; 1985-1986 at 65, 68.

It is my opinion, therefore, that to the extent §§ 19.2-74 and 19.2-82 are in conflict, § 19.2-74 controls. An arresting officer must proceed under § 19.2-74 when arresting without a warrant for an offense committed in the officer's presence, if the offense is one that is specified in § 19.2-74. Otherwise, the arresting officer is required to proceed under § 19.2-82. Section 19.2-74, however, authorizes an arresting officer to refuse to release a person on a summons if the person fails or refuses to discontinue the unlawful act, and prohibits release on a summons if the officer believes the person will disregard the summons or will cause harm to anyone. Under those circumstances, the statute directs that the procedure in § 19.2-82 be followed.

IV. Arresting Officer Is Required to Release Person Under § 19.2-74 Unless Officer Determines that Person Qualifies for One or More Specified Exceptions to Summons Procedure


Section 19.2-74 plainly defines the conditions precedent to the release of a person on a summons following a warrantless arrest. When making an arrest for a specified offense, the officer must take the person's name and address and issue a summons. Section 19.2-74(A)(1), (2). "Upon the giving by such person of his written promise to appear," the officer "shall" release the arrested person. Section 19.2-74(A)(2). If the person fails or refuses to discontinue the unlawful act, the officer "may" proceed to take the person before a magistrate. Id. If the officer reasonably believes the person will disregard the summons or will harm anyone, however, the officer "shall" proceed to take the person before a magistrate. It is my opinion, therefore, that the person must be released on summons if the person gives a written promise to appear and the officer does not believe the person will either fail to appear or harm anyone. If the person fails or refuses to discontinue the unlawful act, the officer has discretion either to proceed by summons or to take the arrestee before a magistrate.
V. Section 29.1-210 Not in Conflict with § 19.2-74 or § 19.2-82; Statute Authorizes Release on Summons, Regardless of Class of Specific Offense

Like § 19.2-74, § 29.1-210 provides a specific exception to the warrantless arrest procedure in § 19.2-82 (or that described in § 19.2-76 for arrest pursuant to a warrant or summons). Section 29.1-210 authorizes an arresting officer to release the person on a summons "if the person gives his written promise to appear" when the arrest is "for a violation of the game, inland fish and boating laws." Section 29.1-210 is even more offense-specific than § 19.2-74. Based on the rules of statutory construction discussed in Part III above, it is my opinion, therefore, that § 29.1-210 supersedes § 19.2-74 to the extent any conflict exists between these two statutes.

I note, however, that the procedures outlined for arrest in § 29.1-210 are not mandatory. It is further my opinion, therefore, that an arresting officer may proceed under § 19.2-74 if the game, inland fish or boating offense is a class of offense that is described in § 19.2-74. Game wardens are expressly authorized by § 19.2-81 to arrest without a warrant. An officer arresting pursuant to § 29.1-210 also may elect to proceed either under § 19.2-82 without a warrant or under § 19.2-76 with a warrant or summons. Section 29.1-210 merely authorizes use of the summons procedure for the offenses it describes, and does not mandate the release of the arrested person.

June 10, 1991

The Honorable R.M. Williams
Sheriff for Stafford County

You ask several questions concerning access by special police officers of the Aquia Harbour Police Department ("Aquia Harbour") to Department of Motor Vehicles ("DMV") Information available from the Virginia Criminal Information Network ("VCIN") terminal at the sheriff's department. You ask first whether these special police officers are prohibited from accessing DMV records through the VCIN terminal maintained by the Stafford County police department. If the Aquia Harbour officers are not prohibited from
doing so, you ask whether the Department of State Police ("State Police") has authority to limit their access. You next ask whether the State Police may use different criteria for granting access to VCIN for different nongovernmental agencies. Finally, you ask whether Aquia Harbour, without assistance from Stafford County deputies, legally may access the DMV records by using the VCIN terminal maintained at the Stafford County sheriff's department.

Aquia Harbour is a privately funded organization of individuals appointed by the circuit court as special police officers pursuant to § 15.1-144 of the Code of Virginia.

I. Applicable Statutes

Section 46.2-208 provides, in part:

(A) All registration and title records in the office of the Department [of Motor Vehicles] shall be public records, but shall be open for inspection only subject to regulations promulgated by the Commissioner [of the Department].

(B) The Commissioner shall consider all driving records in the Department as privileged public records and shall release such information only under the following conditions:

* * *

(4) On the request of any law-enforcement officer, attorney for the Commonwealth or court, the Commissioner shall provide an abstract of the operating record showing all convictions, accidents, driver's license suspensions or revocations, and other appropriate information as the requesting authority may require.

Section 46.2-100 provides that, for purposes of Title 46.2, "[l]aw-enforcement officer" means any officer authorized to direct or regulate traffic or to make arrests for violations of this title or local ordinances authorized by law."

Section 15.1-144, the statute pursuant to which Aquia Harbour officers are appointed, provides that "[s]uch person or persons so appointed [as special police officers] shall be conservators of the peace in their respective counties."

Section 15.1-153 further provides, in part:

[Special police officers] shall apprehend and carry before a judge or justice of the peace to be dealt with according to law, all persons whom they may be directed by the warrant of a judge or justice of the peace to apprehend, or whom they have cause to suspect have violated, or intend to violate any law of the Commonwealth . . . .

Chapter 2 of Title 52, §§ 52-12 through 52-15, provides for the establishment and management of a State Police communication system, referred to as VCIN. Section 52-14 provides:

The basic system herein provided for may be made available for use by any department or division of the State government and by any county, city, town, railroad or other special police department lawfully maintained by any corporation in this Commonwealth as well as agencies of the federal government [upon stated] terms and conditions . . . .
Section 52-15 continues:

Such basic system shall remain at all times under the control of the Superintendent of State Police, and such control may be exercised by him through such member of his department as he shall designate for such purpose. The Superintendent may make and issue such orders, rules or regulations for the use of the system as in his discretion are necessary for efficient operation.

Section 19.2-389(A) provides:

Criminal history record information shall be disseminated, whether directly or through an intermediary, only to [certain designated agencies or individuals, including]:

1. Authorized officers or employees of criminal justice agencies, as defined by § 9-169, for purposes of the administration of criminal justice and the screening of an employment application or review of employment by a criminal justice agency with respect to its own employees or applicants;

   * * *

3. Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement which shall specifically authorize access to data, limit the use of data to purposes for which given, and ensure the security and confidentiality of the data;

   * * *

6. Individuals and agencies where authorized by court order or court rule

   * * *

Section 9-169 defines the term "criminal justice agency" as "a court or any other governmental agency or subunit thereof which as its principal function performs the administration of criminal justice and any other agency or subunit thereof which performs criminal justice activities, but only to the extent that it does so," and further defines the phrase "criminal history record information" to mean "records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal charges, and any disposition arising therefrom."

Section 2.1-379, a portion of the Privacy Protection Act of 1976, §§ 2.1-377 through 2.1-386, defines the term "agency" as

any agency, authority, board, department, division, commission, institution, bureau, or like governmental entity of the Commonwealth or of any unit of local government including counties, cities, towns and regional governments and the departments and including any entity, whether public or private, with which any of the foregoing has entered into a contractual relationship for the operation of a system of personal information to accomplish an agency function.

Federal law provides for the acquisition, preservation and exchange of information from the National Crime Information Center ("NCIC"): (a) The Attorney General [of the United States] shall--
(1) acquire, collect, classify, and preserve identification, criminal identification, crime and other records;

* * *

(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

* * *

(d) For purposes of this section, the term "other institutions" includes--

* * *

(2) police departments of private colleges or universities which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers.


II. VCIN Accesses NCIC and Other Data

VCIN is a computerized criminal justice information system maintained by the State Police pursuant to Chapter 2 of Title 52. Through computer terminals connected to the VCIN system, law-enforcement agencies and other authorized users may gain access to information stored in DMV records, Virginia criminal history record information, information stored in the data banks of NCIC, and various other data banks. NCIC is a nationwide computerized criminal justice information system, maintained by the Federal Bureau of Investigation. Access to NCIC is controlled by federal law. See, e.g., 28 U.S.C.A. § 534.

III. Special Policemen Permitted to Access DMV Records Through VCIN

Officers of Aquia Harbour, as conservators of the peace, have general powers of arrest. See Williams v. Commonwealth, 142 Va. 667, 128 S.E. 572 (1925); §§ 15.1-144, 15.1-153. Thus, they meet the definition of "law-enforcement officer[s]" in § 46.2-100. It is my opinion, therefore, that they may have access to all DMV records, privileged and nonprivileged, from the Commissioner of DMV, under the provision in § 46.2-208(B)(4) requiring the Commissioner to provide such records "[o]n the request of any law-enforcement officer."

Based on your description, Aquia Harbour is a special police department lawfully maintained by a corporation in this Commonwealth. It is further my opinion, therefore, that the State Police are authorized to permit use of the Stafford County sheriff's department's VCIN terminal by Aquia Harbour to receive DMV information, subject to the restrictions discussed below.

IV. Special Police of Aquia Harbour Not Permitted to Access Other Criminal History Record Information Through VCIN

In the facts you present, Aquia Harbour may have access to criminal history record information through the VCIN terminal only if Aquia Harbour is a "criminal justice agency," as defined in § 9-169(3). See § 19.2-389. Since Aquia Harbour is clearly not "a
court or any other governmental agency or subunit thereof," it could qualify as a "criminal justice agency" only if it were "any other agency or subunit thereof which performs criminal justice activities." Section 9-169(3). Although the term "agency," is not defined in the statutes concerning criminal history record information, it is defined in § 2.1-379(6) and does not include any nongovernmental units.

It is my opinion, therefore, that Aquia Harbour is not a "criminal justice agency," as that term is defined in § 9-169(3), and may not have access to any criminal history record information in the VCIN system. As a consequence, the State Police must prohibit access by Aquia Harbour to such information.

V. State Police Have Broad Discretion in Maintaining Security of VCIN System

As discussed above, the State Police are charged by § 52-15 with the maintenance and supervision of VCIN. Section 52-15 permits, but does not require, the Superintendent of State Police to make VCIN available for use by organizations such as Aquia Harbour. Based on the above, it is my opinion that the Superintendent may impose such restrictions on the access to, and supervision and monitoring of, the sheriff's VCIN terminal as deemed necessary to ensure the efficient operation of the VCIN system.

Pursuant to 28 U.S.C.A. § 534, certain nongovernmental agencies, such as private campus police departments, may have access to NCIC information after satisfying certain criteria. If such private campus police departments in the Commonwealth have satisfied these standards, they then are permitted access to NCIC, which may be accessed only through the VCIN terminal. Dissemination of criminal history record information to such campus police departments is authorized under § 19.2-389(A)(14) because such dissemination is "otherwise provided by law." It is further my opinion, however, that access may still be denied to other private police departments that are not authorized access to NCIC information, such as that of Aquia Harbour, even if they fully satisfy the training standards, because this denial of access is based on distinctions made in the federal and state statutes governing such access, discussed above.

1You do not present facts that (1) any specific agreement has been made between Aquia Harbour and any criminal justice agency or (2) Aquia Harbour has been authorized by court order or court rule to access VCIN criminal history record information. See § 19.2-389(A)(3), (6). In either of those situations, Aquia Harbour would be permitted such access.
You ask whether the 1991 amendments to the drug forfeiture procedural statutes, §§ 19.2-386.1 through 19.2-386.14 of the Code of Virginia, permit the Criminal Justice Services Board (the "Board") to issue regulations for the Forfeited Drug Asset Sharing Program (the "Program") that exclude forfeited tangible personal property returned to a participating agency pursuant to § 19.2-386.14(C) from the requirement in § 19.2-386.14(A) for a ten percent deduction.

I. Applicable Constitutional and Statutory Provisions

Article VIII, § 8 of the Constitution of Virginia (1971) formerly provided that all fines and forfeitures be credited to the Literary Fund. On November 6, 1990, the voters of the Commonwealth ratified an amendment to Article VIII, § 8 permitting an exception to that general rule:

The General Assembly may provide by general law an exemption from this section for the proceeds from the sale of all property seized and forfeited to the Commonwealth for a violation of the criminal laws of this Commonwealth proscribing the manufacture, sale or distribution of a controlled substance or marijuana. Such proceeds shall be paid into the state treasury and shall be distributed by law for the purpose of promoting law enforcement.

To implement this new constitutional provision, the General Assembly, at its 1991 Session, enacted substantial revisions to the drug forfeiture procedures detailed in §§ 19.2-386.1, 19.2-386.3, 19.2-386.4, 19.2-386.10 through 19.2-386.12, and 19.2-386.14, and established an asset-sharing program for the benefit of law enforcement. See Ch. 560, 1991 Va. Acts 992 (Reg. Sess.).

Section 19.2-386.11(A) provides that when a court orders tangible personal property forfeited as a result of a drug violation, such property shall be sold unless (i) a sale thereof has been already made under § 19.2-386.7, (ii) the court determines that the property forfeited is of such minimal value that the sale would not be in the best interest of the Commonwealth or (iii) the court finds that the property may be subject to return to a participating agency. If the court finds that the property may be subject to return to an agency participating in the seizure in accordance with subsection C of § 19.2-386.14, the order shall provide for storage of the property until the determination to return it is made or, if return is not made, for sale of the property as provided in this section and § 19.2-386.12.

Section 19.2-386.14(C) provides, in part:

After the order of forfeiture is entered, any seizing agency may petition the Department [of Criminal Justice Services] for return of any forfeited motor vehicle, boat or aircraft or other tangible personal property which is not subject to a grant or pending petition for remission. Where all the participating agencies agree upon the equitable distribution of the tangible personal property, the Department shall return the property to those agencies upon finding that (i) the agency meets the criteria for distribution as set forth in subsection B and (ii) the agency has a clear and reasonable law-enforcement need for the forfeited property.

Section 19.2-386.12 governs the handling of cash, negotiable instruments and the proceeds of forfeited property that is sold instead of being returned to a participating agency. That section provides:
A. Any sale of forfeited property shall be made for cash, after due advertisement. The sale shall be by public sale or other commercially feasible means authorized by the court in the order of forfeiture and shall vest in the purchaser a clear and absolute title to the property sold subject to the rights of any lien holder whose interest is not forfeited. The proceeds of sale, and whatever may be realized on any bond given under § 19.2-386.6, and any money forfeited shall be paid over to the state treasury into a special fund of the Department of Criminal Justice Services in accordance with § 19.2-386.14.

B. In all cases of forfeiture under this section, the actual expenses incident to the custody, preservation, and management of the seized property prior to forfeiture, the actual expenses incident to normal legal proceedings to perfect the Commonwealth's interest in the seized property through forfeiture, and the actual expenses incident to the sale thereof, including commissions, shall be taxed as costs and shall be paid to the person or persons who incurred these costs out of the net proceeds from the sale of such property. If there are no proceeds, the actual expenses shall be paid by the Commonwealth from the Criminal Fund. Actual expenses in excess of the available net proceeds shall be paid by the Commonwealth from the Criminal Fund. The party or parties in interest to any forfeiture proceeding commenced under this section shall be entitled to reasonable attorney's fees and costs if the forfeiture proceeding is terminated in favor of such party or parties. Such fees and costs shall be paid by the Commonwealth from the Criminal Fund.

The residue, if any, shall be paid and disbursed as provided in subsection A of § 19.2-386.10 and § 19.2-386.14 and regulations promulgated by the Criminal Justice Services Board.

Section 19.2-386.10(A) provides for the court to distribute appropriate part of the sale proceeds to lien holders or other similarly interested parties. Section 19.2-386.14(A) then provides for the distribution of the remaining cash, negotiable instruments or forfeiture sale proceeds:

All cash, negotiable instruments and proceeds from a sale conducted pursuant to § 19.2-386.7 or § 19.2-386.12, after deduction of expenses, fees and costs as provided in § 19.2-386.12, shall, as soon after entry of the forfeiture as is practicable, be paid over to the state treasury into a special fund of the Department of Criminal Justice Services for distribution in accordance with this section. The forfeited property and proceeds, less ten percent, shall be made available to federal, state and local agencies to promote law enforcement in accordance with this section and regulations adopted by the Criminal Justice Services Board to implement the asset-sharing program.

The ten percent retained by the Department shall be held in a nonreverting fund, known as the Asset Sharing Administrative Fund. Administrative costs incurred by the Department to manage and operate the asset-sharing program shall be paid from the Fund. Any amounts remaining in the Fund after payment of these costs shall be used to promote state or local law enforcement activities. Distributions from the Fund for these activities shall be based upon need and shall be made from time to time in accordance with regulations promulgated by the Board.
II. Tangible Personal Property Returned to Participating Agencies Treated Differently from Cash, Negotiable Instruments and Proceeds of Sales

Acting under the authority of § 19.2-386.14, the Board has adopted emergency regulations to implement the Program. See VR 240-04-2 (adopted June 17, 1991). As adopted by the Board, these regulations do not contemplate that forfeited tangible personal property being returned to law-enforcement agencies in kind will be subject to the ten percent deduction payable to the Asset Sharing Administrative Fund (the "ASA Fund") that § 19.2-386.14 imposes on cash forfeitures and on the cash proceeds of property that is forfeited and sold. A question has arisen, however, whether the statutory scheme adopted by the General Assembly requires a provision in the regulations for law-enforcement agencies to whom forfeited property is returned in kind, pursuant to § 19.2-386.14(C) to pay ten percent of the value of that property to the ASA Fund, as the equivalent of the ten percent required by § 19.2-386.14(A) to be deducted from seized cash or negotiable instruments or the net cash proceeds of seized property that has been sold.

Your question, therefore, is whether §§ 19.2-386.1 through 19.2-386.14, read as a whole, permit the Board to adopt regulations excluding seized tangible personal property returned to law-enforcement agencies in kind from the ten percent deduction made from cash, negotiable instruments or the proceeds of sales of seized property required under § 19.2-386.14(A) for the ASA Fund.

In creating the asset-sharing program, the General Assembly has divided property seized from drug violations into two categories: (1) tangible personal property that may be returned by the court, in kind, to participating law-enforcement agencies, and (2) cash, negotiable instruments and tangible personal property that the court orders sold and converted to cash. To return tangible property, such as automobiles, boats and aircraft directly to one of the agencies participating in the investigation which resulted in the seizure and forfeiture, the court in which the forfeiture action is pending must specifically "find" that the property is "subject to return." Section 19.2-386.11(A). No other forfeited property requires any similar specific finding by the court prior to its distribution by the Department of Criminal Justice Services. This finding and the corresponding segregation of such tangible personal property to be returned occurs before any cash or proceeds of sales of other personal property are paid into the special fund created by § 19.2-386.12 and described more fully in § 19.2-386.14(A). It is from this special fund that ten percent is deducted and held by the Department in the ASA Fund.

Section 19.2-386.14(A) is the sole statutory provision that establishes the ten percent deduction. By its express terms, this statute applies only to "[a]ll cash, negotiable instruments and proceeds from a sale." The mention of one thing in a statute implies the exclusion of another. Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); 1990 Att'y Gen. Ann. Rep. 175, 176. Tangible property that the court has ordered to be returned in kind under § 19.2-386.11(A)(iii) never reaches the special fund described in § 19.2-386.14(A), and, therefore, is not subject to the ten percent deduction.

This conclusion is further supported by the use of the word "deduction." It is obviously not possible physically to "deduct" ten percent of a motor vehicle before returning it to a law-enforcement agency. In some cases, ten percent of the vehicle's value could be deducted from cash proceeds also being returned to the same agency. In other instances, however, when such cash is not available, the receiving agency would have to pay ten percent of the value of the returned property before receiving it. Such a payment would not fall within the usual meaning of the word "deduction."

Based on the above, it is my opinion that the General Assembly intended to exclude from the ten percent deduction requirement of § 19.2-386.14(A) forfeited tangible personal property returned to a participating agency, and that the provisions for such an
exclusion in the emergency regulations adopted by the Board on June 17, 1991, are not only permitted but required by the statutes establishing the Program.

CRIMINAL PROCEDURE: PRELIMINARY HEARING.

No requirement that attesting signature on certificate of laboratory analysis be notarized for certificate to be admitted into evidence in court proceeding.

November 12, 1991

The Honorable Ruby G. Martin
Acting Director, Department of General Services

You ask whether a certificate of laboratory analysis issued by the Division of Forensic Science under § 19.2-187 of the Code of Virginia must be notarized before it may be admitted into evidence in a court proceeding.

I. Applicable Statute

Section 19.2-187 provides:

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 the Division of Forensic Science ... 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 of 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. [Emphasis added.]

II. Certificate of Analysis Need Not Be Notarized

Except for filing requirements not relevant to the question you raise, the only prerequisite for admission of a certificate of analysis into evidence under § 19.2-187 is that it be "attested" by the person performing the analysis or examination.

"Attest" is defined as "to bear witness to a fact; to affirm to be genuine or true;" "to certify; [or] to make solemn declaration in words or writing to support a fact . . . ." Black's Law Dictionary 127 (6th ed. 1990). "Attesting" means that the person who signs his name to a document does so in order to prove and identify it, or "with the intention of being considered a witness to an act in question" in the document. Ferguson v. Ferguson, 187 Va. 581, 591, 47 S.E.2d 346, 351 (1948). The signature alone (of the person performing the analysis) thus certifies the genuineness of the certificate of analysis. See 1977-1978 Att'y Gen. Ann. Rep. 118, 119 (certificate of breath alcohol analysis under § 18.2-268 is duly attested by certification alone).

The final paragraph of § 19.2-187 provides clearly that the certificate signed by the person performing the analysis shall be admissible as evidence "without any proof of the seal or signature or of the official character of the person whose name is signed to it."

Based on the above, it is my opinion that the attesting signature on a certificate of analysis does not have to be notarized under § 19.2-187 for the certificate to be admitted into evidence.

DOMESTIC RELATIONS: DESERTION AND NONSUPPORT.

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY.

Life of garnishment for child or spousal support enforcement calculated 180 days from date of issuance.

November 12, 1991

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

You ask from what time the life of a garnishment under § 20-78.1(B) of the Code of Virginia for support enforcement is calculated.

I. Applicable Statutes

Section 20-78.1(A) permits an order or decree of child or spousal support to be enforced "in any garnishment proceeding in which the liability is against the United States of America only after arrearage has been reduced to judgment."

Section 20-78.1(B) provides that,

[except as otherwise provided herein the provisions of Article 7 of Chapter 18 (§ 8.01-511 et seq.) shall govern such garnishment. Any garnishment under the provisions of this section shall continue until the sum or sums of money found to be in arrears in the judgment of the court are paid in full or 180 days have elapsed, whichever first occurs.

Section 8.01-514 provides that "[t]he summons in garnishment shall be returnable to the general district court from which it issued not more than ninety days after the date thereof and to the circuit court from which it issued, not more than ninety days after the date thereof."

II. 180 Day Life of Garnishment for Child or Spousal Support Calculated from Date of Issuance of Garnishment

Under § 20-78.1(B) a garnishment "shall continue until ... paid in full or 180 days have elapsed, whichever first occurs." (Emphasis added.) A garnishment logically can "continue" only from the date it is issued. Section 8.01-514, which controls garnishments except as otherwise provided in § 20-78.1, provides that a garnishment is returnable to the circuit or district court "not more than ninety days after the date thereof." (Emphasis added.) Although § 20-78.1(B) extends the life of garnishments under that section
from ninety to 180 days, the remaining provisions of § 8.01-514 apply to those garnish-
ments. It is my opinion, therefore, that the 180-day period provided in § 20-78.1(B) begins
on the date the garnishment is issued.

EDUCATION: DIVISION SUPERINTENDENTS.

CONSTITUTION OF VIRGINIA: EDUCATION - SCHOOL BOARDS.

PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM.

School board required to appoint and employ school superintendent as full-time employee
to run schools; may not contract with independent consultant to act as superintendent
and supervise division schools. Former superintendent who resigned VRS-covered position
may not receive retirement benefits if he returns as superintendent on interim basis.

June 20, 1991

The Honorable Phillip A. Hamilton
Member, House of Delegates

You ask whether a person who is not an employee of a school division may be
retained as a consultant to act as superintendent and supervise the school system. You
also ask whether a former school division superintendent who resigned that position to
take "early retirement" offered by the Virginia Retirement System ("VRS") may supervise
the school system as a full-time consultant while receiving VRS retirement benefits.

I. Applicable Constitutional Provisions and Statutes

Governing Local School Boards and Superintendents

Article VIII, § 7 of the Constitution of Virginia (1971) provides that "[t]he super-
vision of schools in each school division shall be vested in a school board . . . ." Section
22.1-58 of the Code of Virginia also provides that "[f]or each school division there shall
be a division superintendent of schools." (Emphasis added.)

Section 22.1-60 further provides:

The division superintendent of schools shall be appointed by the school board
of the division from the entire list of eligibles certified by the State Board
[of Education]. All contract terms for superintendents shall expire on
June 30. The division superintendent shall serve for an initial term of not
less than two years nor more than four years. At the expiration of the initial
term, the division superintendent shall be eligible to hold office for the term
specified by the employing school board, not to exceed four years.

The division superintendent shall be appointed by the school board within
sixty days . . . (ii) after a vacancy occurs other than by expiration of
term . . . .

***

The Board of Education may, in its discretion, extend the time limits pre-
scribed in this section by not in excess of sixty days . . . before acting pursu-
ant to § 22.1-61. [Emphasis added.][1]
Division superintendents are required to attend school board meetings (§ 22.1-69) and to "perform such other duties as may be prescribed by law, by the school board and by the State Board of Education" (§ 22.1-70). School superintendents are required to serve full time, unless part-time service is approved by the State Board of Education. See § 22.1-62(B). Superintendents are further required to take an oath of office. Section 22.1-64. Each school board is required to pay the "necessary traveling and office expenses of the division superintendent." Section 22.1-87.

II. Applicable Statutes Concerning VRS Early Retirement

By the enactment of Chapter 719 by the 1991 Session of the General Assembly, retirement eligibility and benefits were modified to encourage early retirements. This legislation makes early retirement available to those who are 50 years of age with 25 or more years of creditable service. Section 6 of Chapter 719 provides, in part:

Any public school board ... participating in the Virginia Retirement System may elect to offer benefits payable under this act to eligible employees upon adopting a resolution wherein the employer agrees to be liable for any current or future additional employer contributions and any increases in current or future employer contribution rates resulting from offering employees the benefits of this act.


Dual retirement benefits under the VRS program are prohibited. Section 51.1-125(B) provides:

No person shall hold more than one membership in the retirement system at any one time with respect to any of the benefits provided under [Title 51.1]. Any person employed in more than one position resulting in membership shall elect one position on which his membership shall be based by written notification thereof to the Board [of Trustees of the Virginia Retirement System].

Section 51.1-155(B) further provides:

If a beneficiary of a service retirement allowance ... is at any time in service as an employee in a position covered for retirement purposes under the provisions of this or any chapter other than Chapter 7 (§ 51.1-700 et seq.) of [Title 51.1, dealing with federal social security retirement], his retirement allowance shall cease while so employed.

III. School Board Required to Appoint and Employ School Superintendent; May Not Satisfy Requirement by Contracting with Independent Consultant to Supervise Division Schools

School boards are constitutionally required to supervise the public schools of the division. See Art. VIII, § 7; see also Bristol Virginia School Board v. Quarles, 235 Va. 108, 366 S.E.2d 82 (1988). The application of local policies governing the day-to-day management of the schools is a nondelegable function indispensable to the exercise of the power of supervision, and vested in the local school boards. School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). There is no explicit authority for this requirement to be satisfied by the engagement of a consultant. Indeed, the statutes discussed above contemplate that the superintendent will be a salaried employee, subject to supervision by the school board as to both the results of the performance and the means by which the duties of the office are performed.
The division superintendent is a pivotal school official responsible for implementing the school board's most integral and indispensable function—the daily supervision of the local public schools. In recognition of the importance of the position, state law requires the appointment of a full-time superintendent of schools. See §§ 22.1-60, 22.1-62(B).

In the facts you describe, the former superintendent resigned from that position to take early retirement. Having relinquished the position, therefore, he is no longer school superintendent. There is no indication that the school board has "employed" anyone to fill the vacancy. The facts further indicate that the former superintendent, having resigned that position of employment, has been engaged full time "as a consultant" to the local board to supervise the division schools. While a school board may retain a consultant to aid its division superintendent or employ and appoint as superintendent an individual who has been a consultant, it must appoint and employ a division superintendent to run the schools. Section 22.1-60 mandates that a superintendent be appointed and details the manner and time within which this appointment must be made. The person appointed is a public official who must take an oath of office. "When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982).

It is my opinion, therefore, that a school board may not contract with an independent consultant to act as superintendent and supervise the division schools. For the reasons discussed above, it is further my opinion that the school board must appoint a division superintendent as its "employee."²

IV. Former Superintendent's Position as Consultant Retained to Supervise Schools Disqualifies Him from Receipt of Service Retirement Allotment from VRS

Receipt of VRS retirement benefits, whether through the "early retirement" program or otherwise as a beneficiary of VRS benefits, while "in service as an employee" in a position covered by the VRS program clearly is prohibited. See §§ 51.1-125(B), 51.1-155(B). The position of superintendent of schools is a position covered by the VRS program. The threshold question presented by your inquiry, therefore, is whether the former superintendent, serving as a consultant charged with the supervision of the public schools, is "in service as an employee" in a covered position for purposes of the VRS program and, therefore, is disqualified from receiving a service retirement allotment under § 51.1-155(B).

The definition of "employee" in § 51.1-101 does not resolve this question, since it defines the term as "any teacher, state employee, officer, or employee of a locality participating in the retirement system," "unless the context requires a different meaning." (Emphasis added.) The context in which the term employee is used in § 51.1-155(B), in which "a beneficiary" who is "in service as an employee in a position covered for retirement purposes" under VRS is disqualified from receiving a retirement allowance, clearly indicates that the definition in § 51.1-101 does not apply to the question you raise. One must look beyond the statute in question, therefore, to determine whether the former superintendent in the facts you present would be disqualified from receiving VRS benefits by reason of his consulting agreement.

To determine whether the former superintendent, though denominated an "independent contractor" or an "independent consultant," is in fact "in service as an employee" in a VRS-covered position, the common law definition of "employee" must be considered. The rules applied by the federal government in distinguishing between employees and independent contractors for purposes of federal income and social security tax withholding also are instructive.
At common law four elements determine whether the employer/employee relationship exists: (1) the employer's selection and engagement of the employee; (2) the payment of wages to the employee; (3) the employer's retention of the power of dismissal; and (4) the employer's retention of the power of control. A. C. L. R. Co. v. Tredway's Admx., 120 Va. 735, 93 S.E. 560 (1917), cert. denied, 245 U.S. 670 (1918). The first three factors are not essential to the existence of the relationship; the fourth—the power of control—is determinative. Southern Stevedoring Corp. v. Harris, 190 Va. 628, 58 S.E.2d 302 (1950). The employer's power to control and power to discharge are inconsistent with the status of independent contractor and typify an employer/employee relationship. Thaxton v. Commonwealth, 211 Va. 38, 175 S.E.2d 264 (1970). In determining whether an employer/employee relationship exists, the crucial question of control is whether the employer has the right to control not merely the results but the progress, details, means and methods of the work. N & W Railway v. Johnson, 207 Va. 980, 983, 154 S.E.2d 134, 136, cert. denied, 389 U.S. 995 (1967); 9B M.J. Independent Contractors §§ 5, 6 (1984).

The common law rule whether the employer has a right to control not only what services shall be performed but also how they shall be performed typically is the pivotal factor in determining who is an employee for income tax purposes. Guidance in determining who is an employee further is found in three substantially similar sections of the federal employment tax regulations; namely, 26 C.F.R. §§ 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1 (1990), relating to the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and federal income tax withholding, respectively.

Twenty factors are considered by the Internal Revenue Service ("IRS") to determine whether an individual is an employee. The relationship of employer and employee, rather than that of an "independent contractor," exists "when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished." 26 C.F.R. § 31.3121(d)-1(c)(2). Other factors include (1) whether the services are rendered personally by the individual in question, (2) whether the "consultant" has the authority to hire and supervise other workers on the job, (3) whether there is a continuing relationship, (4) whether the work is full time and must be performed during set hours, (5) whether the work must be performed on the employer's premises, (6) whether business and travel expenses are paid, and (7) whether the person is paid by the hour, week or month. 26 C.F.R. § 31.3121(d)-1.

Whether analyzed under common law principles or analogous IRS rules, the fact that a school division has characterized the present arrangement as a "consultant agreement," or the former superintendent as an "independent contractor," is not determinative of whether the former superintendent is an "employee" for purposes of the VRS program. The decision whether the former superintendent is "an employee in a position covered for retirement purposes" depends not on the title he is given but on whether he is an employee in fact.

The materials you provide make it clear that the former superintendent has been engaged by the school board to perform all of the duties of a superintendent subject to the same degree of supervision by, and accountability to, the school board that he had before he "retired." It also appears from the facts you provide that the compensation the former superintendent will receive for his services will be the same as the salary and benefits he received during his tenure as superintendent. There also does not appear to be any change in the arrangements made to cover the expenses he incurs while serving as the "consultant" superintendent.

Applying the common law principles and the analogous IRS rules discussed above, it is my opinion that the prior employer/employee relationship between the superintendent and the school board, coupled with state statutory provisions vesting control in the school
board over the superintendent's duties and hours of work and the requirement that travel and business expenses be paid, indicate that the former superintendent is, in fact, "in service as an employee" in a VRS-covered position rather than as an independent contractor for purposes of VRS benefits. Accordingly, it is further my opinion that, if the prior superintendent who resigned his position returns as superintendent on an interim basis, he may not receive VRS retirement benefits while serving in that capacity. See 1987-1988 Att'y Gen. Ann. Rep. 459 (reaching similar result under predecessor statute to § 51.1-155(B)).

1 Division superintendents may be removed for cause by the Board of Education or by the local school board. Section 22.1-65.

2 If the General Assembly had intended a relationship in this context other than that of employer/employee, it would have so provided. Moreover, if the General Assembly had intended to authorize the use of independent contractors to run the public schools in the Commonwealth, it would not have required the administration of an oath of office or the payment of office and travel expenses for school superintendents, and it would have been unlikely in the earlier version of § 22.1-67 (effective until 1988) to describe the required minimum compensation of superintendents as "salaries"--a term normally used only to describe wages paid to employees. See Webster's Third New International Dictionary 743 (1968) ("employee" defined as "any worker who is under wages or salary to an employer ... ").

The information you provide does not contain any information indicating that the school board complied with the Virginia Public Procurement Act or alternative policies or procedures adopted by the board based on competitive principles in procuring the professional services to be provided by the former superintendent under the consulting arrangement. The failure to follow such procedures in contracting with the former superintendent would be further evidence that the relationship is, in fact, one of employer/employee rather than a contract with an independent contractor.

In reaching this conclusion about the superintendent's status as an employee for VRS purposes based on the facts you provide, I express no opinion on his status for federal income tax purposes. A close examination of the specific relationship, requiring access to the actual agreement between the parties and other facts beyond those provided with your request, is necessary to make that determination. See Priv. Ltr. Rul. 8916056 (Jan. 25, 1989); Rev. Rul. 87-41, 1987-1 C.B. 296. See also Priv. Ltr. Rul. 7930057 (Apr. 25, 1979) (upholding independent contractor status of consultant who had been executive and had accepted early retirement performing part-time work for former employing company); Rev. Rul. 57-10, 1957-1 C.B. 314 (upholding independent contractor status of consulting engineer whose only client was his former employer).

EDUCATION: DIVISION SUPERINTENDENTS — SCHOOL BOARDS; SELECTION, ETC. — POWERS AND DUTIES OF SCHOOL BOARDS.

CONSTITUTION OF VIRGINIA: EDUCATION — SCHOOL BOARDS.

ADMINISTRATION OF GOVERNMENT GENERALLY: DISABILITIES TO HOLD OFFICE.

Local school board makes factual determination whether superintendent's outside employment constitutes "substantial," not "nominal," business activity or employment; determines whether superintendent's office "deemed vacant," starting date and duration of vacancy, when superintendent engages in "substantial" outside employment. Official actions taken by superintendent during vacancy valid acts of de facto officer; school board may not pay salary during time of vacancy when superintendent acting as de facto
officer. School board may not approve outside employment retroactively nor nullify statutorily created vacancy. School board may, in its discretion, reappoint superintendent after deeming him to have vacated office.

May 6, 1991

The Honorable Jean W. Cunningham
Member, House of Delegates

You ask several questions concerning employment of a local school superintendent outside his school division. First, you ask whether a superintendent who engages in education-related consulting activities, outside his employing school division, on his own time and for compensation, is "engaging in any other business or employment" as contemplated by § 22.1-66 of the Code of Virginia. If a superintendent engages in outside employment proscribed by § 22.1-66, you ask whether § 22.1-66 automatically creates a vacancy in his position, regardless of later actions taken by his employing school board. You also ask who may enforce the prohibition in § 22.1-66, who determines the date and duration of any vacancy, and who determines the validity of official actions taken by the superintendent during any such vacancy.

Finally, you ask whether a school board may take curative action after its superintendent has engaged in outside work, in violation of § 22.1-66, to (i) ratify official actions taken by the superintendent during the time he has vacated his position, (ii) approve the superintendent's outside employment retroactively and thereby nullify any vacancy that has occurred, and (iii) reinstate or reemploy the superintendent and provide for his compensation during the period of vacancy.

I. Facts

You state that during the course of his employment, the Superintendent of Schools for the City of Richmond (the "Superintendent"), at the request of the Washington, D.C., and the Baltimore, Maryland, public school systems, performed education consulting work. That work included a workshop "retreat" for school administrators of the Baltimore public school system for which the Superintendent received $478 in compensation. The Superintendent gave no written notice of this particular consulting engagement to the Richmond School Board (the "School Board").

You further state that the Superintendent had numerous telephone discussions during evenings and weekends with the superintendent of the Washington public schools about development of a student enrollment tracking system. The Superintendent also prepared, on his own time, separate interim and final reports on the student enrollment tracking system for the Washington schools. He received $8,939 in compensation for these activities over a six-month period. The Superintendent gave prior written notice of the Washington consulting work to the Chairman of the School Board, but no official action was taken by the School Board. You note that, in his letter to the Chairman, the Superintendent stated that he would "not let this or any other consulting work interfere with [his] duties as superintendent of Richmond Schools."

II. Applicable Constitutional and Statutory Provisions

Under Article VIII, § 7 of the Constitution of Virginia (1971), the supervision of schools in each school division is vested in the local school board. See also § 22.1-28. The local school board is a corporate body and discharges its legal obligations and enforces its rights only in that corporate capacity. Section 22.1-71. Each local school board is responsible to see that all school laws are observed and enforced within the division. Section 22.1-19(1).
The superintendent is the supervisory official for the school division, appointed by the local school board; his duties are prescribed by statute, by the State Board of Education and by the local school board. Section 22.1-70.

Section 22.1-66 provides:

The office of any division superintendent, whether full-time or part-time, shall be deemed vacant upon his engaging in any other business or employment during his term of office as such superintendent unless such superintendent was granted prior approval by the school board or school boards appointing him, or upon his resignation or his removal from office.

III. Whether Superintendent Vacates Office Under § 22.1-66 Involves Factual Determination to Be Made by School Board

A. Outside Employment Must Be "Substantial" and Not "Nominal"


The determination of what constitutes "substantial" business activity or employment, necessarily depends on the specific facts of each case. Id. at 354. It is questionable, for example, whether publishing a book about education administration constitutes such substantial business activity. See 1960-1961 Att'y Gen. Ann. Rep. 276; see also John C. Williams, Annotation, Validity, Construction, and Application of Regulation Regarding Outside Employment of Governmental Employees or Officers, 94 A.L.R.3d 1230, 1245-48 (1979 & Supp. 1990).

The amounts of compensation received by the Superintendent in the facts you present indicate that his consulting work was not "nominal." See 1940-1941 Att'y Gen. Ann. Rep., supra (service, without remuneration, on bank board which meets once a month is nominal). I am unable to determine, however, from the facts you present, whether the Superintendent's consulting activities constitute substantial business activity or employment prohibited by § 22.1-66.

Facts relevant to that inquiry include the number of hours devoted by the Superintendent to those activities, whether the tasks performed were part of a more extensive employment or business relationship between the Superintendent and the Baltimore and Washington school systems, and whether his providing such expertise, albeit for compensation, is reasonably and customarily considered to be properly within the professional activity of a superintendent for a large school system. Further, while it appears that the work done by the Superintendent consisted of discrete tasks, rather than required hours of employment, it is relevant to inquire whether the retreat for school administrators in Baltimore was conducted entirely on the Superintendent's own time and with his own resources.
B. School Board Must Determine Whether Position "Deemed Vacant"

Section 22.1-66 provides that a superintendent's office "shall be deemed vacant" upon the superintendent's engaging in unauthorized business activities. The ordinary meaning of the verb "deem" is "to sit in judgment upon: decide ... to form or have an opinion ..." Webster's Third New International Dictionary 589 (1968). It connotes a conclusion based upon a perception of facts. The other instances recited in § 22.1-66 under which a superintendent's position is "deemed vacant" indicate that § 22.1-66 is not self-executing. For example, § 22.1-66 also provides that the office "shall be deemed vacant" upon a superintendent's resignation or removal. Neither resignation nor removal from office, however, is effective without action by the superintendent's appointing authority, the local school board. A superintendent may submit a letter of resignation, but that resignation is ineffective until it is accepted by the employing school board. The office of superintendent, therefore, could not be "deemed vacant" on the unilateral act of the superintendent. Similarly, "removal from office" requires action by the school board or a reviewing court.

If the General Assembly intended § 22.1-66 to be self-executing, it could have so provided. See §§ 2.1-30, 2.1-35 (acceptance by state officer of incompatible office "shall ipso facto vacate" first-held office).

Based on the above, it is my opinion that § 22.1-66 does not create a vacancy in a school superintendent's office automatically when the superintendent engages in outside employment, and that the position of superintendent must be "deemed vacant" in such a situation by the local school board which employs the superintendent. This conclusion is supported by the fact that local school boards possess singular authority over the supervision and employment of school division personnel. School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). If the superintendent's office were vacated automatically when the superintendent engaged in outside employment, the employing school board would be precluded from exercising the discretion and supervisory review that Article VIII, § 7 requires it to exercise over the daily operation of the schools. In my opinion, such a result clearly was not intended by the General Assembly in enacting § 22.1-66.

It is my opinion, therefore, that the School Board must determine whether It deems the Superintendent to have vacated his office, based upon the School Board's factual determination about whether his outside work was "substantial," as discussed in Part III(A) above. Since the School Board is the appropriate authority to determine, in the first instance, whether the Superintendent's office is "deemed vacant" on the basis of the facts presented to it, it is further my opinion that the School Board likewise must determine the starting date and duration of any vacancy that the School Board deems to have been created by the Superintendent's actions.

IV. Official Actions by Superintendent During Vacancy Created by Outside Business Activities Are Valid as Acts of "de Facto" Officer

Virginia adheres to the de facto officer doctrine. See § 2.1-37; Farmer's Foods v. Industrial Dev. Auth., 221 Va. 880, 275 S.E.2d 891 (1981); Owen v. Reynolds, 172 Va. 304, 1 S.E.2d 316 (1939); McCraw v. Williams, Supt. Penitentiary, 74 Va. (33 Gratt.) 510 (1880); Griffin's ex'or v. Cunningham, 61 Va. (20 Gratt.) 31 (1870); Monteith, sheriff, & als. v. Commonwealth, 56 Va. (15 Gratt.) 172 (1859). Under this doctrine, the official acts of a public officer are valid even though the individual inadvertently may vacate the office and continue to perform the duties of the office. See generally § 2.1-37; 63A Am. Jur. 2d Public Officers and Employees §§ 578-608 (1984); 15 M.J. Public Officers §§ 56-60 (1979); see also Att'y Gen. Ann. Rep.: 1989 at 69, 71 (actions valid although office vacated upon officer's change of residence); 1981-1982 at 294, 295 (although social services office is vacated upon acceptance of school board office, individual's actions for

Under the de facto officer doctrine, therefore, even if the School Board determines that the Superintendent engaged in business activity proscribed by § 22.1-66 and "deems" the Superintendent's office vacant for a determined period of time, the official actions taken by the Superintendent acting under claim and color of that office are valid. See Owen v. Reynolds, 172 Va. at 308-09, 1 S.E.2d at 317-18. The School Board does not need to ratify or adopt those official actions in order to validate them. The School Board, consistent with Virginia law, may not pay the Superintendent's salary, however, for any period of time during which the School Board deems his office to have been vacant, and during which the Superintendent was acting as a de facto officer. See Norris v. Gilmer, 183 Va. at 369-70, 32 S.E.2d at 89-90.

V. School Board Not Empowered to Nullify Statutory Vacancy by Retroactive Approval of Superintendent's Outside Employment

Once the School Board determines that the Superintendent has engaged in substantial outside employment or business activity and thereby deems him to have vacated his position, that vacancy has arisen by operation of law, as expressed in § 22.1-66. I am not aware of any authority that would empower the School Board to override or nullify the operation of a statute adopted by the General Assembly.

By its plain language, § 22.1-66 authorizes superintendents to have outside employment only with the prior approval of their school boards. No mention is made of retroactive approval. "When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982).

I am of the opinion, therefore, that if the School Board once determines the Superintendent to have vacated his office by engaging in outside employment, it has no authority then to approve that employment retroactively nor in any other manner to nullify the vacancy created by the operation of § 22.1-66.

VI. School Board May Reappoint Superintendent to Office Vacated Under § 22.1-66

Your final question is whether, if the School Board determines the Superintendent to have vacated his office under § 22.1-66, it may then reappoint him to that office.

Section 22.1-60 provides that school boards shall fill vacancies in the office of superintendent "from the entire list of eligibles certified by the State Board [of Education]." Nothing in § 22.1-66 indicates that a superintendent vacating his position under that section loses his previous certification of eligibility for appointment.

Article VIII, § 7 gives local school boards broad authority over the affairs of their respective systems. The Supreme Court of Virginia has held that this authority extends to personnel matters, and that because of Article VIII, § 7, the State Board of Education could not impose a grievance procedure on local boards that required them to submit personnel disputes to binding arbitration, thereby requiring the local boards to surrender their constitutional powers to an outside authority. Parham, 218 Va. at 950, 243 S.E.2d at
468; see also 1989 Att'y Gen. Ann. Rep. 46. The Court also has held that a statute enacted by the General Assembly requiring local school boards to sell school property if the sale was approved by the voters of the locality in a referendum likewise infringed on the constitutional powers of local school boards, in violation of Article IX, Sec. 133 of the 1902 Constitution (predecessor provision to Article VIII, § 7). Howard v. School Board, 203 Va. 55, 122 S.E.2d 891 (1961).

Based on these rulings of the Supreme Court, I am of the opinion that it would be unconstitutional to apply § 22.1-66 to prohibit the School Board from reappointing the Superintendent, if and when it finds him to have vacated his office under that section. It is an accepted rule of statutory construction that when a statute is susceptible to more than one interpretation, the interpretation most consistent with constitutionality of that statute should be adopted. Waterman’s Assoc. v. Seafood, Inc., 227 Va. 101, 314 S.E.2d 159 (1984); see also 1989 Att’y Gen. Ann. Rep. 217, 218.

It is further my opinion, therefore, that § 22.1-66 should be interpreted to permit the School Board to reappoint the Superintendent after having deemed him to have vacated his office, if the School Board determines, in its discretion, to do so.

1While superintendents are legally required to be present or represented at local school board meetings (§ 22.1-69), state law does not prescribe the hours of work generally required of superintendents.

2Similar wording exists in several nonanalogous statutory provisions: §§ 2.1-11.1, 49-13 (failure to give bond vacates office); § 15.1-40 (failure to qualify vacates office); § 15.1-52 (removal vacates office); § 22.1-29 (residence outside district vacates office); § 22.1-124 (purchase of warrants for less than face value vacates office); §§ 23-73, 23-91.28, 23-120 (visitor’s office vacated after two terms); § 54.1-2911 (change of residence vacates office); § 54.1-2944 (residence outside physical therapy district vacates office); § 58.1-3125 (treasurer vacates office upon failure of bond). Unlike the above statutes, § 22.1-66 necessarily involves a review of the facts to determine the extent, or substantial nature, of an officer’s business activity. The operation of the questioned provisions of § 22.1-66 seldom will be determined by a single operative fact, as is the case under most of these other statutes.

3Section 22.1-65 provides: “A division superintendent may be ... removed from office by either the Board of Education ... or the school board of the division for sufficient cause. A division superintendent may appeal to the appropriate circuit court any decision of the Board of Education or school board to ... remove him from office and shall be entitled to a trial de novo on such appeal of whether there was sufficient cause therefor.” See also §§ 24.1-79.1 to 24.1-79.10 (removal of public officers generally).


5Until 1974, there was no statutory provision for local school board approval of a full-time superintendent’s outside employment. See Ch. 191, 1974 Va. Acts 308 (amending § 22-38, predecessor statute to § 22.1-66).

EDUCATION: POWERS AND DUTIES OF SCHOOL BOARDS — SCHOOL PROPERTY — SYSTEM OF PUBLIC SCHOOLS; GENERAL PROVISIONS.

CONSTITUTION OF VIRGINIA: EDUCATION.
Parking optional use of school property that local school board may provide as service to its student licensed drivers. Board authorized to require students to pay fee reasonably related to its cost for this optional privilege; reasonableness of charge is determination of fact made by school board.

November 8, 1997

Mr. David T. Stitt
County Attorney for Fairfax County

You ask whether the Fairfax County School Board lawfully may charge a $100 annual parking fee to students who wish to park their cars on school property.

I. Applicable Constitutional and Statutory Provisions

Article VIII, § 1 of the Constitution of Virginia (1971) requires the General Assembly to "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth." Article VIII, § 7 vests supervision of public school divisions in local school boards.

Section 22.1-6 of the Code of Virginia provides that, "[e]xcept as provided in this title [Title 22.1] or as permitted by regulation of the Board of Education, no fees or charges may be levied on any pupil by any school board."

Section 22.1-79(A) provides:

A school board shall:

** *

3. Care for, manage and control the property of the school division ...."

Section 22.1-131 also provides that "[a] school board may permit the use, upon such terms and conditions as it deems proper, of such school property as will not impair the efficiency of the schools."

II. School Board May Charge Fee for Optional Student Parking on School Property

Prior Opinions of this Office conclude that the requirement for a free public school system in Article VIII, § 1 bars local school boards from imposing student fees as a condition of school enrollment, but not from charging fees for optional or ancillary services or activities. See, e.g., 1981-1982 Att'y Gen. Ann. Rep. 144, 145 (school board may not condition student's continued enrollment on paid participation in drug counseling program).

Sections 22.1-79 and 22.1-131 give local school boards broad authority over the use of school property. Another prior Opinion of this Office concludes that charging for rental of student lockers, an optional service to students, is within the scope of a local board's authority, 1964-1965 Att'y Gen. Ann. Rep. 294. Still another Opinion concludes that a school division superintendent may not impose a student parking fee without the approval of the local school board. 1971-1972 Att'y Gen. Ann. Rep. 356. That Opinion does not question the authority of the local board to charge for student parking. Id. at 357.

Current regulations of the Board of Education ("State Board") adopted as permitted under § 22.1-6 provide that
Fees may be charged for:

Class dues
Voluntary student activities
Night school classes
Postgraduate classes
Summer school
Rental textbooks
Musical instruments used in regularly scheduled instructional classes
Library fees

Nothing in this regulation shall be construed to prohibit the school board of any county, city, or town from making supplies, services, or materials available to pupils at cost. Nor is it a violation to make a charge for a field trip or an educational related program that is not a required activity.

Bd. of Educ., Regulations of the Board of Education of the Commonwealth of Virginia 21 (1980). In appropriate circumstances, a charge for parking can be considered both a payment for a "[v]oluntary student activity[" and a charge for a service made "available to pupils at cost" by a local board. Id.

Obviously, no student is required to drive a car to school or to park it on school property. Fairfax County offers free transportation to students who live beyond walking distance from their schools. Parking is, therefore, an optional use of school property that the Fairfax County School Board may provide as a service to its students who are licensed drivers. In my opinion, based on the above, the Fairfax County School Board is authorized to require students to pay a fee reasonably related to its cost for this optional privilege. Whether a charge of a particular amount is reasonable is a determination of fact to be made in the first instance by the School Board.

CONSTITUTION OF VIRGINIA: EDUCATION.

WELFARE (SOCIAL SERVICES): CHILD WELFARE, HOMES, AGENCIES, ETC.

Local school division not required to bear costs of either special or regular education for children in state-licensed substance abuse treatment facility within school division not placed there by division.

February 2, 1991

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether a school division must bear the expense of special education required by a child undergoing treatment in a state-licensed substance abuse treatment facility located within the jurisdiction of the division, when the child is not a resident of the division or has not been placed in the facility by the school division.

Article VIII, § 1 of the Constitution of Virginia (1971) provides:

The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth.

Section 22.1-3 of the Code of Virginia provides:

The public schools in each school division shall be free to each person of school age who resides within the school division. Every person of school age shall be deemed to reside in a school division when he or she is living with a natural parent, a parent by legal adoption, or when the parents of such person are dead, a person in loco parentis, who actually resides within the school division, or when the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with another person who (i) resides in the school division and (ii) is the court-appointed guardian, or has legal custody, of the person, or when the person is living in the school division not solely for school purposes, as an emancipated minor.

Section 22.1-215 provides, in part:

Each school division shall provide free and appropriate education, including special education, for the handicapped children residing within its jurisdiction in accordance with regulations of the Board of Education.

Section 22.1-216 provides:

A school board may provide special education for handicapped children either directly with its own facilities and personnel or under contract with another school division or divisions or any other public or private nonsectarian school, agency or institution approved by the Board of Education.

Applicable regulations\(^1\) provide that a "child with special needs" means

a child in need of particular services because he is mentally retarded, developmentally disabled, mentally ill, emotionally disturbed, a substance abuser, in need of special educational services for the handicapped, or requires security services.


The regulations further provide:

§ 5.2. No child with special needs shall be accepted for placement by a facility unless that facility has a program appropriate to meet those needs or arrangements are made for meeting those needs through community resources unless the child's admission is required by court order.

§ 5.3. The facility shall accept and maintain only those children whose needs are compatible with those services provided through the facility unless a child's admission is required by court order.

\(\text{id. at 2448.}\)
II. School Division Where Residential Facility for Chemically Dependent Children Located Not Required to Bear Costs of Special Education for Children Not Placed There by School Division

Local school divisions are required to provide necessary regular and special education services to students who are residents within their division. See §§ 22.1-3, 22.1-215; see also 1983-1984 Att'Y Gen. Ann. Rep. 306, 307. A school division may place handicapped students in a state-approved facility if the division is unable to provide the required free, appropriate education to those students. See § 22.1-216.

Absent such a placement, school divisions generally are not responsible for the costs of education of children who have been privately or otherwise placed in such facilities. 1

Residential facilities for children, which must be licensed, may not accept a child with special needs, including the need for special education services, unless the facility provides, or has made arrangements to provide, the needed services. See 5 Va. Regs. Reg., infra note 1, at 2430, 2448. While the applicable regulations permit a facility to make arrangements to provide for a child's special needs through outside community resources, nothing in those regulations compels the school division in which the facility is located involuntarily to extend its resources to students whom the school division has not placed in the facility. Id. at 2448.

Based on the above, it is my opinion that a local school division has no duty to provide or bear any costs of either special or regular education for children in a residential treatment facility who (1) are not residents of the school division, or (2) though residents, have not been placed in the facility by the division but have been privately placed in the facility. 2

1 Regulations concerning residential placement are promulgated cooperatively by the Departments of Social Services; Education; and Mental Health, Mental Retardation and Substance Abuse Services under an interdepartmental regulatory program. See § 63.1-196.4; Exec. Orders No. 58 (1985), No. 5 (1990); 5 Va. Regs. Reg. VR 615-29-02 2424 (1989); see also §§ 22.1-101.1(A)(3), 22.1-214(F), 22.1-215, 22.1-319.

2 See, e.g., § 22.1-101 (education costs of handicapped children placed by certain state agencies in certain facilities, including private residential facilities and foster homes, covered by interagency fund of Commonwealth); see also Schimmel by Schimmel v. Spillane, 630 F. Supp. 159 (E.D. Va. 1986), aff'd, 819 F.2d 477 (4th Cir. 1987) (localities not responsible for special education costs of children who have been offered appropriate placement under Education of the Handicapped Act, 20 U.S.C.A. §§ 1400-1485 (West 1990), but whose parents have unilaterally chosen to place their children privately). School divisions, in their discretion, however, may admit nonresident students on either a tuition or a nontuition basis (§ 22.1-5(A)(2)), and may agree to provide special education services to children who are residents of other school divisions (§ 22.1-216).

3 This is especially true for a facility that has not been approved by the Board of Education to provide special education services. See § 22.1-216. You indicate that the residential facility about which you inquire does not provide special education services. You do not indicate whether the facility provides regular education services. Nevertheless, because this Opinion concludes that a school division is not required to bear any costs of education for children in a residential facility within the division not placed there by the division, it is not necessary to determine whether the residents of the treatment facility you describe are in need of special or regular education services.
EDUCATION: STANDARDS OF QUALITY.

CONSTITUTION OF VIRGINIA: EDUCATION — BILL OF RIGHTS.

Neither Board of Education nor General Assembly may delegate constitutionally derived authority to change standards of quality to Superintendent of Public Instruction, other officer or body; revision of standards must apply uniformly to all school divisions in Commonwealth.

January 31, 1991

The Honorable G.C. Jennings
The Honorable W.W. Bennett Jr.
Members, House of Delegates

You ask whether the General Assembly may adopt legislation authorizing the Superintendent of Public Instruction temporarily to waive compliance by individual local school divisions with particular provisions of the "standards of quality" for public schools, §§ 22.1-253.13:1 through 22.1-253.13:8 of the Code of Virginia, that previously have been determined and prescribed by the Board of Education as constitutionally required.

I. Applicable Constitutional and Statutory Provisions

Article I, § 15 of the Constitution of Virginia (1971) acknowledges the necessity of a state system of public education, and provides:

[that free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.

More specifically, Article VIII, § 1 provides:

The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.

Article VIII, § 2 assigns the responsibility for implementing the goal of a high quality educational program established by Article VIII, § 1:

Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly.

The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.

Article VIII, § 4 provides for the appointment of the Board of Education. Article VIII, § 5 details the powers and duties of that Board. Among other matters, § 5 provides:
(b) [The Board] shall make annual reports to the Governor and the General Assembly concerning the condition and needs of public education in the Commonwealth, and shall in such report identify any school divisions which have failed to establish and maintain schools meeting the prescribed standards of quality.

***

(e) Subject to the ultimate authority of the General Assembly, the Board shall have primary responsibility and authority for effectuating the educational policy set forth in this Article . . . .

Acting pursuant to the constitutional provisions listed above, the Board of Education has prescribed the current standards of quality, which the General Assembly has reviewed and adopted as §§ 22.1-253.13:1 through 22.1-253.13:8. Section 22.1-253.13:8 provides that these standards "shall be the only standards of quality required by Section 2 of Article VIII of the Constitution of Virginia."

II. Neither General Assembly nor Board of Education May Delegate Constitutional Responsibility for Standards of Quality to Superintendent of Public Instruction

As noted above, Article VIII, § 2 is quite specific about the method by which the standards of quality for local school divisions must be established. The standards "shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly." Id. (emphasis added).

The Supreme Court of Virginia has held that

[when a statute is clear and unequivocal, general rules for the construction of statutes of doubtful meaning have no application. The province of construction lies wholly within the domain of ambiguity.

School Board v. State Board et al., 219 Va. 244, 250-51, 247 S.E.2d 380, 384 (1978) (citation omitted). From the plain meaning of the phrase "from time to time" in Article VIII, § 2, it is clear that the Board of Education has the authority to amend the standards of quality. Likewise, the phrase "subject to revision" clearly grants to the General Assembly the right to alter a standard prescribed by the Board of Education. The plain meaning of the word "only," used as an adverb in the context of Article VIII, § 2, is "solely" or "exclusively." The American Heritage Dictionary 869 (2d ed. 1985). Thus, the plain meaning of Article VIII, § 2 is that the Board of Education has been granted the constitutional authority to establish and amend the standards of quality, and that only the General Assembly is authorized by the Constitution to revise standards of quality prescribed by the Board of Education.

Equally well accepted is the principle that, when a statute specifies the method by which something shall be done, it implies that it may not be done otherwise. Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); 1989 Att'y Gen. Ann. Rep. 171, 173. When the method of doing something is prescribed by a constitutional provision, that prescription is, of course, binding on the General Assembly, as well as upon boards, officers and agencies in the executive branch of government.

Based on the plain meaning of Article VIII, § 2 and the principles discussed above, it is my opinion that Article VIII, § 2 provides the exclusive method by which the standards of quality may be prescribed and altered. It is further my opinion, therefore, that neither the Board of Education nor the General Assembly may delegate its constitutionally derived authority to change the standards of quality, even temporarily, to the Superintendent of Public Instruction or to any other officer or body.
III. Changes in Standards of Quality Must Be Applied on Statewide Basis

Article VIII, § 2 does not expressly provide that the standards of quality must have statewide applicability. Your second inquiry, therefore, requires an integrated reading of the other constitutional provisions applicable to the Commonwealth's public education system. "The constitution must be viewed and construed as a whole, and every section, phrase and word given effect and harmonized if possible." Dean v. Paolicelli, 194 Va. 219, 226, 72 S.E.2d 506, 511 (1952).

Article I, § 15 provides for a system of education to be established "throughout the Commonwealth" in recognition of the fact that "free government rests, as does all progress, upon the broadest possible diffusion of knowledge." (Emphasis added.) Article VIII, § 1 likewise imposes on the General Assembly an obligation to provide a system of free public schools "throughout the Commonwealth" and to "seek to ensure that an educational program of high quality is... continually maintained." (Emphasis added.)

A federal court has found that these provisions in the Constitution of 1971 were "dedicated to restoring order to the mayhem wreaked upon the state's educational system by its policy of massive resistance." Irby v. Fitz-Hugh, 693 F. Supp. 424, 428 (E.D. Va. 1988). Under the provisions of the Constitution of 1902 and the statutes in place during the massive resistance era, local governing bodies had the authority to refuse to appropriate funds for school purposes, and the General Assembly had no constitutional obligation to ensure the operation of public schools in a locality that chose to close them. School Board v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963). The elimination of that local discretion not to fund schools was, therefore, a central feature of the 1971 Constitutional Revision Commission's effort to "rid the State's educational system of the racial overtones and prejudices that previously consumed it." Irby, 693 F. Supp. at 429.

By referring to this history, I do not mean to suggest that proposals to waive the standards of quality are racially motivated or would necessarily result in racial discrimination. I am of the opinion, however, that this background and the language of Article I, § 15 and Article VIII, § 1 strongly suggest an intent on the part of the framers of the 1971 Constitution that the standards of quality mandated by Article VIII, § 2 should have statewide applicability.

That conclusion is further supported by the obligation placed on the Board of Education by Article VIII, § 5(b) to "identify any school divisions which have failed to establish and maintain schools meeting the prescribed standards of quality." Section 22.1-253.13:8 goes even further toward a mandated statewide application, authorizing the Board of Education, through court action when necessary, to enforce local adherence to the standards of quality, described as "the only" such standards required by Article VIII, § 2.

Taken as a whole, the constitutional and statutory provisions discussed above demonstrate a constitutional intent that the standards of quality apply uniformly to all school divisions in the Commonwealth. It is my opinion, therefore, that any revision of the standards of quality, whether initiated by the Board of Education or by the General Assembly, must apply on a uniform, statewide basis to all school divisions.

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1You ask specifically about House Bill No. 1351 (1991 Sess.). House Bill No. 1555 (1991 Sess.) also proposes a similar grant of authority to the Superintendent of Public Instruction. House Bill No. 1546 (1991 Sess.) proposes to suspend until July 1, 1993, two specific accreditation requirements adopted by the Board of Education pursuant to the standards of quality.
EDUCATION: THE VIRGINIA SCHOOLS FOR THE DEAF AND THE BLIND.

Authority of Board of Education to assign all deaf or blind children newly in need of residential care to school at Staunton while continuing to provide at Hampton school nonresidential and residential programs for existing children already enrolled there.

December 9, 1991

The Honorable Robert C. Scott
Member, Senate of Virginia

You ask whether the Board of Education (the "Board") has violated a clear statutory mandate and acted outside its statutory authority by assigning all deaf or blind children newly in need of residential care at one of the two Virginia Schools for the Deaf and the Blind ("school" or "schools") to the Virginia School for the Deaf and the Blind ("VSDB") at Staunton. You indicate that such children previously have been admitted at both the Staunton and Hampton school locations.

1. Applicable Statutes

Section 22.1-346(C) of the Code of Virginia provides, in part:

The Board shall be charged with the operational control of the Virginia School for the Deaf and the Blind at Hampton and the Virginia School for the Deaf and the Blind at Staunton....

The Board shall provide rules and regulations for the governance of the schools. The Superintendent of Public Instruction shall administer, supervise and direct the activities and programs of the schools pursuant to the rules and regulations of the Board.

Section 22.1-348 provides:

A. Persons of ages two through twenty-one shall be eligible for educational services provided by the schools. There shall be no charge for the education of students, but fees for student activities may be charged at the Board's discretion.

B. The Virginia School for the Deaf and the Blind at Staunton shall provide an educational program for deaf children from preschool through grade twelve and an educational program for blind children from preschool through grade twelve. The Virginia School for the Deaf and the Blind at Hampton shall provide an educational program for deaf children from preschool through grade twelve, an educational program for blind children from preschool through grade twelve, and an educational program for multi-handicapped children from preschool through grade twelve.

The preschool programs may be residential or nonresidential or both at the discretion of the Board. The Board, from time to time, may approve additional programs as may be appropriate.

"Multi-handicapped children" shall mean, for the purposes of this section and the identification of the program at the Virginia School for the Deaf and the Blind at Hampton, children who have two or more major handicapping conditions so severe that their particular educational needs require unique and special services or whose combination of severely handicapping conditions...
requires extraordinary programs or services or both to meet their particular educational needs.

C. The Board may establish geographic attendance zones to determine the school each student shall attend through grade eight. However, the younger siblings of a child in high school may attend the same school as the child in high school for the convenience and comfort of both children and parents. Multi-handicapped students whose primary disability is either blindness or deafness shall attend the Virginia School for the Deaf and the Blind at Hampton.

D. The Board shall prescribe procedures and criteria for determining admission to the Virginia School for the Deaf and the Blind at Hampton and the Virginia School for the Deaf and the Blind at Staunton. The appropriateness of the placement of each student attending either school shall be reviewed at least annually.

III. Cannot Conclude, as Matter of Law, that Board Abused Its Discretion or Exceeded Its Statutory Authority in Directing New Applications for Residential Program to VSDB at Staunton

You indicate that deaf or blind students in residential programs traditionally have been served at both the Hampton and Staunton schools. The Board has determined, however, that deaf or blind students needing residential care in the future should be assigned to Staunton. Under this directive from the Board, VSDB at Hampton would continue to provide its residential program for children already enrolled there, but new admissions would be confined to multihandicapped pupils (including deaf and blind) as an interim measure, pending General Assembly consideration and approval of the eventual closing of the Hampton facility. See Board Minutes, vol. 82, at 144 (May 1991) (on file with the Superintendent of Public Instruction, Department of Education).

Section 22.1-346(C) designates the Board as the public body responsible for operational control and governance of both schools. The Board has been empowered broadly to "prescribe procedures and criteria for determining admission to the Virginia School for the Deaf and the Blind at Hampton and the Virginia School for the Deaf and Blind of Staunton." Section 22.1-348(D). The only express limitation on this broad power of the Board is that "[t]he appropriateness of the placement of each student attending either school shall be reviewed at least annually." Id. (emphasis added). While § 22.1-348 requires an educational program at Hampton for deaf or blind children, there is nothing in the statutes governing the schools that requires VSDB at Hampton to offer residential programs for deaf or blind students. Thus, the exact nature of the programs to be offered and the appropriateness of individual placements is left to the discretion of the Board.


The Board's interpretation of its authority over pupil assignments at the two schools appears to be consistent with past legislation consolidating the two locations. The schools formerly operated as wholly separate entities with separate governing boards—the "Virginia School for the Deaf and the Blind," now the Staunton location, and "Virginia School at Hampton." See Va. Code Ann. § 970 (1919); Ch. 551, 1966 Va. Acts 732. Effective July 1, 1978, the General Assembly consolidated both schools under the governance of a single board. Ch. 668, 1977 Va. Acts 1331. In doing so, the General Assembly provided in § 23-238:
The Board [of Visitors of the schools] shall prescribe procedures, which conform to educational criteria established by the Board of Education, for determining admission to the Virginia School at Hampton and the Virginia School for the Deaf and Blind at Staunton and for reviewing at least annually the appropriateness of the placement of each person attending either such school.


In 1984, the General Assembly transferred governance of the schools to the Board under § 22.1-346(A). Ch. 413, 1984 Va. Acts 648, 649. As noted above, the statute vesting control in the Board provides:

The Board shall prescribe procedures and criteria for determining admission to the Virginia School for the Deaf and the Blind at Hampton and the Virginia School for the Deaf and the Blind at Staunton.

Section 22.1-348(D).

Accordingly, based on the above, I am unable to conclude, as a matter of law, that the Board's decision to assign all deaf or blind children newly in need of residential care to VSDB at Staunton, while continuing to provide at Hampton the nonresidential program and the residential program for existing children already enrolled there, is an abuse of its discretion or otherwise is outside the scope of the Board's current broad statutory authority to determine the nature of the educational programs and the admissions criteria at the two schools.¹

¹As a result, the Board may not close VSDB at Hampton or cease educational programs for deaf or blind students at Hampton altogether, without General Assembly approval.

This Opinion should not be understood as endorsing the underlying wisdom of this policy decision—a decision entrusted to the Board by the General Assembly under current law. The General Assembly, of course, may choose to change the law and narrow the Board's discretion in these matters if it wishes to do so.

ELECTIONS: APPORTIONMENT OF REPRESENTATIVES.

EDUCATION: SCHOOL BOARDS; SELECTION, ETC.

COUNTIES, CITIES AND TOWNS: GOVERNING BODIES.

School board members' appointments from new election districts contingent on Voting Rights Act preclearance by Department of Justice; old members hold over until redistricting precleared.

June 20, 1991

Mr. Thomas R. Robinett
County Attorney for Gloucester County

You ask whether appointments to replace members of the Gloucester County School Board (the "County" and "School Board") whose terms expire June 30, 1991, should be made by reference to the election district boundaries established by the County's 1991
decennial redistricting ordinance, which will have been adopted by the County Board of Supervisors (the "County Board") before June 30, 1991, but will not, by that date, have been precleared by the United States Department of Justice, as required by § 5 of the federal Voting Rights Act. You note that the redistricting ordinance being considered by the County Board increases the number of election districts and County Board members from five to six, and, therefore, also creates an additional seat to be filled on the School Board.

I. Applicable Statutes

Section 22.1-36 of the Code of Virginia requires that county school boards have a member appointed from each county supervisor's election district.

Section 22.1-29 provides that if a school board member ceases to be a bona fide resident of the district from which he is appointed, his position on the board shall be deemed vacant.

Section 15.1-37.9 provides, however, that,

upon reapportionment of the representation of any county, city or town with or without a change in the boundaries of the district from which a member of the school board or planning commission may have been appointed, any member of a school board or planning commission duly qualified and appointed in accordance with the laws of the Commonwealth of Virginia prior to the date the reapportionment is effective may upon and after said date continue to serve as appointed for the remainder of the then unexpired term, regardless of loss of residency within a particular district due to reapportionment.

Section 24.1-17.2(B) provides:

Ordinances adopted by local governing bodies to accomplish the decennial redistricting of districts for county, city, and town governing bodies required by Article VII, Section 5 of the Constitution of Virginia shall take effect immediately.

Section 5 of the federal Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c (1988), which is applicable to the Commonwealth and all its localities, requires that any change in state or local election laws or voting practices or procedures be submitted to the United States Department of Justice for review and evaluation of its potential impact on minority voters, before such change may be implemented. This review is commonly referred to as "§ 5 preclearance."

II. School Board Members Should Be Appointed from New Election Districts Contingent on Voting Rights Act Preclearance; Old Members to Hold Over Until Redistricting Precleared

It is an established principle of statutory construction that statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to the provisions of each statute, to the maximum possible extent. Op. to Dr. C.M.G. Buttery, St. Health Comm'r (Mar. 7, 1991), and authorities cited therein.

The statutory provisions listed above all relate, directly or indirectly, to the appointment and tenure of county school board members. Section 22.1-29 establishes a general rule that a school board member appointed from an election district who ceases
to be a resident of that district vacates his school board office. Section 22.1-36, by requiring a school board member to be appointed from each county supervisor election district, creates automatic school board vacancies when the county board is enlarged.

A county ordinance redrawing supervisor election district boundaries, when adopted, may cause some school board members to cease to be residents of the districts from which they were appointed. A prior Opinion of this Office, however, concludes that the specific provisions of §15.1-37.9 overrule the more general provisions of §22.1-29, so that school board members who cease to be residents of their districts because of redistricting serve for the remainder of their terms. See 1981-1982 Att'y Gen. Ann. Rep. 324, 325. Nevertheless, because of the possible new vacancy to be created by enlargement of the County Board, and, because two additional School Board vacancies will occur on June 30 by expiration of current members' terms, §15.1-37.9 does not provide a complete answer to your question.

Making appointments to fill the School Board vacancies that will occur in June by reference to the old election district boundaries, and delaying the use of the new election district boundaries for School Board appointment purposes until after January 1, 1992, when the County Board members elected from the newly established districts will take office, would not, in my opinion, give the maximum possible effect to the requirement in §24.1-17.2(B) that local redistricting ordinances take effect immediately.

Obviously, the preclearance requirements of §5 of the federal Voting Rights Act make it impossible to give full, immediate effect to §24.1-17.2(B), because having School Board members appointed from the new districts take office before those districts are precleared would be an implementation that would violate the federal statute. In my opinion, however, that violation may be avoided by making the appointments from the new districts that will be vacant, but making those appointments contingent on §5 preclearance by the Department of Justice. Prior Opinions of this Office conclude that outgoing school board members may hold over after their terms expire, until their successors have qualified. See Att'y Gen. Ann. Rep.: 1985-1986 at 250; 1981-1982, supra, at 325-26. In the meantime, therefore, the School Board may continue to operate with a full complement of members until §5 preclearance is obtained and the members appointed from the new districts can take office. Of course, if §5 preclearance is not obtained, and the district boundaries are changed, the new appointments to the School Board may have to be reconsidered.

1. The federal regulations implementing §5 acknowledge distinctions among the date of adoption of a voting law change, its effective date, and the date it is first enforced or administered. See 28 C.F.R. §51.27(j)-(k) (1990). In this instance, the adoption date and effective date are the same, because of §24.1-17.2(B), but the date the change is first administered or enforced will be delayed pending §5 preclearance.

ELECTIONS: FAIR ELECTIONS PRACTICES ACT.

GENERAL ASSEMBLY: LOBBYING.

Definition of "committee" applicable to single individual who receives contributions or makes expenditures on behalf of or in opposition to candidate or in favor of or opposing ballot question; instances in which committee obligated to record and report receipts and disbursements. Members of Democratic and Republican legislative caucuses excluded from definition of "committee"; general exemption from reporting requirement; other than independent expenditures for or against, or receipt of contributions designates for,
specific candidates. Labor unions constitute "committees" only if funds solicited for purpose of contributing to candidates or if independent expenditures made or material supporting/opposing candidates or ballot questions published or broadcast and incur reporting obligations; political action committee (PAC) formed by labor organization to solicit contributions and make expenditures is "committee"; reporting requirements applicable to PAC. Administrative agency's definition of "committee" restates statutory definition. Obligation to report committee's organizational activities triggered by anticipation of receiving contributions or making expenditures for or against candidates or ballot questions. Travel expense incurred by elected official not currently candidate for office on behalf of another candidate reportable to candidate's campaign treasurer; treasurer reports as contribution. Committee that pays for travel expenses of such elected official must report expenditure; reimbursement received by traveling elected official only reportable as contribution if received in relation to headquarters. Committees that expend funds for politically neutral voter registration activities not required to identify specific recipients of expenditures; may be required to report such expenditures generally in order to provide complete accounting for contributions received. Group advocating general public policies/principles without supporting or opposing candidates or ballot questions not "committee"; no reporting obligations incurred.

August 13, 1991

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

You ask several questions concerning provisions of the Fair Elections Practices Act, Chapter 9 of Title 24.1, §§ 24.1-251 through 24.1-263.1 of the Code of Virginia (the "Act"). You first ask whether the definition of a "committee" in § 24.1-254.1 includes the following entities, if they expend funds in excess of prescribed limits to influence the outcome of an election or publish or broadcast statements in support of, or opposition to, candidates, or to promote or oppose a referendum, proposition or constitutional amendment (a "ballot question"): (a) An individual, whether expending his own funds or soliciting contributions from others;

(b) An organized group of elected officials of a particular party, such as the legislative caucuses of the Democratic and Republican parties;

(c) A labor union.

You also ask whether § 24.1-255 requires the reporting of contributions for all political activities or only those directly related to elections. More specifically, you ask whether the Act requires an entity meeting the definition of a "committee" to report contributions received or funds expended by the entity for any of the following purposes:

(a) Organizational activities undertaken before the committee selects or endorses any candidate or nominee or adopts a position on any ballot question;

(b) Travel and related expenses incurred by an elected official in attending "overtly political functions," even though the official is not an announced candidate for any office at the time the expenditure is made;

(c) Voter registration efforts that do not mention the name of any particular candidate or make reference to any scheduled ballot question; or

(d) Advocacy designed to advance or oppose the adoption of a particular idea or policy, for which no ballot question is currently scheduled.
I. Applicable Statutes

Section 24.1-254.1(a) defines a "committee," for purposes of the Act, as each person, association, organization, group of individuals, any state political party, political action committee, or other committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding $100, but shall not include a candidate's campaign committee or a district, county, or city political party committee or an organized political party group of elected officials.

Section 24.1-254.1(a) further provides that each committee shall file with the State Board of Elections a statement of organization (i) within ten days after its organization or, if later, ten days after the date on which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of $100 or on which it otherwise becomes subject to the provisions of this section; and (ii) annually thereafter by January 15.

Section 24.1-254.1(b)(6) details the contents of this statement of organization, including, among other items;

[i]The name, address, office sought, and party affiliation of (i) each candidate whom the committee is supporting or opposing, and (ii) any other individual, if any, whom the committee is supporting or opposing for nomination for election, or election, to any public office whatever; or, if the committee is supporting the entire ticket of any party, the name of the party.[1]

Section 24.1-254.2 provides:

A. Definition.—A political action committee is any organization, other than a campaign committee or political party committee, established or maintained to receive and expend contributions for political purposes, and subject to the provisions of §§ 24.1-254.1 and 24.1-255.

B. Establishment.—Any stock or nonstock corporation, labor organization, membership organization, or cooperative may establish and administer for political purposes, and solicit and expend contributions for, a political action committee, provided that:

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.

Section 24.1-255 provides, in part:

A. All moneys, services, or other things of value over $100, collected, received or disbursed by or on behalf of any candidate or in relation to his candidacy from every source, except independent expenditures, shall be paid
over or delivered to the candidate's treasurer or shall be reported to such candidate's treasurer in such detail and form as to allow the treasurer to comply fully with this chapter. An independent expenditure shall be reported pursuant to § 2.1-257.1 in lieu of being reported to the candidate's treasurer hereunder. An independent expenditure means an expenditure made by anyone, including any committee as defined in § 24.1-254.1, which is not made to, controlled by, coordinated with, or made upon consultation with a candidate, his campaign committee, or an agent of the candidate or his campaign committee.

B. It shall be unlawful for any candidate, or anyone, including any committee as defined in § 24.1-254.1, collecting, receiving, disbursing or expending money, services, or other things of value over $100 in relation to his candidacy, to fail to report every such collection, receipt, disbursement or expenditure as required herein and in this chapter.

Except as provided in the preceding paragraph and in § 24.1-257.3, any district, county or city political party committee shall be exempt from the requirements of this chapter, but contributions made by any such political party committee to any candidate, his campaign committee, or committee as defined in § 24.1-254.1, shall be reported in accordance with the provisions of this chapter by the recipient of the contribution.

C. Any committee, as defined in § 24.1-254.1, (i) which expends any funds in excess of $500 for a statewide election or $100 for any one other election for the purpose of influencing the outcome of any election, or (ii) which publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate, or for the purpose of promoting or opposing a referendum, proposition, constitutional amendment, or other question submitted to the voters, shall maintain records and report all such receipts and disbursements of moneys, services, or other things of value over $100 pursuant to this chapter.

Section 24.1-257.1 establishes the schedule for reports of contributions and expenditures to be filed by committees as defined in § 24.1-254.1. Section 24.1-257.3 imposes this same schedule of reporting on political party committees, which are excluded from the § 24.1-254.1 definition of a "committee," but the reporting schedule applies only to contributions received by such political party committees that have been designated by the contributor for the election of a specific candidate.

Section 24.1-258 provides:

The report required by this chapter to be filed shall include all contributions and expenditures, except the payment of a filing fee paid by a candidate or his treasurer, and shall set forth the following:

(1) Receipts shall include the total number of contributors who have contributed, in the aggregate, $100 or less each as of the date of the report, and the total amount of contributions from such contributors. For each contributor, who has contributed, in the aggregate, more than $100 as of the date of the report, give the name of the contributor, listed alphabetically, the address of the contributor, the amount of the contribution included in the schedule of
receipts, the aggregate amount of contributions from the contributor to
date, the date of the last contribution; and for each contributor, who has
contributed, in the aggregate, more than $250, the report shall, in addition
to the above-mentioned information, give the occupation and principal place
of business of the contributor. The report shall include each loan, the name
and address of the person making the loan and the date the loan was made.
The schedule for a candidate shall list separately those receipts reported to
the candidate or his treasurer by any committee, as defined in § 24.1-254.1,
and political party committees pursuant to § 24.1-255 setting forth in each
instance the source of the information reported.

(2) Disbursements shall include all expenditures and give the name and
address of the person paid, a brief description of the purpose of the expendi-
ture, the name of the person contracting for or arranging such expenditure,
the amount of expenditures and the date of such expenditures. The schedule
for a candidate shall list separately those expenditures reported to the can-
didate or his treasurer by any committee, as defined in § 24.1-254.1, and
political party committees pursuant to § 24.1-255 setting forth in each
instance the source of the information reported.

All completed forms shall be submitted in hand printed, typed or printed
format.

II. Definition of "Committee" in § 24.1-254.1 Must Be
Read in Conjunction with Other Provisions of Act

It is a fundamental principle of statutory construction that statutes dealing with
the same subject matter must be read together to ascertain the legislative intent. Pril-
laman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957); Op. to Hon. Jerrauid
at 315, 316-17.

To understand how the definition of a "committee" in § 24.1-254.1(a) applies to
each of the entities about which you inquire, therefore, it is necessary to read that defi-
nition in conjunction with the other sections of the Act cited above.

A. Individual May Constitute "Committee" in Appropriate Circumstances

By its plain language, the definition of a "committee" in § 24.1-254.1(a) includes
"each person" who anticipates receiving contributions or making expenditures in excess
of $100 during the calendar year for certain enumerated political purposes. The use of
the word "person" in addition to words connoting groups of various types indicates the
intent of the General Assembly that a single individual will constitute a "committee" if
that individual receives contributions or makes expenditures on behalf of or in opposition
to a candidate or in favor of or opposing a ballot question.

Section 24.1-255(A), however, makes it clear that an individual who merely receives
contributions on behalf of a candidate and turns them over to the candidate's treasurer,
and does not make independent expenditures on behalf of the candidate, is relieved of the
reporting obligation imposed by § 24.1-255(B). Independent expenditures are defined as
those that are not made to, controlled by, coordinated or made in conjunction with the
candidate, his agent or his campaign committee. Section 24.1-255(A). Under
§ 24.1-255(C), a committee, as defined in § 24.1-254.1, incurs an obligation to record and
report receipts and disbursements only when it expends funds in excess of $500 in a
statewide election or $100 in a local election, or when it publishes or broadcasts material
advocating the election or defeat of a particular candidate or taking a position on a bal-
lot question.
If an individual, therefore, merely solicits contributions for a particular candidate and turns them over to the candidate, the candidate's agent or the candidate's campaign committee, and makes no independent expenditures on the candidate's behalf for the purposes and over the amounts set forth in § 24.1-255(C), that individual has incurred no reporting obligation, because the reporting must be performed by the candidate, the agent or the campaign committee. In those circumstances, it is my opinion that the individual does not constitute a "committee," within the meaning of § 24.1-254.1. If the individual makes independent expenditures or uses the funds contributed to him for publishing or broadcasting information about a candidate or ballot question as described in § 24.1-255(C), however, then the individual does constitute a committee under § 24.1-254.1, and must make the reports required by § 24.1-255(B) and detailed in § 24.1-257.1.

B. Legislative Caucuses Are Excepted from § 24.1-254.1 Definition of "Committee"; Generally Exempt from § 24.1-255 Reporting, but Must Report Independent Expenditures for or Against Specific Candidates and Are Subject to § 24.1-257.3 Requirements

Section 24.1-254.1 expressly excludes from its definition of a "committee" "district, county, or city political party committees" and "organized political party group[s] of elected officials." By its plain meaning, this latter phrase includes the members of the Democratic and Republican legislative caucuses.

Section 24.1-255(B), moreover, exempts these caucuses and political party committees generally from the Act's requirements. They are, however, required to report their independent expenditures, if any, for or against specific candidates, as described in § 24.1-255(A). These entities also are required by § 24.1-257.3 to report contributions they receive that are designated for specific candidates.

C. Labor Union Constitutes "Committee" Only if It Makes Independent Expenditures Supporting or Opposing Candidate or Ballot Question

A labor union clearly is an "organization," "association," or "group of individuals," and thus may be a "committee" as described in § 24.1-254.1. As with individuals, however, labor unions incur reporting obligations under §§ 24.1-255 and 24.1-257.1 only if they solicit funds for the purpose of contributing to candidates or if they make independent expenditures or publish or broadcast material supporting or opposing candidates or ballot questions. If they only make direct contributions to candidates, therefore, and make no such independent expenditures, publications or broadcasts, labor unions do not become committees under § 24.1-254.1.

A prior Opinion of this Office notes that unions and other labor organizations are subject to certain restrictions on direct political contributions under federal law. See 1981-1982 Att'y Gen. Ann. Rep. 156, 158. Section 24.1-254.2, therefore, includes labor organizations among the groups that may form a political action committee ("PAC") and solicit contributions for and make expenditures through the PAC. A PAC, in turn, is a "committee" under § 24.1-254.1. If a labor union, therefore, solicits and expends contributions only for and through its PAC, the reporting requirements of §§ 24.1-255 and 24.1-257.1 are applicable to the PAC and not to the union itself.

D. Interpretation by State Board of Elections Supports Limited Inclusion of Individuals and Labor Unions, and Exclusion of Legislative Caucuses, in Definition of "Committees"

The State Board of Elections has published a Summary of the Fair Elections Practices Act, dated July 1, 1991 ("Summary of the Act"). The section of that document entitled "Committees" includes the following definition:
The term "committee" includes any person, association, organization, group of individuals, any state political party, political action committee, or other committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding $100.

It includes any person, association, organization or group of individuals who publishes or broadcasts to the public any material referring to a candidate, or promoting or opposing any question or proposition (issue) which is to appear on a ballot, regardless of the cost involved.

It includes corporations, unions and individuals [making independent expenditures on behalf of, or in opposition to, a candidate or issue] of more than $500 for a statewide election or $100 for any one other election.

It does not include corporations, unions and individuals so long as they simply make direct contributions to candidates or to a political action committee. In this case, only the candidate or political action committee is required to report.

It does not include a candidate's campaign committee or a district, county, or city political party committee or an organized group of elected officials.

A political action committee (PAC) is any organization, other than a campaign committee or a political party committee, established or maintained to receive and expend contributions for political purposes. Any stock or non-stock corporation, labor organization, membership organization, or cooperative may establish and administer for political purposes, and solicit and expend contributions for a political action committee.

Id. at 11.

The interpretation given a statute by the administrative agency charged with its enforcement is entitled to great weight. Forst v. Rockingham County, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); Op. to Hon. A.R. Giesen Jr., H. Del. Mbr. (July 22, 1991); 1990 Att'y Gen. Ann. Rep. at 175, 176; id. at 185, 187; id. at 231, 232. This restatement by the State Board of Elections of the statutory definition of a "committee," therefore, provides additional support for the conclusions expressed in Part II(A)-(C) above.

III. Requirement for Reporting Contributions or Expenses for Activities Not Related to Specific Candidates or Ballot Questions Dependent on Specific Facts and Circumstances

It is not possible to give a general answer to your question concerning the reporting of contributions and expenditures for activities not directed at specific candidates or ballot questions, because the applicability of the reporting obligations of §§ 24.1-254.1 and 24.1-255 is dependent in each instance on particular facts and circumstances. The application of the Act to each of the four types of activities you describe is discussed below.

A. Obligation to Report Committee's Organizational Activities Triggered by Anticipation of Receiving Contributions or Making Expenditures for or Against Candidates or Ballot Questions

An entity listed in § 24.1-254.1(a) becomes a committee as soon as it "anticipates" receiving reportable contributions or making reportable expenditures. It must file a statement of organization within ten days of its organization or, if later, within ten days
of receiving information giving rise to that anticipation. Id. Once it receives contributions in excess of $100 in value, the committee must begin reporting on the schedule detailed in §§ 24.1-257.1 and 24.1-257.2. Because the committee generally must receive contributions before it can make expenditures, it is the receipt of contributions of $100 in value that generally will trigger these reporting obligations. In my opinion, § 24.1-258 contemplates that a committee's reports will include all contributions received during its organizational period, even though the committee has not yet made expenditures directed to specific candidates or ballot questions. This conclusion is supported by the State Board of Elections in its Summary of the Act:

Each report must include all activity since the preceding report and a report must be filed on each date indicated even if no contributions were made to candidates during the period covered.

Id. at 12. It is my further opinion, however, that expenditures during this organizational period must be reported generally, but need not be specifically identified under § 24.1-258 until they are related to specific candidates or ballot questions as described in § 24.1-258(C).

B. Reporting Requirement for Travel Expenses of Elected Official Not Currently Candidate Dependent on Who Makes and Receives Expenditure

The answer to your question regarding the travel expenses of an elected official not currently a candidate for any office is dependent on additional circumstances not clear from your request. If the traveling official pays these expenses himself, and they exceed $100, and the travel is incurred so that the official can speak on behalf of another candidate, for example, the expense would not be reportable by the official himself, but should be reported by the traveling official to the candidate's campaign treasurer, and, in turn, reported by the treasurer as a contribution, pursuant to § 24.1-255.

Alternatively, if a political party committee, a candidate's campaign committee or a committee within the definition of § 24.1-254.1 pays for the travel expenses of an elected official who is not an announced candidate for any office, the expenditure is reportable by the paying committee under § 24.1-255(B). The reimbursement received by the traveling elected official is only reportable as a contribution under the Act, however, if it is received by him or in his behalf as a candidate or "in relation to his candidacy." Section 24.1-255(A).

C. Politically Neutral Voter Registration Expenses Not Specifically Reportable; Completion of Reporting Form May Require Identification of Such Expenses Generally

An organization whose sole purpose is to solicit contributions for voter registration activities that genuinely are not directed in support of or in opposition to particular candidates or ballot questions clearly is not a "committee" within the plain meaning of § 24.1-254.1. Either a § 24.1-254.1 committee or a political party committee excluded from that section may, of course, choose to make expenditures for voter registration drives. Section 24.1-254.1 committees must comply with § 24.1-255 in reporting contributions received, but if they expend funds for such politically neutral voter registration activities, they are not required by § 24.1-255 to identify the specific recipients of the expenditures. Because § 24.1-258 and the reporting forms prescribed by the State Board of Elections pursuant to the Act contemplate that a committee's reported expenditures and cash balance will equal its contributions received, however, the § 2.1-254.1 committee necessarily will report these voter registration expenditures, at least as a general category. Political party committees excluded from § 24.1-254.1, of course, are required only to report contributions directed by the contributor to a specific candidate. This requirement would not affect a political party committee's contributions or expenses for the neutral voter registration activities you describe.
D. Advocacy of Issues Not Currently Posed as Ballot Questions Not Covered by Act

By its clear terms, the Act applies only to contributions and expenditures relating to elections. See § 24.1-251. A group that merely advocates general public policies or principles without supporting or opposing candidates or ballot questions, therefore, would not constitute a "committee" and would incur no reporting obligations under the Act. See §§ 24.1-254.1, 24.1-255.

As with neutral voter registration activities, however, committees otherwise obligated to report all contributions under the Act are required to report such issue-oriented expenditures generally in order to provide a complete accounting for their contributions received. See § 24.1-258.

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Your inquiry refers to possible differences in answers to your questions resulting from 1991 amendments to the Act. Because these amendments became effective July 1, 1991, this Opinion interprets the Act as it is currently in force. See Chs. 9, 474, 709, 1991 Va. Acts 15, 737, 1360 (Reg. Sess.), respectively.

In appropriate circumstances, such expense payments may be reportable by the traveling official under the disclosure provisions of the State and Local Government Conflict of Interests Act, §§ 2.1-639.12 to 2.1-639.15:1, or comparable provisions of the General Assembly Conflict of Interests Act, §§ 2.1-639.39 to 2.1-639.41. These requirements, however, are outside the scope of your questions.

In some instances, advocacy of issues may constitute lobbying, regulated by Chapter 2.1 of Title 30, §§ 30-28.01 to 30-28.9:1. In these cases, the group sponsoring the advocacy or the lobbyists it employs will be required to report expenditures under § 30-28.5:1.

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ELECTIONS: QUALIFICATION OF VOTERS AND REGISTRATION -- ELECTORAL BOARDS.

City council may request general registrar to verify that petition contains required number of city's qualified voters' signatures before considering whether to amend or repeal either of two capital project appropriations in response to that petition.

July 17, 1991

The Honorable Jerrauid C. Jones
Member, House of Delegates

You ask whether the City Council of the City of Norfolk, before considering a citizen referendum petition calling for repeal of two capital project appropriations previously adopted by the council, may ask the general registrar of the city to verify that the petition has been signed by a number of qualified voters of the city sufficient to meet the requirements of the city charter provisions governing that type of referendum.

I. Applicable City Charter Provisions

Section 35 of the charter for the City of Norfolk provides:

If at any time within a thirty-day period following the adoption of an ordinance a petition, signed by qualified voters equal in number to twenty-five percent of the number of electors who cast their votes at the last preceding regular municipal election for the election of councilmen, but in no case signed by less than four thousand qualified voters of the city, be filed with
the city clerk, requesting that any such ordinance be repealed, or amended, as stated in the petition, such ordinance shall not become operative until the steps indicated herein shall have been taken or the time allowed for taking any such step shall have elapsed without action. Such petition shall state therein the names and addresses of at least five electors, who shall constitute a committee to represent the petitioners, who shall be officially regarded as filing the petition, and shall constitute a committee of the petitioners for the purposes hereinafter stated. Referendum petitions need not contain the text of the ordinance or ordinances, the amendment or repeal of which is sought, but shall contain the proposed amendment, if an amendment is demanded.


Section 36 of the charter further provides, in part:

The city clerk shall present the said petition to the council at its next regular meeting, and thereupon the council shall proceed to reconsider the ordinance. If, within thirty days after the filing of such petition, the ordinance be not repealed or amended as requested in such petition, the city clerk shall, if so requested by a writing signed by a majority of the said committee and presented to the said city clerk within twenty days after the expiration of said period of thirty days, present to the clerk of the corporation [circuit] court of said city, the said petition and all copies thereof as one instrument together with a copy of the ordinance the repeal of which is sought. Within ten days after the filing of said petition, the clerk of said court shall ascertain and certify whether the required number of qualified voters have signed the same. If it be found that the required number of qualified voters have signed the said petition, then within five days after the expiration of said ten days the said petition, with the certificate of the clerk thereon, shall be presented by the said committee to the corporation [circuit] court of said city, or to the judge thereof in vacation, and thereupon the said court or the judge thereof in vacation shall forthwith enter an order calling and fixing a date for holding an election for the purpose of submitting the said ordinance to the electors of said city.

Ch. 34, 1918 Va. Acts 31, 49.

Section 44 of the charter also provides, in part:

All such petitions substantially complying with the requirements of this charter and certified by [the circuit court] clerk to bear the required number of signatures of qualified voters shall be accepted and treated as prima facie sufficient. The burden of proving the insufficiency of any such petition in any respect shall be upon the person alleging the same.

II. Relevant Facts

On May 21, 1991, the council adopted an ordinance appropriating city funds for various capital projects, including $4 million for a proposed maritime museum (Nauticus), and $700,000 for planning a proposed baseball stadium. On June 20, 1991, the city clerk received a petition, purporting to contain the signatures of qualified voters of the city equal in number to twenty-five percent of the number who voted in the last preceding regular election for members of council, calling on the council to repeal these two appropriations or submit them to a referendum, pursuant to §§ 35 and 36 of the charter for the City of Norfolk. At the council's request, the city clerk delivered this petition to
the general registrar, whose voter registration records must be used to determine if the signers of the petition are qualified voters, and asked the registrar to proceed with verifying that the requisite number of qualified voters have signed the petition.

The committees presenting the petition then objected to the signatures' being checked before the council has acted on their demand for repeal of the two appropriations, and the Norfolk electoral board directed the registrar to return the petitions to the council unchecked. The State Board of Elections, however, later directed the registrar to check the signatures on the petition, if the council formally requested her to do so, and the mayor has now made that request to the registrar in writing on behalf of the council.

The specific question you present, therefore, is whether the city council may request the general registrar to determine the validity of the petition before deciding whether to repeal either of the two appropriations, or must make its decision without knowing whether the petition contains the required number of signatures.

III. City Council Not Prohibited from Seeking Verification of Petition's Validity Before Reconsidering Ordinance

Section 36 of the city charter, by its plain language, requires that, if the city council declines or fails to amend or repeal an ordinance within thirty days after receiving a referendum petition pursuant to §35, the circuit (formerly corporation) court clerk must "ascertain and certify whether the required number of qualified voters have signed" the petition, before the court may order the referendum election to proceed. 1918 Va. Acts, supra Pt. I, at 49. Nothing in either §35 or §36, however, expressly prohibits the council from seeking an earlier determination of a petition's validity, before the council reconsider the ordinance that is the subject of the petition.

The primary object of statutory construction is to determine the intent of the legislature in enacting the provision. Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Att'y Gen. Ann. Rep.: 1990 at 92, 93; 1989 at 325, 326. Statutes dealing with the same subject must be read and interpreted as a whole, giving effect to each provision to the fullest possible extent. Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957); Att'y Gen. Ann. Rep.: 1990 at 220, 223 n.4; 1989 at 315, 316-17. It is clear from reading the referendum provisions in Norfolk's charter as a whole that the General Assembly intended for a referendum on the repeal of a city ordinance to be submitted to the voters only after the city council has had an adequate opportunity to consider whether to amend or repeal the ordinance in response to the petition calling for the referendum. In my opinion, it would be inconsistent with that legislative intent to require the council to undertake its reconsideration of an ordinance in response to a petition when any member of the council is in doubt about that petition's validity.

That conclusion is further supported by the language of §44 of the city charter, which provides that petitions "shall be accepted and treated as prima facie sufficient" only after the clerk of court has certified that they "bear the required number of signatures of qualified voters." 1918 Va. Acts, supra Pt. I, at 51. Section 44 also provides that the burden of proof of the insufficiency of a petition "in any respect shall be upon the person alleging the same." Id. If the council believes that a significant number of signers of the petition may not be qualified voters, this language would appear to obligate the council to establish that insufficiency before declining to consider the petition.

Based on the above, it is my opinion that the city council properly may request the general registrar\d to verify that the petition you describe contains the requisite 4,481 signatures of qualified voters of Norfolk, before considering whether to amend or repeal the Nauticus Maritime Museum and baseball stadium appropriations in response to that petition.
Section 43 of the charter provides that "[n]o such petition shall be deemed invalid by reason of the fact that it is signed by one or more persons who are not qualified voters, but the names of such persons shall not be counted."

The general registrar's office has advised that the number of valid signatures required on the petition, based on the last city council election in Norfolk, is 4,481.

Although the general registrar is appointed by the local electoral board, Va. Code Ann. § 24.1-32 designates her to be an employee of the city, making it appropriate for her to respond to the city council's request for her to check the signatures. Section 24.1-56 provides that voter registration records are open to inspection by any person. Even if the registrar were obligated by the electoral board's action not to check the signatures on the petition, therefore, the city council could designate some other person to perform this task using the registration records.

ELECTIONS: SENATORIAL DISTRICTS OF VIRGINIA -- SPECIAL ELECTIONS.

Governor may exercise discretion in determining whether to call special election. Special election, if called, to fill seat of member of General Assembly resigning after effective date of decennial redistricting measure held in redrawn district most closely approximating district from which resigning member elected.

July 22, 1991

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

You ask whether the Governor is required by statute to issue a writ of special election to fill the seat of a member of the General Assembly resigning after September 11, 1991, for the balance of the resigning member's current term. You also ask whether a special election to fill the resigning member's seat would be held in the district as constituted under § 24.1-12.3 or § 24.1-14.2 of the Code of Virginia, in effect when that member last was elected, or in the district newly established by the General Assembly at its 1991 Special Session.

I. Applicable Statutes

Section 24.1-16 provides:

When a vacancy occurs in the membership of the General Assembly during the recess of the General Assembly or when a member-elect to the next General Assembly shall die, resign or be legally incapacitated to hold such office prior to its meeting, a writ of election to fill such vacancy shall be issued by the Governor, and when such vacancy happens during the session of the General Assembly of which the person so dying or resigning or whose office is otherwise vacated is a member, the writ shall be issued by the Speaker of the House of Delegates, or by the President of the Senate, as the case may be. Upon receipt of written notification by a member or member-elect of his resignation as of a stated date, the Governor, Speaker, or President, as the case may be, may immediately issue the writ to call such an election.

Such writ shall be directed to the secretary of the electoral board of the county or the city for which the election is to be held, or to the secretaries of the electoral boards of the respective counties and cities composing the election district, or districts, for the election of senators or delegates, when
the election is for such districts, but whenever any district is changed after
the election of a delegate or senator, and the delegate or senator shall die,
resign, or his office be otherwise vacated, the election to fill the vacancy
shall be held in the district as constituted when the delegate or senator was
elected.

Section 24.1-17.2 provides, in part:

A. Legislation enacted to accomplish the decennial redistricting of congres-
sional and General Assembly districts required by Article II, Section 6 of the
Constitution of Virginia shall take effect immediately. Members of Congress
and the General Assembly in office on the effective date of the decennial
redistricting legislation shall complete their terms of office. The elections
for their successors shall be held at the November general election next pre-
ceeding the expiration of the terms of office of the incumbent members and
shall be conducted on the basis of the districts set out in the legislation to
accomplish the decennial redistricting.

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C. If a vacancy in any such office occurs after the effective date of a
decennial redistricting measure and a special election is required by law to
fill the vacancy, the vacancy shall be filled from the district in the decennial
redistricting measure which most closely approximates the district in which
the vacancy occurred.

Section 24.1-163 details the procedures for the conduct of special elections, and
provides, in part, that,

[w]henever a special election is ordered by the Governor, Speaker of the
House, or President of the Senate, it shall be his duty to issue a writ of elec-
tion, designating the office to be filled at such election and the time when
such election is to be held, and to transmit the same to the secretary of the
electoral board of the county or city in which such election is to be held.

II. Decision Whether to Call Special Election Discretionary with Governor

The first sentence of § 24.1-16 provides that when a General Assembly vacancy
occurs while the General Assembly is in recess, a writ of election "shall be issued by the
Governor," and when the vacancy occurs during a legislative session, the writ "shall be
issued by the Speaker of the House of Delegates, or by the President of the Senate, as
the case may be."

The word "shall" used in a statute ordinarily, but not always, implies that its provi-
sions are mandatory. See, e.g., Schmidt v. City of Richmond, 206 Va. 211, 217-18,
142 S.E.2d 573, 578 (1965) (statute using "shall" required court to summon nine disinter-
ested freeholders in condemnation case). Compare Ladd v. Lamb, 195 Va. 1031, 1035-36,
81 S.E.2d 756, 758-59 (1954) (statute providing that clerk of court "shall forward" copy of
conviction to Commissioner of Department of Motor Vehicles within 15 days not manda-
Statutes § 60, at 351-52 (1979).

In Huffman v. Kite, 198 Va. 196, 83 S.E.2d 328 (1956), the Supreme Court of Vir-
ginia considered the meaning of a state statute using the word "shall" in connection with
circuit courts' appointments of school trustee electoral board members within 30 days
after July 1. The Court held that the time limit imposed on the circuit courts by that
statute was not mandatory, saying:
If it appears from the nature, context, and purpose of the act that the legislature intended that "shall" be treated as advisory or directory, then it should be accorded that meaning.

Id. at 202, 93 S.E.2d at 332.

It is clear from the context of § 24.1-16 that the General Assembly has used "shall" in a mandatory sense to establish when it is the Governor who is empowered to call a special election, and when it is the Speaker of the House of Delegates or the President of the Senate who exercises that authority. It is less clear, however, that any of those officials is required to issue a writ of election to fill every vacancy, regardless of when the vacancy occurs. That uncertainty is aggravated by the first sentence of § 24.1-163, which provides that "[w]henever" one of those officials orders a special election to fill a General Assembly vacancy, "it shall be his duty to issue a writ of election." The use of "whenever" suggests that the decision whether to order the special election is discretionary, with issuance of the writ being mandatory only after the decision to order the election has been made.

I am advised by the State Board of Elections that past governors have not called special elections to fill every vacancy that has occurred while the General Assembly is in recess. This interpretation by the Governor and the State Board of Elections that §§ 24.1-16 and 24.1-163 make the ordering of a special election discretionary is entitled to great weight. See Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981). The General Assembly is presumed to be cognizant of an administrative or executive construction of a particular statute and, when such construction continues without legislative alteration, will be presumed to have acquiesced in it. Peyton v. Williams, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965).

Section 24.1-163 also expressly prohibits the holding of a special election within sixty days prior to a general election. In the situation you present, therefore, a special election ordered to fill the unexpired term of a member resigning after September 11, 1991, could not be held until the date of the general election, November 5, 1991. If the special election were held on that date, voters in the district in question would be asked to fill two separate terms for the same office on the same election date, and possibly to choose from different sets of candidates for the two differing terms. The impracticality of this result and the potential for voter confusion are readily apparent. If the special election were postponed until after the general election, the unexpired term to be filled would have less than two months remaining. The General Assembly should not be presumed to have intended a statute to have unreasonable or irrational consequences. See VEPCO v. Citizens, 222 Va. 866, 869, 284 S.E.2d 613, 615 (1981).

Based on the above, it is my opinion that §§ 24.1-16 and 24.1-163, read together, do not impose a mandatory duty on the Governor, the Speaker of the House of Delegates, or the President of the Senate, as the case may be, to call a special election to fill every vacancy occurring in the General Assembly. It is further my opinion, therefore, that in the facts you present, the Governor may exercise his discretion in determining whether a special election is appropriate.

III. Special Election, if Called, to Fill Vacancy After September 11, 1991, Held in Redrawn District Most Closely Approximating One Where Vacancy Occurs

Your second question is whether a special election ordered by the Governor in the facts you present would be held in the district as constituted under former § 24.1-12.3 (House) or § 24.1-14.2 (Senate), from which the resigning member was elected, or from the most nearly comparable district established under Chapters 11, 16 and 20, which redistricted the House of Delegates based on 1990 census figures, or Chapter 18, which
similarly redistricted the Senate. 1991 Va. Acts, infra note 1. Section 24.1-16 provides a general rule that,

whenever any district is changed after the election of a delegate or senator, and the delegate or senator shall die, resign, or his office be otherwise vacated, the election to fill the vacancy shall be held in the district as constituted when the delegate or senator was elected.

Section 24.1-17.2(C), however, establishes a contrary rule when the vacancy occurs after the effective date of a decennial redistricting measure. In that case, "the vacancy shall be filled from the district in the decennial redistricting measure which most closely approximates the district in which the vacancy occurred." Chapter 11 was such a decennial redistricting measure. By constitutional and statutory dictate, it became effective upon its adoption. Va. Const. Art. II, § 6 (1971); § 24.1-17.2(A).


It is my opinion, therefore, that any special election called by the Governor to fill a vacancy in the General Assembly occurring by resignation after September 11, 1991, must be held in the district established by Chapters 11, 16 and 20, or by Chapter 18,\(^1\) as the case may require, that most closely approximates the district under § 24.1-12.3 or § 24.1-14.2 from which the resigning member was elected.

\(^1\) Assume, for purposes of this Opinion, that the resigning delegate is one who, at the time of his resignation, is not a candidate for reelection at the 1991 general election.


\(^3\) I also assume, for purposes of this Opinion, that the General Assembly will be in recess at the time this member resigns or gives notice to the Governor of his intention to resign.

When the late Delegate Joseph Crouch from the 22nd House of Delegates District died on April 8, 1989, for example, no special election was called. His seat remained vacant for the balance of his term. Delegate Joyce K. Crouch was elected to a full two-year term from that district at the general election in November 1989. The current Governor has not issued a writ of election to fill an existing vacancy in the 2nd House of Delegates District.

\(^4\) Assume, for purposes of this Opinion, that by the time any such special election to fill a vacancy in the House of Delegates is called, Chapters 11, 16 and 20 will have been "precleared" by the United States Department of Justice, as required by § 5 of the federal Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(c) (1988). Chapters 11 and 16 were submitted for preclearance on May 17, 1991; preclearance was denied on July 16, 1991. Chapter 18 was precleared on the same date. See letters from Asst. U.S. Att'y Gen. John R. Dunne to Va. Dep. Att'y Gen. K. Marshall Cook (July 16, 1991). Chapter 20 was adopted in response to the Justice Department's objection to Chapters 11 and 16. The House of Delegates redistricting plan, as established by these three chapters, was resubmitted for preclearance today.
GAME, INLAND FISHERIES AND BOATING: LICENSES - HUNTING, TRAPPING AND FISHING LICENSES.

Virginia resident 65 years of age or older who purchases $1 license to hunt statewide required to purchase special archery and muzzleloading licenses and special license to hunt bear, deer and turkey; exempt from basic hunting or special licensing requirements when hunting on private property in county or city where hunter resides. Bonus deer permit required for all hunters, including exempt fee hunters.

September 18, 1991

The Honorable V. Elwood Mason
Clerk, Circuit Court of King George County

You ask whether a Virginia resident over sixty-five years of age who has purchased a one-dollar license to hunt statewide also is required to purchase special archery licenses, special muzzleloader licenses, special licenses for hunting bear, deer and turkey or bonus deer permits to engage in the hunting activities allowed under those special licenses. Additionally, you ask whether persons exempt from the licensing requirements under § 29.1-301 of the Code of Virginia, including Virginia residents sixty-five years of age or older who hunt on private property in the county or city in which they reside, are required to purchase those special licenses or permits to engage in the activities such licenses and permits cover.

I. Applicable Statutes

Section 29.1-300 provides:

It shall be unlawful to hunt, trap or fish in or on the lands or inland waters of this Commonwealth without first obtaining a license, subject to the exceptions set out in § 29.1-301.

Section 29.1-301 details various classes of persons for whom "[n]o [hunting or fishing] license shall be required."

Section 29.1-301(E) also provides, in part:

No license shall be required of a resident person sixty-five years of age or over to hunt or trap on private property in the county or city in which he resides. ... A resident sixty-five years of age or older may, upon proof of age satisfactory to the Department [of Game and Inland Fisheries] and the payment of a one-dollar fee, apply for and receive from any authorized agent of the Department a nontransferable annual license permitting such person to hunt or an annual license permitting such person to trap in all cities and counties of the Commonwealth.

Section 29.1-305 provides, in part:

A special license is required for hunting bear, deer and turkey in this Commonwealth, which shall be in addition to the license required to hunt other game. The fee for the special license shall be twelve dollars for a resident age sixteen or over, seven dollars and fifty cents for a resident under age sixteen and sixty dollars for a nonresident.

Section 29.1-305.1 provides, in part:
The Board [of Game and Inland Fisheries] shall establish by regulation a procedure for selling bonus deer permits. Each bonus deer permit purchased shall entitle the holder thereof to take additional deer under conditions prescribed by the Board. The cost of a bonus deer permit shall be set by the Board but shall not exceed the fee charged for the special license to hunt bear, deer and turkey, as prescribed under § 29.1-305.

The first paragraph of § 29.1-306 provides:

There shall be a license for hunting with a bow and arrow during the special archery seasons, which will be in addition to the license required to hunt small game. The fee for the special license shall be twelve dollars for a resident and twenty-five dollars for a nonresident.

Section 29.1-307 provides, in part:

There shall be a license for hunting with a muzzleloader during the special muzzleloading seasons, which shall be in addition to the license required to hunt small game. The fee for the special license shall be twelve dollars for a resident and twenty-five dollars for a nonresident.

II. Virginia Residents Age 65 or Older Hunting Statewide Not Exempt from Additional Requirements for Bear, Deer and Turkey, Archery or Muzzleloading Licenses

Unlike the various provisions in § 29.1-301 that exempt certain persons from the hunting license requirement of § 29.1-300, § 29.1-301(E) merely reduces the basic statewide hunting license fee to one dollar for residents sixty-five years of age or older.

The special license for hunting bear, deer and turkey is required "in addition to the license required to hunt other game." Section 29.1-305 (emphasis added). Since residents sixty-five years of age or older wishing to hunt statewide must have the basic small game license to hunt statewide, albeit at a reduced fee, it is my opinion that the plain language of § 29.1-305 requires them also to have the special license for hunting bear, deer and turkey. The special archery license and the special muzzleloading license likewise are required in addition to the basic statewide license. See §§ 29.1-306, 29.1-307. It is further my opinion, therefore, that residents sixty-five years of age or older must also purchase those special licenses to engage in those forms of hunting on a statewide basis.

III. Persons Exempt Under § 29.1-301 Not Required to Buy Either Basic Hunting Licenses or Special Licenses

In contrast to the reduced fee provision in § 29.1-301(E), the various exemption provisions in § 29.1-301, including the one that applies to residents sixty-five years of age or older who hunt and trap on private property in the county or city in which they reside, actually relieve persons in the exempt categories of the obligation to buy a license. Because the special licenses required by §§ 29.1-305, 29.1-306 and 29.1-307 are licenses required in addition to the basic small game license to hunt, in my opinion, they plainly are not required for those classes of residents who are exempted altogether by § 29.1-301 from hunting license requirements. Even if a Virginia resident sixty-five years or older purchases a reduced fee basic hunting license under § 29.1-301(E) to hunt statewide, therefore, he still will be exempt from all licensing requirements when hunting on private property in the county or city in which he resides.
IV. Bonus Deer Permit Under § 29.1-305.1 Required for All Hunters Including Those Exempt Under § 29.1-301

Under the statutes discussed above, the General Assembly has established requirements for both hunting permits and hunting licenses. The Department of Game and Inland Fisheries has long required permits for all hunters seeking the benefit of the permit, including exempt fee hunters. 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 Att'y Gen. Ann. Rep.: 1990 at 175, 176; 185, 187; 231, 232; 1989 at 354, 356. In my opinion, therefore, since § 29.1-301 grants exemptions only from licensing requirements, persons exempt under that section still must purchase the bonus deer permit required under § 29.1-305.1.

1 It is my understanding that the Department of Game and Inland Fisheries in prior years did not require the special license to hunt deer, bear and turkey for residents sixty-five years of age or older who had obtained the reduced fee basic statewide small game hunting license. I am advised that the Department has concluded that this practice was erroneous and, based on the above, I agree. "An erroneous construction by those charged with its administration cannot be permitted to overrule the clear mandates of a statute." 17 M.J. Statutes § 59, at 347 (Repl. Vol. 1979).

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GAME, INLAND FISHERIES AND BOATING: LICENSES - HUNTING, TRAPPING AND FISHING LICENSES.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY - TRESPASS TO REALTY - CRIMES INVOLVING HEALTH AND SAFETY - DANGEROUS USE OF FIREARMS OR OTHER WEAPONS.

Revocation only of license for activity in which second-time trespass violator involved at time of offense, not to all licenses for other activities—hunting, trapping, or fishing—held by violator.

January 9, 1991

The Honorable Phoebe M. Orebaugh

Member, House of Delegates

You ask whether § 29.1-338 of the Code of Virginia requires the revocation of all the hunting, fishing, and trapping licenses held by an individual upon his conviction of a second offense for trespassing.

I. Applicable Statutes

Article 1, Chapter 3 of Title 29.1, §§ 29.1-300 through 29.1-339.1, addresses the licenses for hunting, trapping and fishing issued by the Board of Game and Inland Fisheries. Section 29.1-338 requires the revocation of such licenses under certain circumstances, and provides:

If any person is found guilty of violating [among other things] any provisions of §§ 18.2-131 through 18.2-135 [trespass; destruction of posted signs] and §§ 18.2-285 through 18.2-287.1 [hunting while intoxicated; shooting in road or street or from vehicles; carrying loaded firearm on public highway; transporting loaded rifle or shotgun] a second time within three years of a previous conviction for violating any such law ... the license issued to such
person shall be revoked by the court trying the case and that person shall not apply for a new license until twelve months succeeding the date of conviction.

Section 18.2-136.1 currently provides that "[g]ame wardens, sheriffs and all other law-enforcement officers shall enforce the provisions of" §§ 18.2-131 through 18.2-135. You state that during the 1991 Session of the General Assembly, you intend to propose an amendment to add language to § 18.2-136.1 providing a cross-reference between § 29.1-338 and the trespass statutes in §§ 18.2-131 through 18.2-135. The proposed amendment would require the court, upon a second conviction for trespass, to "revoke the license of such person to hunt, fish, or trap in accordance with the provisions of § 29.1-338." You ask whether this proposed language in § 18.2-136.1 would mandate revocation of all the hunting, fishing, and trapping licenses held by the offender upon the conviction of the second offense of trespass. Because your proposed amendment provides that the revocation is to be effected in accordance with § 29.1-338, the relevant inquiry is whether § 29.1-338 requires revocation of all three types of licenses held by an offender, upon a second conviction.

II. Section 29.1-338 Requires Revocation of Only License for Activity Involved in Second Offense

Section 29.1-338 provides specifically that "the license issued to such person shall be revoked" upon conviction of the second offense. (Emphasis added.) This requirement is in the singular, and uses the definite article, referring to "the license," not to "any license." When there is no language in a statute that compels a different interpretation, the words in question should be given their usual meaning, including their proper grammatical effect. See Att'y Gen. Ann. Rep.: 1987-1988 at 538, 539; 1986-1987 at 53, 53-54. Based on the language of the section itself, it is my opinion that § 29.1-338 requires revocation only of the license for the activity in which the violator was involved at the time of the offense, and not to all licenses for other activities—hunting, trapping, or fishing—held by the violator.

GENERAL ASSEMBLY: GENERAL ASSEMBLY AND OFFICERS THEREOF.

Party to court proceeding represented by attorney member, officer or employee of General Assembly entitled to continuance as matter of right during the period beginning thirty days before, and ending thirty days after adjournment sine die, of special session.

April 4, 1991

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

You ask whether § 30-5 of the Code of Virginia entitles a party to a court proceeding who is represented by an attorney member of the General Assembly to obtain a continuance as a matter of right during the period beginning thirty days before, and ending thirty days after, a special session of the General Assembly.

I. Applicable Statute

Section 30-5 provides, in part, that

[any party to an action or proceeding in any court, including the Court of Appeals and the Supreme Court of Virginia, commission or other tribunal
having judicial or quasi-judicial powers or jurisdiction, who is an officer, employee or member of the General Assembly, employee of the Division of Legislative Services, or who has, prior to or during the session of the General Assembly, employed or retained to represent him in such action or proceeding an attorney who is an officer, employee or member of the General Assembly, or employee of the Division of Legislative Services, shall be entitled to a continuance as a matter of right (i) during the period beginning thirty days prior to the commencement of the session and ending thirty days after the adjournment thereof, and (ii) during a period beginning one day prior to the meeting date of any reconvened or veto session or of any committee, council, committee or subcommittee created by the General Assembly at which such officer, employee or member is scheduled to attend and ending one day after the adjournment of such meeting; provided no continuance need be granted under (ii) unless it shall have been requested at least three days prior to the first day for which such continuance is sought. Any pleading or the performance of any act relating thereto required to be filed or performed by any statute or rule during the period beginning thirty days prior to the commencement of the session and ending thirty days after the adjournment of the session shall be extended until not less than thirty days after any such session.

II. Special Session Entitles General Assembly Member to Continuance as Matter of Right Pursuant to § 30-5

The Supreme Court of Virginia has construed § 30-5 liberally, in favor of the right of legislators and their clients to obtain continuances and extensions of filing deadlines. See, e.g., Rice v. Commonwealth, 212 Va. 778, 779, 188 S.E.2d 196 (1972) (criminal defendant represented by member of House of Delegates entitled to continuance as matter of right; failure of trial court to grant constitutes reversible error); Howell v. Catterall, 212 Va. 525, 527, 186 S.E.2d 28, 30 (1972) (section held applicable to proceedings before State Corporation Commission even when Commission performs legislative function; Lieutenant Governor entitled to request continuance as officer of Senate).

Prior Opinions of this Office applying § 30-5 likewise generally have construed it in favor of the right to extensions and continuances. See Att'y Gen. Ann. Rep.: 1965-1966 at 28 (time for payment of writ tax and costs on civil appeal from general district court to circuit court extended to thirty days after legislative session); 1961-1962 at 121 (delegate allowed to file responsive pleading within thirty days following session); id. at 120 (when thirtieth day after adjournment of session falls on Sunday, pleading may be filed next day); 1959-1960 at 191 (thirty-day period begins to run on day following adjournment sine die). Compare 1971-1972 Att'y Gen. Ann. Rep. 212 (continuance not available under section for hearing before District Committee of Virginia State Bar).

At least one such prior Opinion applies § 30-5 to extend filing dates in a situation involving a special session of the General Assembly. 1965-1966 Att'y Gen. Ann. Rep. 28. The Supreme Court of Virginia also has held that § 30-5 operated to extend the time for filing an appeal, in a case where the appellants were represented by a member of the Senate of Virginia, to thirty days after the adjournment of a special session. Hartsock v. Powell, 199 Va. 320, 321-22, 99 S.E.2d 581, 583 (1957).

In a more recent case, the Court rejected an appeal filed by an attorney legislator that was originally due to be filed within the thirty days following adjournment of a regular session, but before the convening of a one-day special session. Upshur v. Haynes Furniture Co., 228 Va. 595, 324 S.E.2d 653 (1985). The appeal was filed less than thirty days after the one-day special session, but thirty-nine days after the regular session. Noting that § 30-5 did not, at that time, provide for the extension of filing dates for matters
required to be filed before a session, the Court rejected the contention that the deadline was extended to thirty days after the special session. In so doing, however, the Court stated that, "[f]or purposes of this opinion, we accept plaintiff's contention that Code § 30-5 'makes no distinction between regular and special sessions'." Upshur, 228 Va. at 597, 324 S.E.2d at 654.

Based on the above, it is my opinion that § 30-5 entitles a party to a court proceeding who is represented by an attorney member, officer or employee of the General Assembly to a continuance as a matter of right, during the period beginning thirty days before a special session is convened and ending thirty days after the special session is adjourned sine die.

1Following the decision in Upshur, the General Assembly amended § 30-5 to grant both filing date extensions and continuances before and after legislative sessions. Ch. 192, 1987 Va. Acts 260 (Reg. Sess.).

HEALTH: DEPARTMENT OF MEDICAL ASSISTANCE SERVICES.

PROFESSIONS AND OCCUPATIONS: PROFESSIONAL COUNSELING — SOCIAL WORK — MEDICINE AND OTHER HEALING ARTS — PSYCHOLOGY.

Physicians' services, eligible for Medicaid payments, include services of licensed clinical social workers when provided under direct personal supervision of physician with requisite psychiatric training; no similar extension of coverage for services of licensed professional counselors. Physicians providing psychiatric services to patients eligible for Medicaid may not include in billings under Medicaid contracts services provided by licensed professional counselors.

May 10, 1991

The Honorable J. Granger Macfarlane
Member, Senate of Virginia

You ask whether a licensed physician with three years of postgraduate residency training in psychiatry is permitted, under the terms of his Medicaid provider contract, to bill for services provided to a Medicaid-eligible patient by a licensed professional counselor on the physician's staff. You state that the counselor will provide these services under the personal supervision of the physician, and as part of the treatment program prescribed by the physician for the Medicaid patient.

I. Applicable Statutes and Administrative Policies

A. Federal Statutes

Part of Title XIX of the Social Security Act provides that state Medicaid programs shall make payment for "physicians' services." 42 U.S.C.A. § 1396d(a)(5)(A) (Supp. 1991). Federal regulations define "physicians' services" as services "within the scope of practice of medicine." 42 C.F.R. § 440.50 (1990). Further definition of these terms is left to the laws of the respective states.

B. State Statutes

State statutes define the scope of practice for all of the several classes of professionals relevant to your inquiry.
Section 54.1-2900 of the Code of Virginia defines the "practice of medicine" as "the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities ...."

Section 54.1-3600 defines a "clinical psychologist" as one "who is competent in the diagnosis, prevention, treatment and amelioration of psychological problems, behavioral or emotional disorders or conditions or mental conditions ...."

Section 54.1-3700 defines a "clinical social worker" as one "who, by education and experience, is professionally qualified at the autonomous practice level to provide direct diagnostic, preventive and treatment services where functioning is threatened or affected by social and psychological stress or health impairment."

Section 54.1-3500 defines a "professional counselor" as a person who assists individuals in "achieving more effective personal, social, educational and career development and adjustment."

Chapter 10 of Title 32.1, §§ 32.1-323 through 32.1-331.11, establishes the Department of Medical Assistance Services ("DMAS") and designates it as the agency to administer the Virginia Medicaid program. Section 32.1-325 directs DMAS to prepare a "state plan" for medical assistance services, and to submit that state plan and any amendments to the Secretary of the United States Department of Health and Human Services (the "Secretary"). Section 32.1-325(C) authorizes DMAS to execute contracts with "medical care facilities, physicians, dentists and other health care providers" to implement the state plan. Section 32.1-325(C) also contains the following specific requirement for DMAS to contract with psychologists:

When the services provided for by such plan are services which a clinical psychologist is licensed to render in Virginia, the Director of DMAS shall contract with any duly licensed clinical psychologist who makes application to be a provider of such services, and thereafter shall pay for covered services as provided in the state plan.

C. DMAS Plan and Policies

The State Plan Under Title XIX of the Social Security Act Medical Assistance Program (the "State Plan"), promulgated for Virginia by DMAS and approved by the Secretary, includes psychiatric services within the definition of covered services for which DMAS will make payment to physicians and clinical psychologists. Id. Supp. 1, Attch. 3.1 A & B, at 6, 7, 9. DMAS also publishes and distributes to its contracting physicians a policy manual that explains its regulations, policies and procedures for the Medicaid programs. See Physician Medicaid Manual (Jan. 1988) (the "Medicaid Manual"). This manual provides that payment for psychiatric services furnished by a physician is limited to services provided by the physician personally, or by a licensed clinical social worker working directly under the supervision of the physician.

II. Physician May Not Bill Medicaid for Services Provided by Licensed Professional Counselor

The definition of physicians' services eligible for Medicaid payments in applicable federal statutes and regulations does not require the inclusion of services provided by a licensed professional counselor under a physician's supervision. The federal definitional provisions, however, allow the state, by statute or regulation, to provide more specific definitions of eligible physicians' services. 42 U.S.C.A. § 1396d(a)(5)(A); 42 C.F.R. § 440.50.
Section 32.1-325(C) specifically requires the inclusion of services provided by clinical psychologists within Virginia's definition of physicians' services, but does not make any similar reference to either clinical social workers or professional counselors. The inclusion of one item in a statute implies the exclusion of other things. See Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); see also 1990 Att'y Gen. Ann. Rep. 175, 176. A comparison of §§ 54.1-2900 and 54.1-3600 with §§ 54.1-3500 and 54.1-3700 makes it clear that licensed professional counselors and clinical social workers provide services that differ substantially from one another, and from the services of physicians or clinical psychologists.

By adopting the provisions of the Medicaid Manual, DMAS has extended the statutory definition of physicians' services covered by the State Plan to include the services of licensed clinical social workers, when they are provided under the direct personal supervision of a physician with the requisite psychiatric training, but has made no similar extension of coverage for the services of licensed professional counselors. In the absence of a clear statutory definition, the interpretation given a provision by the 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.

It is my opinion, therefore, that physicians providing psychiatric services to patients eligible for Medicaid may not include in billings under their Medicaid contracts services provided by licensed professional counselors, even when those services are prescribed by, and performed under the personal supervision of, the physicians themselves.

1 The Medicaid Manual also provides that psychiatric services include "[s]ervices performed by a licensed physician who has completed at least three years of postgraduate residency training in psychiatry," and "[s]ervices of a licensed clinical social worker provided under the direct, personal supervision of a licensed physician who has completed three years of postgraduate residency training in psychiatry and when billed by the physician as physician services." Id. Ch. IV, at 17.


3 DMAS has a statutory basis for this differing treatment. "Clinical social worker[s]," as defined by § 54.1-3700, are qualified to perform "diagnostic, preventive and treatment services" more clearly analogous to medical or psychiatric services than the services that professional counselors are licensed to provide. Compare § 54.1-3500.

INSURANCE: ASSESSMENT FOR ADMINISTRATION OF INSURANCE LAWS AND DECLARATIONS OF ESTIMATED ASSESSMENTS BY INSURERS.

CONSERVATION: FLOOD PROTECTION AND DAM SAFETY - FLOOD PREVENTION AND PROTECTION ASSISTANCE FUND.

State Corporation Commission may require company that issues flood insurance policies only under National Flood Insurance Act to pay $100 statutory minimum annual assessment. Commissioner of Insurance interpretation of statutory language that all companies licensed to write flood insurance in Virginia, including those issuing NFIA policies, subject to assessment.

April 12, 1991
You ask whether the State Corporation Commission (the "Commission") may require an insurance company that issues flood insurance policies only under the National Flood Insurance Act of 1968 to pay a $100 minimum annual assessment into the Virginia Flood Prevention and Protection Assistance Fund pursuant to § 38.2-401.1 of the Code of Virginia.

I. Applicable Statute

Section 10.1-603.17 establishes the Flood Prevention and Protection Assistance Fund (the "Fund"). Section 10.1-603.19 provides that the Fund shall be used to make grants or loans to local government entities for flood prevention or protection studies and projects.

Section 38.2-401.1 provides:

The Commission shall annually assess against all licensed insurance companies doing business in this Commonwealth by writing any type of flood insurance an assessment in the amount of one percent of the total direct gross premium income for such insurance. . . . In any year in which a company has no direct gross premium income from flood insurance or in which its direct gross premium income from flood insurance is insufficient to produce at the rate of assessment prescribed by law an amount equal to or in excess of $100, there shall be so apportioned and assessed against such company a contribution of $100. . . . The assessment established by this section shall not apply to premium income for policies written pursuant to the National Flood Insurance Act of 1968. . . .

Section 38.2-137 defines "flood insurance" as "insurance against loss or damage to any property caused by flooding or the rising of the waters of the ocean or its tributaries."

II. No Exemption from Statutory Minimum Contribution for Insurers Issuing Policies Under National Flood Insurance Act

By its plain language, § 38.2-401.1 requires that the Commission levy an annual assessment against all insurance companies licensed to do business in the Commonwealth that write "any type of flood insurance." The section contains no provision that exempts any such company from the obligation to pay an assessment, merely because the company writes policies pursuant to the National Flood Insurance Act of 1968, 42 U.S.C.A. §§ 4001-4128 (West 1977 & Supp. 1990) ("NFIA"). The stated exemption in § 38.2-401.1 applies only to exclude a company's premium income attributable to its NFIA policies from the calculation of gross receipts on which the company's § 38.2-401.1 assessment is based.

The statutory language of § 38.2-401.1 also plainly indicates that it is not necessary for a company actually to have had premium income for writing flood insurance to be subject to an assessment, because it provides that a company that has had no direct gross premium income from flood insurance in a given year—or such small premium income that its calculated assessment does not equal or exceed $100—still shall be assessed a mandatory minimum $100 "contribution."

Based on this statutory language, the Commissioner of Insurance has concluded that all companies licensed to write flood insurance in Virginia, including those that write...
only NFIA policies, are subject to the $100 minimum annual assessment. See memo. from Commissioner of Insurance Steven T. Foster to All Property and Casualty Insurers Authorized by Licensure to Write Flood Insurance or Any Other Line of Insurance Which Provides Such Coverage (Dec. 1, 1990). It is a recognized principle of statutory construction that the interpretation given to a statute by the state agency charged with its implementation and enforcement is entitled to great weight. Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); 1989 Att'y Gen. Ann. Rep. 354, 356. Furthermore, the General Assembly is presumed to acquiesce in an agency's interpretation which continues without legislative alteration. Peyton v. Williams, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965).

While the General Assembly could have exempted insurers that write only flood insurance policies pursuant to NFIA from any assessment obligation imposed by § 38.2-401.1, it is my opinion, based on the above, that it has not done so and, therefore, that the Commission may require a company that issues flood insurance policies only under NFIA to pay the $100 minimum annual assessment.

INSURANCE: ASSESSMENTS AND DECLARATIONS BY INSURERS.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

Volunteer fire companies provide public benefit, making them eligible to receive county's statutorily prescribed Fire Program Fund allocation. County may use Fund allocation to make interest free loans to its eligible volunteer fire companies on revolving basis prescribed by loan guidelines adopted by county's board of supervisors; loans to be used for statutorily authorized fire-fighting equipment purchases.

November 5, 1991

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

You ask whether Augusta County (the "County") may use funds it receives from the Fire Programs Fund under § 38.2-401 of the Code of Virginia to create a revolving loan program that makes matching interest free loans to volunteer fire companies for purchasing fire-fighting equipment. The County board of supervisors has adopted written policy guidelines for the program specifying that these loans may be made only for assistance in purchasing fire-fighting equipment and requiring that the loan application describe and justify the equipment's intended use. The loans are repayable in equal installments over a ten-year period and may not exceed $100,000 per voluntary company or combination of companies annually. Major Revolving Apparatus and/or Equipment Loan Fund for Augusta County Volunteer Fire Departments, adopted May 24, 1988 (the "Loan Guidelines").

I. Applicable Statutes

Section 38.2-401(A) establishes a Fire Programs Fund (the "Fund") administered by the Department of Fire Programs (the "Department") under policies established by the Virginia Fire Services Board (the "Board"). The Fund is maintained through annual assessments paid by insurers writing fire, marine, homeowners, farmowners or miscellaneous property insurance. Under § 38.2-401(B), seventy-five percent of the annual collections from insurers are allocated to localities "for the improvement of volunteer and salaried fire services." Section 38.2-401(B) further specifies that these locally allocated funds "shall not be used directly or indirectly to supplant or replace" any other funds.
appropriated locally for fire service operations and "shall be used solely for the purposes of fire service training, constructing, improving and expanding regional or local fire service training facilities, purchasing fire-fighting equipment or purchasing protective clothing and protective equipment for fire-fighting personnel."

II. County May Distribute Allocations from Fund Through Interest Free Revolving Loan Program for Equipment Purchases

The only restrictions imposed by § 38.2-401(B) on local governments' use of their allocations from the Fund are that they not be used to supplant local appropriations,¹ and that they be spent for one of four purposes--fire-fighter training, construction of fire training facilities, purchasing protective clothing and protective equipment for fire-fighting personnel, or purchasing fire-fighting equipment. Nothing in § 38.2-401 expressly restricts a locality from distributing its Fund allocation to its volunteer fire companies for one or more of these statutory purposes in the form of loans rather than grants.

As directed by § 38.2-401(A) (formerly § 38.1-44.1), the Board has adopted policies for the administration of the Fund. Va. Fire Serv. Bd., Dept of Fire Programs, Policies for the Administration of the Fire Program's [sic] Fund (Oct. 4, 1985) ("Fund Policies"). Section 3.2 of the Fund Policies provides that money from the Fund received by localities must be used for the statutory purposes set out in § 38.2-401 and that "[t]o this end, the money received by the locality may be disbursed to the fire department, if one has been established, and/or may be divided among the fire companies operating in that locality as the locality deems appropriate." Id. at 3. Localities receiving funds are required to provide information reporting how funds are spent. See id. app. D at 20.

As with § 38.2-401 itself, nothing in the Fund Policies clearly prohibits the County from using its allocation from the Fund to make loans, as opposed to grants, for volunteer companies to purchase fire-fighting equipment. While the Fund Policies do not actually mention such loans, they do provide in § 3.9 that unspent Fund allocations may be carried over by the recipient locality from year to year or in anticipation of a permissible purchase, and that if Fund monies are placed in an interest bearing account, the locality must use the interest for a purpose authorized by § 38.2-401(B). Id. at 6. The operation of the County's loan program is consistent with these provisions of the Fund Policies.

The Loan Guidelines require that loan proceeds be used only for purchasing fire-fighting equipment, one of the uses expressly authorized in § 38.2-401. By establishing the loan program on a "revolving" basis, the County has ensured that, as loans are repaid, the Fund monies will again be expended for this statutorily approved purpose. This maximizes the benefit from the Fund and, thus, is consistent with the legislative intent apparent in § 38.2-401.

Based on the above, it is my opinion that the County may use its allocation from the Fund to make interest free loans to eligible volunteer fire companies in the County on the revolving basis prescribed in the County's Loan Guidelines, as long as those loans are used by the volunteer companies for equipment purchases authorized under § 38.2-401(B).²

¹While your request does not address this issue, I assume for purposes of this Opinion that the County's loan program is not being used to supplant funds previously appropriated by the County.

²In certain circumstances, a loan of public funds to a private entity may violate the "credit clause" in Article X, § 10 of the Constitution of Virginia (1971). When the animating purpose of the loan and the object it is designed to accomplish are for the public
benefit, however, there is no unconstitutional lending of the public credit, even though private interests might receive an incidental benefit. See City of Charlottesville v. DeHaan, 228 Va. 578, 585-86, 323 S.E.2d 131, 134-35 (1984); see also 1990 Att'y Gen. Ann. Rep 51, 53 (underlying constitutional premise of credit clause is that public funds only may be expended for public purposes). Unquestionably, volunteer fire companies provide a public benefit. The General Assembly has recognized that fact by making volunteer companies eligible recipients of a locality's Fund allocation under § 38.2-401(B). The "animating purpose" of the County's loan program is to maximize that public benefit by having the public expenditures from the Fund periodically repaid from private sources and then re-expended as new loans.

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INSURANCE: LIFE INSURANCE — LIFE INSURANCE POLICIES — PROVISIONS RELATING TO INSURANCE POLICIES AND CONTRACTS.

Virginia resident who purchases life insurance policy on own life may designate charitable organization as beneficiary of policy. Purchase and subsequent assigned ownership of policy to charity must be for purpose other than mere assignment; assignment does not create insurable interest in insured's life. Heirs and estate of insured, if not named beneficiaries, have no claim to benefits of such policy.

June 27, 1991

The Honorable G. Steven Agee
Member, House of Delegates

You ask several questions concerning the validity of a Virginia resident's purchase of an insurance policy on his own life and assignment of that policy to a charity qualified as exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code ("I.R.C.").

I. Applicable Statutes

Section 38.2-301 of the Code of Virginia provides:

A. Any individual of lawful age may procure or effect an insurance contract upon himself for the benefit of any person. No person shall knowingly procure or cause to be procured any insurance contract upon another individual unless the benefits under the contract are payable to: (i) the insured or his personal representative, (ii) a beneficiary designated by the insured, or (iii) a person having an insurable interest in the insured at the time when the contract was made.

B. . . . "[I]nsurable interest" means:

* * *

2. [Inter alia] a lawful and substantial economic interest in the life, health, and bodily safety of the insured. 'Insurable Interest' shall not include an interest which arises only or is enhanced by the death, disability or injury of the insured . . . .

Section 38.2-3111 provides:
No life insurance policy shall be taken out by the insured or by a person having an insurable interest in the insured's life for the mere purpose of assignment. A policy may be assigned whether or not the assignee has an insurable interest in the life insured unless the policy provides otherwise.

With specific regard to a group life insurance policy, § 38.2-3337 provides:

With mutual agreement among the insured, the policyholder, and the insurer, any person insured under a group life insurance policy may make an irrevocable assignment of the rights and benefits ... of the policy .... The assignment may be made to any person other than the insured's employer.

Section 38.2-100 includes in the definition of "person," as used in Virginia insurance statutes, "any association, aggregate of individuals, business, company, corporation, individual ... organization ... trustee or society."

II. Virginia Resident May Purchase Life Insurance on Own Life and Designate Charitable Organization as Beneficiary

Each of your questions is based on a hypothetical example concerning a Virginia resident ("A") who intends to purchase a life insurance policy on his own life and name as the sole beneficiary of that policy a charity that qualifies for federal income tax exemption under I.R.C. § 501(c)(3) (1988). A, who has been engaged by the charity as an independent contractor and has made contributions to the charity in the past, also intends irrevocably to assign ownership of the policy to the charity. A plans, however, to continue paying all future policy premiums.

You ask first whether, under Virginia law, A may designate the charity as the beneficiary of the life insurance policy. While a number of states require that the beneficiary of a life insurance policy have an "insurable interest" in the life of the insured, the prevailing rule is that, in the absence of a statute to the contrary, a person competent to enter into a contract has an insurable interest in his own life and, of his own accord, may effect a valid insurance policy on his life, pay the required premiums, and make the policy payable at his death to a third person who has no insurable interest in the insured's life. 3 George J. Couch, Cyclopedia of Insurance Law §§ 24:116, 24:117 (rev. 2d ed. 1984).

Virginia law conforms to this majority view. By its plain language, § 38.2-301 authorizes an individual to purchase a life insurance policy upon his own life for the benefit of any person. A charitable organization qualifying as tax exempt under I.R.C. § 501(c)(3) clearly meets the definition of a "person" under § 38.2-100. It is my opinion, therefore, that an individual purchasing a life insurance policy on his own life in Virginia may designate such a charitable organization as the beneficiary of the policy.

III. Life Insurance Policy May Be Assigned to Charity but Assignment Does Not Create Insurable Interest

You also ask whether, in your hypothetical example, A's assignment of the life insurance policy on his own life to the charity would be valid, and whether the charity would acquire an "insurable interest" if A assigns ownership of the policy to the charity when the policy is issued.

Early Virginia cases required the assignee of a life insurance policy to have an insurable interest in the life of the insured. Crismond v. Jones, 117 Va. 34, 37, 83 S.E. 1045, 1046 (1915); Tate v. Building Ass'n., 97 Va. 74, 33 S.E. 382 (1889); Roller v. Moore's Adm'r., 86 Va. 512, 10 S.E. 241 (1889).
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More recently, however, based on statutory provisions changing the common law rule, Virginia has held that a life insurance policy, taken out by the insured or by a person having an insurable interest in the life of the insured, may be assigned to any person without regard to whether the assignee has an insurable interest in the life of the insured. *Bryant v. Continental Life Ins. Co.*, 168 Va. 585, 593, 192 S.E. 581, 584 (1937) (interpreting Va. Code § 5767 (1936), predecessor statute to § 38.2-3111).

Section 38.2-3111, which generally authorizes assignment of a life insurance policy, nevertheless includes a limitation that "[n]o life insurance policy shall be taken out ... for the mere purpose of assignment." Your second question, therefore, requires a determination whether the life insurance policy has been purchased for the "mere" purpose of assigning it to another person.¹

In the hypothetical example you pose, A intends to purchase insurance on his own life and designate a particular charity the beneficiary of the policy. One purpose for A's purchase of the life insurance policy appears to be the making of an investment, the proceeds of which will benefit the designated charity when A dies. However, A also intends to assign ownership of the policy to the charity when the policy is issued, presumably so that A will realize a tax benefit as the result of making a charitable gift. Under these circumstances, it is my opinion that A's purchase and subsequent assignment of the policy would be valid because A would purchase the policy for a purpose other than "mere" assignment to the charity. Because § 38.2-301 makes it clear that the charity does not need to have an insurable interest in order to be the assignee of A's policy, it is not necessary to address your question whether the charity has an insurable interest in A's life.

IV. Insured's Heirs and Estate Have No Claim to Proceeds of Insurance Policy Properly Assigned to Charity

Your final question concerns whether A's heirs or estate would have any claim to the benefits of the insurance policy purchased by A, of the assignment of the policy to the charity or of the charity's lack of an insurable interest in A's life.

The statutes discussed above permit an individual (1) to insure his own life, provided he has not purchased insurance for the mere purpose of assignment, (2) to designate "any person," which may include a charitable organization, as the policy beneficiary, and (3) to assign the life insurance policy regardless of whether the assignee has an insurable interest in the insured's life, unless the policy provides otherwise. See §§ 38.2-100, 38.2-301, 38.2-3111, 38.2-3337. In my opinion, therefore, A's heirs and estate, if not named beneficiaries, would have no claim to the benefits of a life insurance policy that A has purchased in good faith and properly assigned to a charitable organization.

¹Section 38.2-3337 provides that, with the agreement of the policyholder and the insurer, an insured under a group life insurance policy irrevocably may assign his rights and benefits "to any person other than the insured's employer." Section 38.2-3337 contains no limitation comparable to that in § 38.2-3111. Your hypothetical facts do not indicate, however, that the benefit to be assigned by A would be under a group policy.

MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL.

Law-enforcement officer required to find probable cause to take custody of person believed to be mentally ill and in need of hospitalization without emergency custody order issued by judge or magistrate. Probable cause to believe person needs hospitalization must exist before person taken into custody; person must be taken into custody
before psychiatric evaluation performed. Evaluator designated by community services board may conduct evaluation at person's residence.

March 29, 1991

The Honorable Roland L. Oates
Sheriff for the City of Fredericksburg

You ask two questions concerning when § 37.1-67.1 of the Code of Virginia authorizes a law-enforcement officer to take a person into custody without an emergency custody order issued by a judge or magistrate.

I. Applicable Statute

Section 37.1-67.1 establishes a procedure for a judge or magistrate, upon finding probable cause that a person is mentally ill and in need of hospitalization, to issue an emergency custody order requiring the person to be taken into custody for evaluation of the need for hospitalization. In addition, § 37.1-67.1 provides that

[a] law-enforcement officer who, based upon his observation or the reliable reports of others, has probable cause to believe that any person is mentally ill and in need of emergency evaluation for hospitalization, may take that person into custody and transport him to an appropriate location to assess the need for hospitalization without prior judicial authorization. Such evaluation[1] shall be conducted immediately.

In all such cases, whether the person is taken into custody pursuant to judicial order or on the law-enforcement officer's finding of probable cause, § 37.1-67.1 further provides that "[t]he person shall remain in custody until a temporary detention order is issued or until the person is released but in no event shall the period of custody exceed four hours."

II. Officer Required to Find Probable Cause Before Taking Person into Custody Without Emergency Custody Order

You first ask whether § 37.1-67.1 authorizes a law-enforcement officer to take a person into custody without an emergency custody order, based on a telephone request from a third party, when the officer has no personal knowledge of the person's prior medical or mental history. By its plain language, § 37.1-67.1 clearly authorizes officers to take into temporary custody a person who the officer has probable cause to believe is mentally ill and in need of emergency evaluation. The officer's finding of probable cause may be "based upon his observation or the reliable reports of others." Section 37.1-67.1.

Detention and commitment for mental illness, though civil in nature, involve a significant deprivation of personal liberty and are subject to constitutional safeguards analogous to those governing arrest and detention on criminal charges. See Addington v. Texas, 441 U.S. 418, 425 (1979); 1983-1984 Att'y Gen. Ann. Rep. 235, 236. A law-enforcement officer's taking a person into temporary custody pursuant to § 37.1-67.1 without a prior judicial determination of probable cause, therefore, is analogous to the making of a warrantless arrest, and requires a comparable finding of probable cause.

Probable cause exists for a warrantless arrest on a felony charge if, at the moment the accused is taken into custody, the arresting officer has knowledge of sufficient facts and circumstances to warrant a reasonable person to believe that the felony has been committed. See Bryson v. Commonwealth, 211 Va. 85, 86-87, 175 S.E.2d 248, 250 (1970); Carter v. Commonwealth, 9 Va. App. 310, 312, 387 S.E.2d 505, 506 (1990). In felony
cases, actual knowledge or observation by the arresting officer is not required; he may base his determination of probable cause on both those facts and circumstances within his own knowledge and those of which he has reasonably trustworthy information. 


As with warrantless arrests, probable cause for temporary detention under § 37.1-67.1 may be based either on the law-enforcement officer's direct observation of the detained person or on the receipt of reliable and credible information provided to the officer by others. When a person is taken into custody on the basis of information provided by a telephone informant, the existence of probable cause depends on the facts and circumstances surrounding the call. See Draper v. United States, 358 U.S. 307 (1959). If the telephone informant is anonymous or provides no facts which could form a basis for a reasonable belief that the subject of the call is mentally ill and in need of hospitalization, the officer would not have probable cause. On the other hand, if the informant identifies himself, is known to the officer to be a reliable person, and provides detailed facts that provide a basis for a reasonable belief that the person about whom the informant is calling is mentally ill and in need of hospitalization, probable cause is established. Although the officer's knowledge of the person's prior medical or mental history may be a factor in determining the presence of probable cause, it is not an absolute requirement. 

"[W]hen an officer receives from a known reliable informant a report that a felony is being committed that is so detailed as to raise an inference either of personal observation or of acquisition of the information in a reliable way then the officer has probable cause to arrest ..." McKoy v. Commonwealth, 212 Va. 224, 227, 183 S.E.2d 153, 156 (1971); see also Spinelli v. United States, 393 U.S. 410 (1969).

III. Evaluation at Person's Home of Need for Hospitalization Not Precluded by § 37.1-67.1

You next ask whether a law-enforcement officer may have a person being considered for temporary detention under § 37.1-67.1 evaluated at the person's home for the need for hospitalization.

Section 37.1-67.1 requires events surrounding a temporary detention to take place in a prescribed sequence. Probable cause to believe that the person needs hospitalization must exist before the person is taken into custody, and the person must be taken into custody before an evaluation of the need for hospitalization can be performed. The court's or law-enforcement officer's finding of probable cause necessarily will precede the psychiatric evaluation and, therefore, also will precede a decision about where that evaluation will be conducted.

Under § 37.1-67.1, a law-enforcement officer is permitted to "transport [the person] to an appropriate location to assess the need for hospitalization." Evaluation at the person's home, however, is not precluded. It is my opinion, therefore, that, once an officer receives a temporary detention order from a court or magistrate, or determines, based on his own observation and reliable information provided by others, that probable cause exists for temporary detention and evaluation of a particular person, the officer may, when it is practicable, arrange with the evaluator designated by the community services board to conduct the evaluation at the person's residence, or may transport the person to another appropriate location for conduct of the evaluation.

1 The evaluation of the need for hospitalization must be conducted by "a person designated by the community services board who is skilled in the diagnosis and treatment of mental illness." Section 37.1-67.1.
This type of reliable, detailed information provided to the officer, coupled with the officer's own observation of the person after responding to the call, corroborating the details provided, would constitute the strongest evidence of probable cause. Draper v. United States, 358 U.S. at 312-13.

MOTOR VEHICLES: DEPARTMENT OF MOTOR VEHICLES — TITLING AND REGISTRATION OF MOTOR VEHICLES.

Official written statements, records or reports prepared by public officials pursuant to statutory duty admissible in evidence as exception to hearsay rule, provided admitted record relates to facts or events within knowledge and observation of recording official. Electronically transmitted transcript of motor vehicle record from Department of Motor Vehicles properly authenticated by machine imprint admissible as evidence of vehicle ownership. Certificate of license plate number furnished under seal of Department provides prima facie evidence of ownership of vehicle to which license plate assigned.

March 28, 1991

The Honorable J. Allen Walker
Judge, Loudoun County General District Court

You ask whether an electronically transmitted transcript of a motor vehicle record from the Department of Motor Vehicles, certified by means of a machine imprint as authorized pursuant to § 46.2-215 of the Code of Virginia, is admissible in evidence to prove ownership of the vehicle in light of the provisions of § 46.2-213, which appear to require that a certificate of license plate number evidencing vehicle ownership be furnished "under seal of the Department."

I. Applicable Statutes

Section 46.2-213 provides:

The Commissioner [of the Department of Motor Vehicles], on request of any person, shall furnish a certificate, under seal of the Department, setting forth a distinguishing number or license plate of a motor vehicle, trailer, or semitrailer, together with the name and address of its owner. The certificate shall be prima facie evidence in any court in the Commonwealth of the ownership of the vehicle to which the distinguishing number or license plate has been assigned by the Department. Certificates furnished under this section shall be provided free of charge to law-enforcement officers of the Commonwealth, any other state, or the federal government, but the Commissioner may charge a reasonable fee for certificates furnished under this section to other persons.

Section 46.2-215 provides:

Whenever any record, including records maintained by electronic media, by photographic processes, or paper, in the office of the Department is admissible in evidence, a copy, a machine-produced transcript, or a photograph of the record or paper attested by the Commissioner or his designee may be admitted as evidence in lieu of the original. In any case in which the records are transmitted by electronic means a machine imprint of the Commissioner's name purporting to authenticate the record shall be the equivalent of attestation or certification by the Commissioner.
Any copy, transcript, photograph, or any certification purporting to be sealed or sealed and signed by the Commissioner or his designee or imprinted with the Commissioner's name may be admitted as evidence without any proof of the seal or signature or of the official character of the person whose name is signed thereto. If an issue as to the authenticity of any information transmitted by electronic means is raised, the court shall require that a record attested by the Commissioner or his designee be submitted for admission into evidence.

II. Vehicle Records Certified by Machine Imprint Pursuant to § 46.2-215 Admissible

In *Ingram v. Commonwealth*, 1 Va. App. 335, 338 S.E.2d 657 (1986), the Court of Appeals of Virginia held that Department of Motor Vehicles records properly authenticated pursuant to § 46.1-34.1 (present § 46.2-215) are admissible in evidence as an exception to the hearsay rule because they are official written statements, records or reports prepared by public officials pursuant to a duty imposed by statute, provided the fact to be proved by an admitted record relates to facts or events within the knowledge and observation of the recording official. In the facts you present, the transcript of a vehicle record would be introduced to demonstrate ownership of the vehicle as shown by titling and registration information on file at the Department of Motor Vehicles. Such titling and registration information would be within the knowledge and observation of the Commissioner of the Department of Motor Vehicles, because issuance of motor vehicle title and registration certificates to vehicle owners is one of the specific statutory duties of the Department. See §§ 46.2-200, 46.2-600, 46.2-603. It is my opinion, therefore, that a vehicle transcript of record properly authenticated by machine imprint pursuant to § 46.2-215 is admissible in evidence to prove ownership of a vehicle.

III. Certificate of License Plate Number Furnished Under Seal of Department of Motor Vehicles Pursuant to § 46.2-213 Admissible and Constitutes Prima Facie Evidence of Vehicle Ownership

The effect of § 46.2-213 is not to limit the admissibility of a vehicle transcript of record authenticated pursuant to § 46.2-215, but to provide an additional evidentiary effect to a vehicle record which satisfies the requirements of § 46.2-213 because it is furnished "under seal of the Department." A certificate of license plate number furnished "under seal of the Department" is not merely admissible, but is prima facie evidence of ownership of the vehicle to which the license plate has been assigned. Section 46.2-213.

"Prima facie evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted. It imports that the evidence produces for the time being a certain result, but that the result may be repelled." *Babbitt v. Miller*, 192 Va. 372, 379-80, 64 S.E.2d 718, 722 (1951). Vehicle records satisfying the requirements of § 46.2-213 because they are furnished under seal constitute prima facie evidence of vehicle ownership. Vehicle records properly authenticated pursuant to § 46.2-215, but not furnished under seal, do not. Both records, however, are admissible as evidence of ownership.

**MOTOR VEHICLES: LICENSURE OF DRIVERS - HABITUAL OFFENDERS.**

Basing habitual offender determination on conviction for grand larceny or unauthorized use of motor vehicle requires evidence that offense one in which motor vehicle run, operated or driven by defendant.

June 4, 1991
The Honorable Robert J. Humphreys  
Commonwealth's Attorney for the City of Virginia Beach

You ask whether convictions for grand larceny of a motor vehicle and for unauthorized use of a motor vehicle valued in excess of $200 are among the convictions that subject a person to being declared an habitual offender under § 46.2-351(1)(e) of the Code of Virginia, a part of Article 9, Chapter 3 of Title 46.2, §§ 46.2-351 through 46.2-363, entitled "Habitual Offenders."

I. Applicable Statute

Section 46.2-351(1) details the convictions that form the basis for declaring an individual to be an habitual offender, including "[a]ny offense punishable as a felony under the motor vehicle laws of Virginia or any felony in the commission of which a motor vehicle is used." Section 46.2-351(1)(e) (emphasis added).

II. Grand Larceny and Unauthorized Use Not Automatically Basis for Habitual Offender Determination but Included Among Offenses on Which Habitual Offender Determination May Be Based

In Lamb v. Driver, 196 Va. 393, 83 S.E.2d 741 (1954), the Supreme Court of Virginia considered the revocation of an individual's driver's license under former § 46-416(4) (now § 46.2-389(5)), following a conviction for grand larceny of an automobile. Although Lamb was not an habitual offender case, the statutory language applied in that decision concerns the use of a motor vehicle during the commission of a felony and is virtually identical to the language in § 46.2-351(1)(e).

The Court concluded in Lamb that the purpose of § 46.2-389(5) is "to remove from the highways those drivers who endanger the public and who operate motor vehicles in the perpetration of serious crimes." 196 Va. at 396, 83 S.E.2d at 743. The Court held, therefore, that "used," the key word in § 46.2-389(5), "[i]n this context ... means that the person whose license is sought to be revoked 'operated,' 'drove,' or 'ran' a motor vehicle in committing a felony." Id. at 396, 83 S.E.2d at 743-44. The Court concluded, however, that there was no evidence in the case to show the defendant had "operated" the vehicle while committing the larceny. "Simply because an automobile was stolen, it does not necessarily follow that it or any other motor vehicle has been run, operated or driven, and thus 'used' in effecting the crime." Id. at 397, 83 S.E.2d at 744.

Courts in other jurisdictions have been less restrictive and upheld the revocation of licenses in cases where the motor vehicle was an integral part of the crime. Citing the remedial purpose of the revocation statutes, these courts have employed a standard that focuses on whether the motor vehicle contributed, and was connected, to the crime. See, e.g., Dehn v. Com'r of Dept. of Public Safety, 442 N.W.2d 830 (Minn. App. 1989) (licensee had sexual contact in his truck with minor babysitter while driving her home); Appeal of Deems, 395 A.2d 616 (Pa. Commw. 1978) (licensee sold motor vehicle with defaced manufacturer's serial number); see also Olin v. Commonwealth, Dept. of Transp., Bur. of T. S., 331 A.2d 575 (Pa. Commw. 1975) (license suspended after licensee had been seen at scene of crime in his car with his trousers open and was convicted of public indecency). Passengers in motor vehicles also have had their licenses revoked or suspended because they were being transported to and from the place of an offense. See Langfield v. Dept. of Public Safety, 449 N.W.2d 738 (Minn. App. 1990); Com., Dept. of Transp., Bu. of Traffic Safety v. Hull, 416 A.2d 581 (Pa. Commw. 1980). But cf. State by Mendota Heights Police v. Coley, 453 N.W.2d 64 (Minn. App. 1990) (defendant's car not subject to forfeiture as conveyance used in crime since no evidence car was used in assault).

Based on the above and the plain language of the "Habitual Offender" law, it is my opinion that a conviction for grand larceny or unauthorized use of a motor vehicle does not automatically qualify as an offense on which an habitual offender determination may be based. If, however, in addition to the mere fact of conviction there is affirmative evidence that the offense was one in which a motor vehicle was operated or driven by the defendant, it is further my opinion that the offense may be used in making an habitual offender determination under § 46.2-351.

MOTOR VEHICLES: LICENSURE OF DRIVERS - HABITUAL OFFENDERS.

Conviction under former Code section of operating motor vehicle with suspended driver's license constitutes predicate offense for adjudication of individual as habitual offender under recodified section; individual adjudged habitual offender under former statute may be convicted under recodified statute for violation of prior habitual offender order.

September 6, 1991

The Honorable Robert J. Humphreys
Commonwealth's Attorney for the City of Virginia Beach

You ask two questions concerning the Commonwealth's "Habitual Offenders" statutes, §§ 46.2-351 through 46.2-363 of the Code of Virginia. You first ask whether a conviction of operating a motor vehicle with a suspended driver's license in violation of former § 46.1-350, now recodified as § 46.2-301, constitutes a predicate offense for the adjudication of an individual as an habitual offender pursuant to § 46.2-351. You next ask whether an individual adjudged an habitual offender under former § 46.1-387.6, now recodified as § 46.2-355, may be convicted under § 46.2-357 for driving after having been adjudged an habitual offender.

I. Applicable Statutes

The recodification of former Title 46.1, effective October 1, 1989, resulted in its renumbering and reorganization, including the provisions of the "Habitual Offenders" statutes, which were contained in Article 7, Chapter 5 of Title 46.1, §§ 46.1-387.1 through 46.1-387.12, but now appear in Article 9, Chapter 3 of Title 46.2, §§ 46.2-351 through 46.2-363. See Ch. 727, 1989 Va. Acts 1718, 1747-51 (Reg. Sess.).

Section 46.2-351, which defines an habitual offender under the recodified Title, provides:

An habitual offender shall be any resident or nonresident person whose record, as maintained in the office of the Department of Motor Vehicles, shows that he has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate offenses, described in this subsection, committed within a ten-year period . . . as follows:
1. Three or more convictions, or findings of not innocent in the case of a juvenile, singularly or in combination, of the following separate offenses arising out of separate acts:

* * *

c. Driving a motor vehicle while his license, permit, or privilege to drive a motor vehicle has been suspended or revoked in violation of §§ 18.2-272, 46.2-301 or § 46.2-302 . . . .

The corresponding portion of former § 46.1-387.2, from which § 46.2-351 was derived, provided:

An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Department of Motor Vehicles, shows that such person has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate and distinct offenses, described in subdivision (a), (b) and (c) of this section, committed within a ten-year period . . . . as follows:

(a) Three or more convictions, or findings of not innocent in the case of a juvenile, singularly or in combination, of the following separate and distinct offenses arising out of separate acts:

* * *

(4) Driving a motor vehicle while his license, permit or privilege to drive a motor vehicle has been suspended or revoked in violation of §§ 18.2-272, 46.1-350 or § 46.1-351 . . . .

Id. (Repl. Vol. 1986). The only significant difference between these two statutes is that former § 46.1-387.2(a)(4) referred to convictions for driving while suspended in violation of § 46.1-350 or § 46.1-351, while § 46.2-351(1)(c) refers to convictions for driving while suspended in violation of § 46.2-301 or § 46.2-302. The provisions of §§ 46.2-301 and 46.2-302 are the recodified versions of, and are virtually identical to, the provisions of former §§ 46.1-350 and 46.1-351, respectively.

Section 46.2-357, which makes it a felony to operate a motor vehicle after being adjudged an habitual offender, provides:

It shall be unlawful for any person to drive any motor vehicle or self-propelled machinery or equipment on the highways of the Commonwealth while the order of the court prohibiting such operation remains in effect. . . . Any person found to be an habitual offender under this article, who is thereafter convicted of driving a motor vehicle or self-propelled machinery or equipment in the Commonwealth while the order of the court prohibiting such driving is in effect, shall be punished by confinement in the state correctional facility for not less than one year nor more than five years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for twelve months and no portion of such sentence shall be suspended . . . .

Former § 46.1-387.8 provided:

It shall be unlawful for any person to operate any motor vehicle in this Commonwealth while the order of the court prohibiting such operation
remains in effect.... Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this Commonwealth while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the state correctional facility not less than one nor more than five years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for twelve months and no portion of such sentence shall be suspended....

Id. (Supp. 1988).

Chapter 727, which recodified Title 46.1, provides:

2. That whenever any of the conditions, requirements, provisions, or contents of any section, article, or chapter of Title 46.1 or any other title of this Code as such titles existed prior to October 1, 1989, are transferred in the same or modified form to a new section, article, or chapter of this title or any other title of this Code and whenever any such former section, article, or chapter is given a new number in this or any other title, all references to any such former section, article, or chapter containing such conditions, requirements, provisions, contents, or portions thereof.


II. Convictions Under § 46.1-350 Constitute Predicate Offenses for Adjudication Under "Habitual Offenders" Statutes

Your first inquiry has been answered by a recent decision of the Court of Appeals of Virginia, Hoye v. Commonwealth, 12 Va App. 587, 405 S.E.2d 628 (1991). In Hoye, the appellant had been convicted twice of driving under the influence of alcohol and once of operating a motor vehicle in violation of the provisions of a restricted license issued pursuant to § 18.2-271.1(E), which provided, at the time of Hoye's conviction, that "[a]ny person who operates a motor vehicle in violation of any restrictions imposed pursuant to this section shall be guilty of a violation of § 46.1-350." Id. (Repl. Vol. 1988). The transcript of Hoye's driving record, certified to the circuit court by the Department of Motor Vehicles pursuant to § 46.1-387.3, indicated two convictions of driving while intoxicated and one conviction of driving in violation of § 46.1-350. The circuit court adjudged Hoye an habitual offender, and his appeal was granted.

In addressing Hoye's arguments, the Court of Appeals stated:

[Hoye] concedes that Code § 18.2-271.1(E) provides that any person who operates a motor vehicle in violation of the restrictions of a license issued pursuant to Code § 18.2-271.1 shall be guilty of a violation of former Code § 46.1-350, but argues that Code § 46.2-351 also makes no reference to former Code § 46.1-350.

12 Va App. at 589, 405 S.E.2d at 629. The Court then quotes Enactment 2 of Chapter 727, holding that

[The quoted provision of the 1989 Acts translates that reference to [§ 46.1-350], a violation expressly embraced within the scope of Code § 46.2-351. Therefore, the trial court acted properly in considering that conviction [of violating § 46.1-350] in adjudging the appellant an habitual offender.]
III. Individuals Adjudged Habitual Offenders Prior to Recodification
May Be Convicted Under § 46.2-357 for Violation of Habitual Offender Order

The Hoye case does not address your second question. Nevertheless, the Court's holding in Hoye supports the conclusion that an individual adjudged an habitual offender prior to the recodification of § 46.2-355 may be convicted and punished for violating the habitual offender order under § 46.2-357.

Section 46.2-357 provides penalties for "[a]ny person found to be an habitual offender under this article." (Emphasis added.) A literal reading of that language might exclude individuals adjudged under former § 46.1-387.5, which was in Article 7, Chapter 5 of Title 46.1, not Article 9, Chapter 3 of Title 46.2. A literal reading of § 46.2-357 would be no more appropriate in the facts you present, however, than in Hoye. Just as the Hoye Court construed Enactment 2 of Chapter 727 to translate a conviction under former § 46.1-350 to one under § 46.2-301, it is my opinion that an adjudication under former Article 7, Chapter 5 of Title 46.1 should be translated to an adjudication "under this article."

Any other interpretation would make a nullity of the thousands of habitual offender orders entered throughout the Commonwealth prior to October 1, 1989, and there is no indication in Chapter 727 that the General Assembly intended such a radical result. Such a result could not have been intended. The general rule is that a statute that is recodified is presumed to be incorporated into the new Code without substantive change, even though it is reworded and rephrased during the recodification process. See Muniz v. Hoffman, 422 U.S. 454, 467-74 (1975); Norfolk Bar Ass'n v. Drewry, 161 Va. 833, 172 S.E. 282 (1934); see also 1A Norman J. Singer, Sutherland Statutory Construction § 28.10 (Sands 4th ed. 1985 & Supp. 1991). This rule is subject to an exception, when it clearly appears from the new language that the legislature intended a substantive change. "The rule of construction, when there has been a revision, is that the old law was not intended to be altered, unless such intention plainly appears in the new Code." Harrison v. Wissler, 98 Va. 597, 600, 36 S.E. 982, 983 (1900).

There is nothing in § 46.2-357 to indicate an intention by the General Assembly to alter the law substantively. The language of § 46.1-387.8 is altered in § 46.2-357 to read "under this article" instead of "under the provisions of this article," but that change (eliminating the phrase "the provisions of") is made throughout Chapter 727 in an apparent attempt to eliminate unnecessary words, and does not evidence any legislative intent to change the substantive law.

A literal interpretation of the phrase "this article" or "this section" as used in Chapter 727 would lead to unintended results in other provisions of recodified Title 46.2, as well. For example, an individual convicted of a third offense of drunk driving is subject to an indefinite license revocation under § 46.2-391(B), formerly § 46.1-421(b). He is eligible to petition a circuit court for restoration of his driving privilege after ten years pursuant to § 46.2-391(B), or after five years pursuant to § 46.2-391(C), formerly § 46.1-421(c). A petition under § 46.2-391(C), however, is available only to those "revoked in accordance with subsection B of this section." (Emphasis added.) Similarly, a petition under § 46.2-391(B) is available "ten years from the date of the revocation hereunder." (Emphasis added.) If such phrases are not interpreted to include revocations under the corresponding predecessor statutes, then individuals whose license was revoked indefinitely under former § 46.1-421(b) will not be eligible to petition for restoration of their license under § 46.2-391(C) and, perhaps, never will be eligible to petition for restoration at all. Such a result, in my opinion, also would be unintended, but no more unintended a
result than an interpretation of § 46.2-357 that would nullify all habitual offender adjudication orders entered prior to October 1, 1989. It is further my opinion, therefore, that an individual adjudged an habitual offender under former § 46.1-387.6 may be convicted under § 46.2-357 for violation of the prior habitual offender order.

MOTOR VEHICLES: LICENSURE OF DRIVERS - HABITUAL OFFENDERS.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED.

Semantic differences in Virginia and another state's statutes do not preclude use of other state's drunk driving convictions as predicate offenses for Virginia habitual offender determinations. "Impaired driving" conviction under North Carolina statute may serve as predicate offense in habitual offender proceeding in Commonwealth.

October 26, 1991

The Honorable Everett P. Shockley
Commonwealth's Attorney for Pulaski County

You ask whether a conviction of "impaired driving" under § 20-138.1(a) of the General Statutes of North Carolina may be used as one of the predicate offenses that brings the person convicted within the definition of an "habitual offender" in § 46.2-351 of the Code of Virginia.

I. Applicable Statutes

Section 46.2-351 defines an "habitual offender" as

any resident or nonresident person whose record, as maintained in the office of the Department [of Motor Vehicles of the Commonwealth], shows that he has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate offenses, described in this subsection, committed within a ten-year period...

1. Three or more convictions, or findings of not innocent in the case of a juvenile, singularly or in combination, of the following separate offenses arising out of separate acts:

   **

   b. Driving or operating a motor vehicle while under the influence of intoxicants or drugs in violation of § 18.2-266 or subsection A of § 46.2-341.24;

   **

3. The offenses included in subdivision[ ] 1... of this section shall be deemed to include offenses under any valid county, city, or town ordinance paralleling and substantially conforming to the state statutory provisions cited in subdivision[ ] 1... of this section and all changes in or amendments thereof, and any federal law, any law of another state or any valid county, city, or town ordinance of another state substantially conforming to the aforesaid state statutory provisions. [Emphasis added.]
Section 18.2-266, the Virginia statute prohibiting driving under the influence of intoxicants or drugs, provides:

It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.10 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of §18.2-268, (ii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely. For the purposes of this section, the term "motor vehicle" shall include mopeds, while operated on the public highways of this Commonwealth.

Section 20-138.1(a) of the General Statutes of North Carolina (the "North Carolina statute") provides:

A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance[1]; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more.

II. North Carolina Statute Substantially Conforms to § 18.2-266

Section 46.2-351(3) permits a conviction under a statute of another state "substantially conforming" to a relevant Virginia statute to serve as a predicate offense for an habitual offender determination in the Commonwealth. The underlying question raised by your inquiry, therefore, is whether the North Carolina statute substantially conforms to §18.2-266.

Under the North Carolina statute, subsections (1) and (2) provide two means by which a person may be prosecuted for driving while impaired. Comparing the Virginia statute with the North Carolina statute, subsections (ii), (iii) and (iv) of §18.2-266 are the substantive equivalent to §20-138.1(a)(1), because both statutes prohibit driving under the influence of alcohol, drugs and other impairing substances. Section 18.2-266(i) is substantively identical to §20-138.1(a)(2), the "per se" provisions of the North Carolina statute.

A. Prior Virginia Decisions Not Instructive on Issues Raised

I am not aware of any case that has decided whether the North Carolina statute is "substantially conforming" to §18.2-266 in the context of an habitual offender adjudication. In Shinault v. Commonwealth, 228 Va. 269, 321 S.E.2d 652 (1984), the Supreme Court of Virginia considered whether the Virginia and North Carolina statutes prohibiting driving under the influence of intoxicants or drugs were "substantially similar" for purposes of the enhanced punishment provisions of §18.2-270, which provides penalties for violations of §18.2-266, and held that they were not. It is important, however, to note that the Shinault case concerns the difference between the North Carolina "per se" law and Virginia Code §18.2-269, detailing certain rebuttable presumptions in prosecutions under §18.2-266(ii), and not with the difference between the North Carolina statute and
a Virginia "per se" law. Indeed, at the time Shinault was decided, Virginia had not yet adopted its "per se" law. As a result, the decision of the Supreme Court of Virginia in Shinault, in my opinion, is not dispositive of the question you ask.

The opinion of the Court of Appeals of Virginia in Davis v. Commonwealth, 8 Va. App. 291, 381 S.E.2d 11 (1989), however, in interpreting the Virginia "per se" provisions, uses a hypothetical statute for comparison purposes that closely parallels the North Carolina "per se" provision. The court concludes that the Virginia "per se" provision, "by its literal terms," is not written in the same fashion as the hypothetical statute. Id. at 299, 381 S.E.2d at 15-16. The issue in Davis, however, was not the similarity of the Virginia and North Carolina "per se" statutes, or the similarity of any other provisions of § 18.2-266 and the North Carolina statute. This is important because a conviction under the North Carolina statute will be reported to the Department of Motor Vehicles of the Commonwealth as just that, with no distinction shown between convictions under § 20-138.1(a)(1) and (2). In deciding whether such a conviction may be a predicate offense under the "Habitual Offenders" statutes, the determination concerning "substantial conformity" of the Virginia and North Carolina statutes must be made on the basis of both statutes in their entirety, and not merely on the "per se" provisions. In my opinion, the court of appeals' decision in Davis is not determinative whether a conviction under the North Carolina statute may serve as a predicate offense toward Virginia habitual offender status.

B. Identical Language in Statutes Not Required; Legislative Purpose

for Enactment of Civil Habitual Offender Statute Instructive

The language in § 18.2-266 and in the North Carolina statute admittedly is not identical, but identity is not required, in my opinion, for the North Carolina conviction to be used as a basis for having a person declared an habitual offender, as that term is defined in § 46.2-351. The habitual offender provision in § 46.2-351 is a remedial civil statute and not a criminal statute. See Bouldin v. Commonwealth, 4 Va. App. 166, 170, 355 S.E.2d 352, 355 (1987). As a result, courts have construed this statute more liberally than a criminal statute. Compare McClure v. Commonwealth, 222 Va. 690, 283 S.E.2d 224 (1981) (uncounseled misdemeanor conviction may be used as predicate offense in habitual offender adjudication) with Sargent v. Commonwealth, 5 Va. App. 143, 360 S.E.2d 895 (1987) (uncounseled misdemeanor conviction may not be used as basis for trying individual as second or subsequent offender in drunk driving prosecution).

The clear legislative purpose behind the enactment of an habitual offender statute also must be taken into consideration in determining whether the two statutes are "substantially conforming." In Davis v. Commonwealth, 219 Va. 808, 812, 252 S.E.2d 299, 301 (1979), the Supreme Court of Virginia expressed that purpose:

The purpose of the Habitual Offender Act is to promote highway safety by denying the privilege of operating motor vehicles to those persons "who by their conduct and record" have demonstrated their lack of concern for the safety of others and their disrespect for law and authority. The Act is civil in nature and does not violate any provisions of the United States or Virginia Constitutions. [Citation omitted.]

If mere semantic differences in the Virginia and North Carolina statutes were sufficient to preclude the use of North Carolina drunk driving convictions as predicate offenses for Virginia habitual offender determinations, then drunk driving convictions from every state with a "per se" law could be avoided in an habitual offender adjudication, because various state legislatures may have chosen to use slightly different language to express a substantively identical concept. Such a result would frustrate the legislative policy upon which the Virginia "Habitual Offenders" statutes are based.
Because the purpose of an habitual offender adjudication is to protect public safety, it is my opinion that the provisions of § 46.2-351, including the phrase "substantially conforming," should be read broadly to effect the legislative intent described in the Virginia Supreme Court decision in Davis. Based on the above, it is further my opinion that an "impaired driving" conviction under the North Carolina statute may serve as a predicate offense in an habitual offender proceeding in the Commonwealth.

1"Impairing substance" is defined as "[a]lcohol, [a] controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." N.C. Gen. Stat. § 20-4.01(14a) (1989).

2"Relevant Time after the Driving" is defined as "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving." N.C. Gen. Stat. § 20-4.01(33a).

3A "per se" law in this context means that proof of the requisite alcohol concentration is sufficient, by itself, to convict, there being no requirement to prove intoxication, as would be required in a prosecution under § 18.2-266(ii). See Davis v. Commonwealth, 8 Va. App. 291, 381 S.E.2d 11 (1989); State v. Howren, 312 N.C. 454, 323 S.E.2d 335 (1984).

4The General Assembly of Virginia enacted its "per se" provision in 1984, prohibiting driving with a blood alcohol concentration of 0.15 percent. See Ch. 666, 1984 Va. Acts 1155. The Virginia statute then was amended in 1986 to make the same blood alcohol content used in the North Carolina statute (0.10 percent) a "per se" violation. See Ch. 635, 1986 Va. Acts 1585 (Reg. Sess.).

5The court of appeals in Davis makes no attempt definitively to interpret § 20-138.1(a)(2). It does not cite or quote that statute. It does not trace the history of the North Carolina "per se" statute from its enactment as § 20-138(b) in 1973 through its reenactment "in substance" as § 20-138.1(a)(2) in 1983. See Shinault, 228 Va. at 271, 321 S.E.2d at 654. Davis also does not address the fact that § 20-138(b) had provided that "[i]t is unlawful for any person to operate any vehicle . . . when the amount of alcohol in such person's blood is 0.10 percent or more," and that Shinault held that language in the former North Carolina statute to be "in substance" the language of its successor § 20-138.1(a)(2). N.C. Gen. Stat. § 20-138(b) (Repl. Vol. 1978). In short, the issue before the Davis court made a direct comparison between the Virginia and North Carolina statutes unnecessary. The language of the Davis court, therefore, only can be considered dicta on this issue.

6The court of appeals case of Davis v. Commonwealth, discusses the various approaches that other jurisdictions have taken toward "per se" laws. 8 Va. App. at 298-99, 381 S.E.2d at 15; see also 1986-1987 Att'y Gen. Ann. Rep. 163.

MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY - MAXIMUM VEHICLE WEIGHTS.

General district court may not waive liquidated damages for driver with no previous violation of weight laws, if excess weight exceeds 2,500 pounds; court may exercise discretion in waiving damages for person who has no prior violation and excess weight does not exceed 2,500 pounds.

June 10, 1991

The Honorable Franklin J. Jenkins
Judge, Goochland County General District Court
You ask whether a court may waive any of the liquidated damages assessed against an individual who has violated the motor vehicle weight laws by operating a vehicle which exceeds the maximum allowable weight by more than 2,500 pounds, but who has no prior violation of the weight laws in Virginia.

I. Applicable Statute

Motor vehicle weight laws are detailed in Article 17, Chapter 10 of Title 46.2, §§ 46.2-1122 through 46.2-1138.1 of the Code of Virginia. Section 46.2-1135, governing the imposition of liquidated damages for weight law violations, provides:

Any person violating any weight limit as provided in this chapter or in any permit issued either by the Virginia Department of Transportation or by local authorities pursuant to this chapter shall be assessed liquidated damages. The amount of those damages shall be two cents per pound for each pound of excess weight over the prescribed limit in this article for an excess which does not exceed 5,000 pounds, five cents per pound for each pound of excess weight over the prescribed limit in this article when such excess is more than 5,000 pounds, two cents per pound for each pound of excess axle weight over the prescribed limit in any permit issued pursuant to § 46.2-1139 or § 46.2-1148 when the excess is 5,000 pounds or less, five cents per pound for each pound of excess axle weight over the prescribed limit in any permit issued pursuant to § 46.2-1139 or § 46.2-1148 when such excess is more than 5,000 pounds and ten cents per pound for each pound of excess gross weight over the prescribed limit in any permit issued pursuant to § 46.2-1139 or § 46.2-1148. However, whenever any vehicle does not exceed the gross weight permitted according to the table provided in § 46.2-1139 and exceeds the axle weight in this article by 2,000 pounds or less, the liquidated damages shall be assessed in the amount of one cent per pound for each pound of excess weight over the prescribed axle limit in this article. If a person has no prior violations under the motor vehicle weight laws, and the excess weight does not exceed 2,500 pounds, the general district court may waive the liquidated damages against such person. Except as provided by § 46.2-1138, such assessment shall be entered by the court or by the Department as a judgment for the Commonwealth, the entry of which shall constitute a lien upon the overweight vehicle. Except as provided by § 46.2-1138, such sums shall be paid to the Department or collected by the attorney for the Commonwealth and forwarded to the State Treasurer and allocated to the fund appropriated for the construction and maintenance of state highways. [Emphasis added.]

II. Discretion of Court to Waive Liquidated Damage Limited to First Offender with Excess Weight of 2,500 Pounds or Less

The language of § 46.2-1135 is mandatory in almost every instance: "shall be assessed liquidated damages," "amount of those damages shall be," "such assessment shall be entered," "such sums shall be paid to." The only part of § 46.2-1135 that gives the court any discretion is the sentence providing that the general district court may waive the liquidated damages if the person has no prior violations and the excess weight does not exceed 2,500 pounds. The discretion allowed in the emphasized sentence is limited to a very specific set of circumstances, and clearly is not intended as a broad grant of discretion to the general district court to waive liquidated damages in all cases.

It is a maxim of statutory construction that the expression of one thing means the exclusion of others. A statute limiting the manner in which something is to be done implies that it should not be done otherwise. 1990 Att'y Gen. Ann. Rep. 65, 66, and Opinions cited therein.
In § 46.2-1135 the General Assembly has expressed a single, specific instance in which a general district court may exercise its discretion to waive liquidated damages. It may be inferred, therefore, that the General Assembly intended to exclude that discretion in any other fact situation, including the situation mentioned in your letter.

Based on the above, it is my opinion that a general district court may not waive any part of the liquidated damages imposed under § 46.2-1135 for a driver with no previous violation of the weight laws, if the excess weight exceeds 2,500 pounds.

April 12, 1991

The Honorable James H. Harvell III
Chief Judge, Newport News General District Court, Traffic Division

You ask whether a motor vehicle used for home delivery of commercially prepared food violates § 46.2-1052 of the Code of Virginia by having a sign on top of the vehicle that is attached by a metal bar and suction cups connected to the front side window of the vehicle.

I. Facts

You state that you are aware of several traffic infraction cases involving pizza or fried chicken delivery vehicles that have signs attached to the vehicles by means of metal bars and suction cups connected to the front side windows. The drivers of these vehicles are charged with a violation of § 46.2-1052. You also state that the metal bars and suction cups are nontransparent and partially obstruct the view through the front passenger's window, and that some of the vehicles used for delivery of the food items are small trucks with no rear side windows.

II. Applicable Statutes

Section 46.2-1052(A) provides, in part:

Except as otherwise provided in [Article 6, Chapter 10 of Title 46.2] or permitted by federal law, it shall be unlawful for any person to operate any motor vehicle on a highway with any sign, poster, colored or tinted film, sun-shading material, or other colored material on the windshield, front or rear side windows, or rear windows of such motor vehicle. This provision, however, shall not apply to any certificate or other paper required by law or permitted by the Superintendent [of the Department of State Police of the Commonwealth] to be placed on a motor vehicle's windshield or window.
III. Objects On Windows Obstructing View Could Violate Statute; Sufficiency of Evidence Is Issue for Trier of Fact

Section 46.2-1052 details several items that are prohibited from being located on the windshield, front or rear side windows or rear windows of any motor vehicle. Before July 1, 1987, § 46.1-291 (now § 46.2-1052) provided that "it shall be unlawful for any person to operate any motor vehicle upon a highway with any sign, poster or other nontransparent material upon the front windshield, front or rear side windows, or rear windows of such motor vehicle." A prior Opinion of this Office concludes that a material that transmits light still is "nontransparent" if it causes sufficient diffusion to eliminate perception of distinct images. See 1976-1977 Att'y Gen. Ann. Rep. 184. Another prior Opinion concludes that § 46.1-291, as it read before 1987, prohibited only the use of materials which rendered the windshield or other windows "nontransparent." Tinted, but still transparent, materials were not prohibited. See 1985-1986 Att'y Gen. Ann. Rep. 203.

The 1987 Session of the General Assembly, however, amended former § 46.1-291, effective July 1, 1987, to prohibit "any sign, poster, colored or tinted film or sun-shading material or other colored or nontransparent material" upon the windows of a motor vehicle." Ch. 315, 1987 Va. Acts 387 (Reg. Sess.) (amendatory language emphasized in italics). The 1989 Session of the General Assembly then recodified former Title 46.1 as Title 46.2, and § 46.2-1052 was enacted with its present language. See Ch. 727, 1989 Va. Acts 1718, 1852-53 (Reg. Sess.). The recodification deleted the reference to "nontransparent" material.

It is presumed that the General Assembly intended, by the 1987 amendment, to change existing law. See Wisniewski v. Johnson, 223 Va. 141, 286 S.E.2d 223 (1982). Before July 1, 1987, it was permissible to have materials on the windows of a motor vehicle without specific authorization either by law or from the Superintendent of State Police. The obvious purpose of § 46.2-1052 is to limit the placement of materials that may obstruct a driver's view through the windows of a motor vehicle.

I do not infer from your letter that the metal bars and suction cups in your pending cases could be considered a "sign, poster, colored or tinted film, [or] sunshading material," as those terms are used in § 46.2-1052. If a violation of § 46.2-1052 exists, therefore, it would depend upon whether the metal bars and suction cups constitute "other colored material." The trier of fact will have to consider the evidence and determine if the materials violate § 46.2-1052. The fact that the metal bars and suction cups are nontransparent is no longer a determinative factor, but these items conceivably could still come within the prohibitions of § 46.2-1052.

1Section 46.2-1021.1 authorizes privately owned vehicles used for home delivery of commercially prepared food to have a light for nighttime illumination of a sign, but neither § 46.2-1021.1 nor § 46.2-1052 addresses where or how that sign may be attached to the vehicle.

food and other products and farm supplies back to farm in conjunction with other activities also exempt from registration requirements.

July 25, 1991

The Honorable H.R. Lightner
Sheriff for Highland County

You ask whether, as a result of the recodification of Title 46.1 of the Code of Virginia in 1989, § 46.2-673 provides a broader exemption of farm vehicles from motor vehicle registration requirements than did former § 46.1-45(i).

I. Applicable Statutes

Former § 46.1-45(i) provided that

[The exemptions contained in this section shall also apply on any return trip made from any marketplace as provided herein, when the motor vehicle is used to transport back to the farm ordinary and essential food and other products for home and farm use, or when the motor vehicle is used for carrying supplies to the farm.]

Section 46.1-45(i) was recodified in 1989 as § 46.2-673, which provides:

No person shall be required to obtain the registration certificate, license plates and decals, or pay a registration fee for any farm vehicle exempted from registration under the provisions of this article [Article 6, Chapter 6 of Title 46.2] when that vehicle is:

1. Making a return trip from any marketplace;
2. Transporting back to a farm ordinary and essential food and other products for home and farm use; or
3. Transporting supplies to the farm.


II. Prior Opinions Construe Exemption Under § 46.1-45(i) Strictly

Prior Opinions of this Office consistently conclude that the exemption in § 46.1-45(i) must be construed strictly, as is the general rule for exemptions from tax requirements. One such Opinion interprets the exemption in § 46.1-45(i) for transporting "ordinary and essential food and other products for home and farm use" or "for carrying supplies to the farm" as applying only "on any return trip made from any marketplace as provided herein." 1976-1977 Att'y Gen. Ann. Rep. 173, 175. Another Opinion interpreting § 46.1-45(i) concludes that the exemption applies to "farmers operating their vehicles on return trips under the conditions of this section only." 1971-1972 Att'y Gen. Ann. Rep. 282, 283.

III. Language of § 46.2-673 Reflects Intent to Change Prior Rule

As a general rule, a statute that is recodified is presumed to be incorporated into the new Code without substantive change, even though it is reworded and rephrased during the recodification process. See Muniz v. Hoffman, 422 U.S. 454, 467-74 (1975); Norfolk Bar Ass'n v. Drewry, 161 Va. 833, 172 S.E. 282 (1934); see also 1A Norman J. Singer,
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Sutherland Statutory Construction § 28.10 (Sands 4th ed. 1985 & Supp. 1991). That rule is subject to exceptions, however, when it clearly appears from the new language that the legislature intended a change. As stated in Harrison v. Wissler, 98 Va. 597, 600, 36 S.E. 982, 983 (1900):

The rule of construction, when there has been a revision, is that the old law was not intended to be altered, unless such intention plainly appears in the new Code.

The Wissler Court also points out that a report of the revisers may indicate legislative intent. Id. at 601, 36 S.E. at 983.

Where it is clear that a change was intended, as where portions of the recodified statute are omitted entirely, then the new statute will be construed as having been amended by the revision. See Godlewski v. Gray, 221 Va. 1092, 1096, 277 S.E.2d 213, 215 (1981).

In this instance, the restructuring of the language in § 46.2-673 so that there are three separate situations in which the exemption applies, instead of the single situation with two limitations described in § 46.1-45(i), clearly indicates that the General Assembly intended to make a substantive change. The prior Opinions of this Office interpreting § 46.1-45(i) construe the provisions concerning transportation of food products and supplies as subordinate clauses that were modified, and were thus limited, by the clause, "on any return trip made from any marketplace." In my opinion, it is impossible to construe the corresponding provisions in subsections 2 and 3 of § 46.2-673 as subordinate to, and therefore limited by, the language of subsection 1, because each of these three provisions is now clearly equal to the other two. Because these instances in which a farm vehicle is exempt under § 46.2-673 are connected by the disjunctive "or," each of them stands alone and is not modified by the others. All three instances of exemption, however, still are limited by the language of the first paragraph of § 46.2-673, which requires that the vehicle be a "farm vehicle exempted from registration under the provisions of this article."

Based on the above, it is my opinion that the provisions of § 46.2-673 providing an exemption for farm vehicles transporting "ordinary and essential food and other products for home and farm use" and for "[t]ransporting supplies to the farm" are no longer limited to return trips from a marketplace.

1 The revisers' Note, moreover, suggests that some change in substance is intended: "Former § 46.1-45 has been broken up into proposed §§ 46.2-663 through 46.2-674 for clarity. The exemptions contained in the present section are so thoroughly shaken together with restrictions on those exemptions that it is difficult really to say just what exemptions are provided and what conditions apply to those exemptions." 3 H. & S. Docs., Thg Revision of Title 46.1 of the Code of Virginia, H. Doc. No. 42, at 97 (1989 Sess.).

2 This would include vehicles exempted under § 46.2-664 (vehicles for spraying fruit trees or other plants); § 46.2-665 (vehicles used for an agricultural or horticultural purposes); § 46.2-666 (vehicles used to transport produce or livestock); § 46.2-667 (farm machinery and tractors); § 46.2-668 (vehicles registered in other states used in Virginia harvesting operations).

NOTARIES AND OUT-OF-STATE COMMISSIONERS: CIVIL AND CRIMINAL LIABILITY.

WILLS AND DECEDEXTS' ESTATES: WILLS - PROBATE.
FIDUCIARIES GENERALLY: INVENTORIES AND ACCOUNTS.

PROPERTY AND CONVEYANCES: RECORDATION OF DOCUMENTS.

Self-proving certificate not separate writing/document from will it authenticates. Notary named as will's executor has direct beneficial interest in will when will admitted to probate for which notary receives compensation for services as; executor; prohibited from notarizing certificate. Notary who is secretary or law partner of person named as will's executor has no direct beneficial interest in will; may notarize self-proving certificate.

August 14, 1991

The Honorable William J. Howell
Member, House of Delegates

You ask whether § 47.1-30 of the Code of Virginia prohibits a notary from notarizing the certificate of a self-proving will authorized by § 64.1-87.1, when the notary also either is named as the executor in the will that the certificate authenticates, or is the secretary or law partner of the executor.

I. Applicable Statutes

Section 64.1-87.1 provides a means by which a will may be made self-proving, to avoid the necessity of producing witnesses before the court to establish the will's authenticity after the death of the testator. Section 64.1-87.1 contains a form of certificate to be executed by the testator, two witnesses and a notary or other officer authorized to administer oaths. This certificate provides:

Before me, the undersigned authority, on this day personally appeared _______, _______, and _______, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, _______, the testator, declared to me and to the witnesses in my presence that said instrument is his last will and testament and that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; that said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will and testament in the presence of said witnesses who, in his presence and at his request, and in the presence of each other, did subscribe their names thereto as attesting witnesses on the day of the date of said will, and that the testator, at the time of the execution of said will, was over the age of eighteen years and of sound and disposing mind and memory.

Title 47.1 contains the Virginia Notary Act (the "Act"). Section 47.1-30 concerns conflicts of interests and provides:

No notary shall perform any notarial act with respect to any document or writing to which the notary or his spouse shall be a party, or in which either of them shall have a direct beneficial interest.

Any notary who violates the provisions of this section shall be guilty of official misconduct.
A notarial act performed in violation of this section shall not automatically be void for such reason, but shall be voidable in the discretion of any court of competent jurisdiction upon the motion of any person injured thereby.

Section 47.1-12 provides that a notary commissioned in the Commonwealth is empowered to administer oaths.

Title 26 concerns fiduciaries generally. Section 26-30 provides, in part, that

[the commissioner of accounts], in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts, or otherwise.

II. Self-Proving Certificate Not Separate from Will; Notary Named as Executor in Will Has "Direct Beneficial Interest" in Certificate When Notary Is Primary Beneficiary of Compensation Paid for Services as Executor

The purpose of the certificate prescribed in § 64.1-87.1 is to authenticate a will in order to avoid having to produce witnesses before the court to establish the will's authenticity after the testator has died. It is clear from the plain language of the form of certificate set forth in § 64.1-87.1, which refers to the will as the "attached or foregoing instrument," that this self-proving certificate has no purpose other than to authenticate the will to which it is attached or of which it is a part. In my opinion, therefore, a notary who notarizes such a certificate is performing a "notarial act with respect to" the will, within the meaning of § 47.1-30, even when the certificate is on a separate piece of paper, or is executed on a date after execution of the will itself.

By its plain language, therefore, § 47.1-30 prohibits a notary from notarizing the certificate if the notary is a "party" to the will, or if he has a direct beneficial interest in the will, by virtue of being named as its executor. The term "direct beneficial interest" is not defined in the Act. A prior Opinion of this Office concludes, however, that the General Assembly intended a "direct beneficial interest," as used in § 47.1-30, to mean profit, value, worth, advantage or use resulting from a transaction or derived from a writing. 1984-1985 Att'y Gen. Ann. Rep., supra, at 229. As executor of the will, the notary will receive compensation for his services, pursuant to § 26-30, if it is admitted to probate. It is my opinion, therefore, that a notary has a "direct beneficial interest" in a will naming him as its executor, and that § 47.1-30 prohibits him from notarizing the self-proving certificate in such circumstances. In view of this conclusion, it is not necessary to determine whether the notary also would be a "party" to the will by virtue of being named as its executor.

III. Notary Who Is Secretary or Law Partner Has Only Indirect Interest, Not "Direct Beneficial Interest," in Self-Proving Certificate When Law Firm or Other Law Partner Named as Executor in Will

The intent of the General Assembly in enacting § 47.1-30 is to prevent a notary from acknowledging a document when the notary has an interest in the document or its operation. 1984-1985 Att'y Gen. Ann. Rep., supra, at 229. In past Virginia cases, notaries have been disqualified for being the grantee of a deed or the trustee of a deed of trust. The competence of a notary has been affirmed, however, when the notary was an employee of the company executing the document, received token compensation for serving on the board of an eleemosynary institution and the document secured a debt running to the institution, or was a partner in an automobile sales firm who acknowledged the seller's signature.
Neither a stockholder nor a corporate officer is disqualified from acting as a notary to corporate documents if he is not otherwise interested in the transaction. See § 55-121.

The General Assembly clearly intended a "direct beneficial interest," as used in § 47.1-30, to be profit, value, worth, advantage or use resulting directly to the individual notary from a transaction or a writing. This construction excludes the indirect interest of employees, corporate officers and stockholders when the primary beneficiary of the transaction is the employer or corporation. 1984-1985 Att'y Gen. Ann. Rep., supra, at 229.

In the facts you present, while either the secretary or the law partner of the person named as executor could potentially benefit indirectly from the will, it is my opinion, based on the above, that neither of them has a "direct beneficial interest" as contemplated by § 47.1-30. It is further my opinion, therefore, that either the secretary or the law partner of the named executor may notarize the self-proving certificate as provided in § 64.1-87.1, without violating § 47.1-30.

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1Section 64.1-87.2 contains an alternate form of this certificate. The differences are not significant for purposes of this Opinion.
4Bank of Christiansburg, supra note 2, 163 Va. at 809, 178 S.E. at 3 (cashier of bank); Scott v. Thomas, 104 Va. 330, 51 S.E. 829 (1905) (salaried employee).
7See Bird v. Newcomb, 170 Va. 208, 216, 196 S.E. 605, 608 (1938) (defining benefit as used in will).

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PENSIONS, BENEFITS AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM.

DOMESTIC RELATIONS: DIVORCE, AFFIRMATION AND ANNULMENT.

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

No statutory prohibition against monetary awards made to either party in divorce proceeding being based upon consideration of state retirement income as marital property; circuit court may consider state retirement benefits in making equitable distribution of such property.

January 9, 1991

The Honorable G. Steven Agee
Member, House of Delegates

You ask whether the portion of § 20-107.3 of the Code of Virginia that concerns the equitable distribution of retirement plan funds conflicts with §§ 51.1-102 and 51.1-802, which exempt Virginia Retirement System ("VRS") and local retirement system benefits from "execution, attachment, garnishment, or any other process." Assuming that these retirement benefits are exempt from allocation pursuant to § 20-107.3, you also ask whether such an exclusion is permitted by the federal Employment Retirement Income Security Act of 1974.
I. Applicable Statutes

When a circuit court decrees the dissolution of a marriage, § 20-107.3(A) requires that

the court ... shall determine the legal title ... and value of all property, real or personal, tangible or intangible, of the parties and shall consider which of such property is separate property, which is marital property, and which is part separate and part marital property ....

   * * *

2. ... All property including that portion of pensions, profit-sharing or deferred compensation or retirement plans of whatever nature, acquired by either spouse during the marriage, and before the last separation of the parties, if at such time or thereafter at least one of the parties intends that the separation be permanent, is presumed to be marital property in the absence of satisfactory evidence that it is separate property.

Although both parties to a divorce proceeding have rights and interests in marital property, such rights and interests do not affect the legal title of such property, and are used only as one consideration in determining what monetary award, if any, the circuit court will make. The court has no authority to order the division or transfer of property not jointly owned. See § 20-107.3(B)-(C).

In addition to any monetary award made to either party in a divorce proceeding, § 20-107.3(G) further provides that

the court may direct payment of a percentage of the marital share of any pension, profit-sharing or deferred compensation plan or retirement benefits, whether vested or nonvested, which constitutes marital property and whether payable in a lump sum or over a period of time. However, the court shall only direct that payment be made as such benefits are payable. No such payment shall exceed fifty percent of the marital share of the cash benefits actually received by the party against whom such award is made.

Section 51.1-102 provides that VRS

[retirement allowances and other benefits accrued or accruing to any person under [Title 51.1] and the assets of the retirement system created under this title shall not be subject to execution, attachment, garnishment, or any other process whatsoever, except any process for a debt to any employer who has employed such person, nor shall any assignment thereof be enforceable in any court.

Section 51.1-800 authorizes political subdivisions to establish local retirement systems or to participate in VRS. Section 51.1-802 extends the exemptions in § 51.1-102, discussed above, to these local retirement systems.

II. Direct Payment of Retirement or Pension Benefits to Spouse Not Authorized; Value of Benefits May Be Considered in Determining Monetary Award

It is an established rule of statutory construction that statutes which relate to the same subject matter, to the extent possible, should 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); Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938); see also 1989 Att'y Gen. Ann. Rep. 189, 190-91.
Section 20-107.3(G) specifically provides that the court may award a percentage of
the marital share of retirement benefits. Two conditions are placed on such an award:
(1) the award may be made only when such benefits are payable, and (2) the award may
not exceed half of the "marital share of the cash benefits actually received by the party
against whom such award is made." (Emphasis added.)

The circuit court has "no authority to order the division or transfer of separate
property or marital property which is not jointly owned." Section 20-107.3(C).

A prior Opinion of this Office construes § 20-107.3 as it pertains to retirement
funds and concludes that

[the court, however, cannot specifically designate [retirement] benefits as a
source of payment [for monetary award] or convey the benefits if they are
titled in the name of one party. The person against whom the award is made
has the discretion to satisfy the award from his retirement benefits or some
other source of income.


While the court may consider the value of retirement benefits in determining a
monetary award, therefore, it may not require the trustee of the fund to make the pay-
ment to the spouse who is the recipient of the award.

Section 51.1-102 exempts VRS plan benefits from "execution, attachment, garnish-
ment, or any other process whatsoever." Section 51.1-802 similarly exempts local plan
benefits from "execution, attachment, garnishment or any other process." The mere
decree of a monetary award in a divorce action in consideration of retirement benefits,
however, is neither an execution, "attachment" nor garnishment.4

In addition, a monetary award by decree does not constitute "process," as that term
is used in §§ 51.1-102 and 51.1-802. Section 1-13 requires that the construction of all
statutes be consistent with the rules and definitions set forth in Title 1 of the Code of
Virginia unless the General Assembly manifests an intent otherwise. Section 1-13:23 pro-
vides that "[t]he word 'process' shall be construed to include subpoenas in chancery,
notices to commence actions at law and process in statutory actions." I find no manifest
intent by the General Assembly to broaden the definition of "process" as used in
§§ 51.1-102 and 51.1-802 to include court orders pertaining to equitable distribution. See
contexts).

III. Section 20-107.3 Does Not Conflict with §§ 51.1-102 and 51.1-802

Because §§ 51.1-102 and 51.1-802 do not prohibit monetary awards based upon a
consideration of retirement income as marital property, it is my opinion that § 20-107.3
does not conflict with either § 51.1-102 or § 51.1-802. It is further my opinion, therefore,
that the court may consider such retirement benefits in making an equitable distribution
of property in a divorce action. Because I conclude that no conflict exists between
§ 20-107.3 and §§ 51.1-102 and 51.1-802, a response to your second question is
unnecessary.

1The 1988 amendment to § 20-107.3 that deleted retirement benefits as a factor to be
considered in determining the basic equitable distribution monetary award and that
rewrote subsection G to provide for an additional monetary award based upon retirement
benefits does not change the conclusion reached in this Opinion. See Ch. 880, 1988 Va.
Acts 1816, 1817.
2 An execution is "the setting aside of specific property from the general property of the defendant and placing the same in the custody of the law until it can be sold and applied to the payment of the execution." 21 A M.J. Words and Phrases 159 (Repl. Vol. 1987); see also Walker & als. v. The Commonwealth, 59 Va. (18 Gratt.) 13 (1867).

3 "An attachment is an execution in advance, to secure the plaintiff in the event he recovers a judgment or decree." 21 A M.J., supra note 2, at 34.

4 Garnishment is "the process by which a creditor enforces the lien of his execution against the effects of his debtor in the hands of the garnishee." 21 A M.J., supra note 2, at 182; see also Bickle and Others v. Chrisman's Adm's, &C., 76 Va. 678 (1882).

PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM - INVESTMENTS.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

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

If Board of Trustees of Virginia Retirement System determines that purchase of controlling interest in Richmond Fredericksburg & Potomac Corporation prudent investment with animating purpose to benefit VRS and not to aid in construction or maintenance of RF&P, purchase not violative of Constitution's "credit clause" or "stock or obligations" clause. Board authorized to transfer controlling interest in RF&P to corporation wholly owned and operated by VRS for development of RF&P's real estate assets. Board members incur no personal liability for investment decisions if investments authorized by law and if Board adheres to fiduciary responsibilities and standard of care prescribed by statute.

August 23, 1991

Mr. Glen D. Pond
Director, Virginia Retirement System

You ask several questions concerning the acquisition by the Virginia Retirement System ("VRS") of a controlling portion of the shares of stock of the Richmond Fredericksburg & Potomac Corporation ("RF&P"), and the corporate restructuring of RF&P. First, you ask whether the acquisition of a controlling interest in RF&P by VRS violates Article X, § 10 of the Constitution of Virginia (1971). You also ask whether VRS lawfully may transfer the assets it owns in RF&P to a wholly owned single-purpose corporation, own all of the stock of that corporation, and then operate the corporation as an entity holding only real estate assets. Your third question is whether the Board of Trustees of VRS (the "Board") faces potential personal liability for any losses later incurred from the acquisition of the controlling portion of RF&P stock and the transfer of VRS ownership of that stock into the wholly owned real estate holding corporation.

I. Facts

In the proposed corporate restructuring, RF&P will transfer all of its assets relating to its railroad operation to CSX Corporation ("CSX") in return for the shares of stock CSX currently holds in RF&P. RF&P will retain all of its real estate holdings as its principal assets, and the sole business of the newly restructured RF&P will be the management and development of those real estate holdings, which are located both within and outside the Commonwealth. The result of the RF&P stock acquisition by VRS, which already owns a large block of shares of RF&P, will be that VRS will own a controlling portion of the outstanding stock of RF&P.
II. Applicable Constitutional and Statutory Provisions

Article X, §10 provides:

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; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; nor shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work.

Article X, §11 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 2.1-187 of the Code of Virginia provides:

The [State] Treasurer is authorized, when in his discretion he deems proper, to sell, transfer, and convey any notes, bonds, obligations or certificates of stock held in the general fund of the state treasury. The proceeds from any such sale or disposition shall immediately be paid into the general fund. This section shall apply to any such present holdings and to those hereafter acquired.

Section 51.1-114, a portion of Article 3, Chapter 1 of Title 51.1, §§ 51.1-114 through 51.1-124 ("Article 3"), provides:

A. The Board shall be the trustee of the funds of the retirement systems that it administers and of those resulting from the abolished system. The Board shall have full power to invest and reinvest such funds, subject to the provisions of this chapter.

The Board may invest trust funds in first deeds of trust on residential real property limited to twenty percent of total trust fund investments based on cost. Subject to such limitations, the Board shall have full power to hold, purchase, sell, except as limited by § 2.1-187, assign, transfer, or dispose of any of the securities or investments in which any of the trust funds have been invested, as well as any of the proceeds of such investments and any monies belonging to such funds.

* * *

G. No member of the Board, nor any member of the Investment Advisory Committee, shall be personally liable for losses suffered by the retirement system on investments made under the authority of this chapter.

Section 51.1-116, which establishes the standard of judgment and care required of the Board in making investment decisions, provides:

[The Board shall exercise the judgment of care under the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in
regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

III. Proposed Transaction Does Not Violate Article X, § 10

Article X, § 10 imposes specific limitations on the lending of the State's credit. The two clauses of Article X, § 10 relevant to this question commonly are referred to as the "credit clause" ("[n]either 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"), and the "stock or obligations clause" ("nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work"). See generally 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 1126-27 (1974).

In Almond v. Day, 197 Va. 782, 91 S.E.2d 660 (1956), the Supreme Court of Virginia considered whether the investment of funds held by VRS (formerly the Virginia Supplemental Retirement System) in bonds of public utilities and private corporations violated the "credit clause" and the "stock or obligations clause" of Article XIII, Sec. 185 of the Constitution of Virginia (1902), the predecessor provision to Article X, § 10. After holding that VRS funds were "state" funds, the Court conducted a historical review of former Sec. 185 and the rationale for its inclusion in the Constitution. Before 1869, the Commonwealth had freely extended its credit and funds to various private corporations and businesses. As a result of the large losses suffered by the Commonwealth, the "credit clause" and the "stock or obligations clause" were first incorporated in the Constitution of 1869. 197 Va. at 787-89, 91 S.E.2d at 664-65.

Looking first at the "credit clause" in former Sec. 185, the Court found that the moving consideration and motivating cause of a transaction are the chief factors by which to determine if it is prohibited by § 185. Whether or not a transaction contravenes the "credit clause" in § 185 depends upon its animating purpose and the object that it is designed to accomplish.

197 Va. at 790, 91 S.E.2d at 666-67. The Court concluded:

Use of the State's funds for purchase of securities for the State's benefit is not an extension of "credit" which poses any threat to the financial security or welfare of the State. Extending its credit to aid and promote private enterprise was the evil from which the State had suffered financially. The potential danger incurred in lending credit to foster and promote the interests of those who had no rightful claim, in justice or in morals, to the State's help or relief was the evil to be arrested. When the underlying and activating purpose of the transaction and the financial obligation incurred are for the State's benefit, there is no lending of its credit though it may have expended its funds or incurred an obligation that benefits another. Merely because the State incurs an indebtedness or expends its funds for its benefit and others may incidentally profit thereby does not bring the transaction within the letter or the spirit of the "credit clause" prohibition.

Id. at 791, 91 S.E.2d at 667.

In examining the "stock or obligations clause," the Court in Almond v. Day focused on the phrase "for the purpose of aiding in the construction or maintenance of the works of such company." This language was added to the clause in 1902, modifying the previously unqualified prohibition against subscribing to, or becoming interested in, the stock
or obligations of any company or corporation. As it did with the "credit clause," the Court found that the "purpose of the transaction was the vital and controlling factor by which its validity or invalidity shall be determined." Id. at 792, 91 S.E.2d at 667. If the transaction is for the "State's benefit," and not to aid in the construction or maintenance of the company, then there is no violation of the "stock or obligations clause." Id. at 792, 91 S.E.2d at 667-68.

Subsequent decisions by the Supreme Court of Virginia have resulted in fewer restrictions on the ability of the Commonwealth to be involved in development activities than a strict reading of Article X, § 10 might dictate. In cases decided under both the "credit clause" and the "stock or obligations clause," the Court has upheld government actions, when the underlying purpose of the transaction was for the governmental entity's benefit, that would otherwise appear to violate these prohibitions. See, e.g., City of Charlottesville v. DeHaan, 228 Va. 578, 323 S.E.2d 131 (1984) (city appropriation to redevelopment and housing authority which, in turn, loaned money to private developer for hotel project did not constitute violation of "credit clause"); Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966) (financing and construction of facilities by authority for lease to private industry served primarily public purpose of stimulating industrial development); Button v. Day, 203 Va. 687, 127 S.E.2d 122 (1962) (Virginia Public School Authority could pledge local school bonds acquired to secure its own bonds without constituting lending of credit in violation of former Sec. 185; Harrison v. Day, 200 Va. 750, 107 S.E.2d 585 (1959) (no constitutional prohibition against State making loan to Richmond Produce Market Authority when loan was for public benefit). "[T]o state the matter another way, its purpose is to see that public money is used only for public purposes." Button v. Day, 203 Va. at 694, 127 S.E.2d at 127. If the purpose is clearly to foster and encourage the operation of a private enterprise, however, then the Supreme Court has not hesitated to declare the transaction violative of former Sec. 185. See, e.g., Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968).

The Board is mandated by statute to make prudent investment decisions under § 51.1-116. If the Board determines in the exercise of its judgment under § 51.1-116 that the purchase of a controlling interest in RF&P is a prudent investment the animating purpose of which is to benefit VRS and not to aid in the construction or maintenance of RF&P, it is my opinion that the purchase will not violate Article X, § 10.

IV. 1991 Amendments Authorize Board to Transfer RF&P Stock to Wholly Owned Real Estate Holding Corporation

You next ask whether VRS may transfer its controlling interest in RF&P, the assets of which consist largely of real estate, to a new corporation, wholly owned and operated by VRS for the development of those real estate assets.

Article X, § 11 provides that the General Assembly shall maintain a state employees retirement system "subject to such restrictions or conditions as may be prescribed by the General Assembly." The General Assembly has set forth those restrictions and conditions on investments by the Board in Article 3. Before the 1991 Session of the General Assembly, the Board did not have clear authority under any state statute to own and operate RF&P or a wholly owned successor corporation for real estate development.

Prior to July 1, 1991, § 2.1-187 contained the following restriction on the disposition of RF&P assets by VRS:

Notwithstanding the foregoing, the Treasurer shall transfer any and all stock held by the Commonwealth in the R F & P Corporation to the Virginia Retirement System at a valuation of $8,660,000. Such stock shall not be sold, pledged, encumbered or otherwise disposed of by the trustees of the fund
without the consent of the General Assembly and shall be retransferred by the trustees to the Treasurer upon repayment to the trustees of the amount credited by the trustees for such stock at the valuation provided herein.

At its 1991 Session, however, the General Assembly amended § 2.1-187, effective July 1, 1991, to delete the restrictions on VRS' transfer of RF&P stock. See Chs. 349, 366, 1991 Va. Acts 500, 564 (Reg. Sess.), respectively. It also amended § 51.1-116 to designate a wholly owned real estate development corporation as a clearly permissible VRS investment:

[T]he Board is authorized to acquire and retain every kind of property and every kind of investment, specifically including but not limited to...

(iii) not less than all of the stock of a corporation organized by the Board under the laws of the Commonwealth for the purposes of acquiring and retaining real property that the Board is authorized under this article to acquire and retain....


Based on the above, it is my opinion that the Board is now authorized by statute to transfer its interest in RF&P to a corporation wholly owned by VRS and operated to hold RF&P's real estate assets.

V. Board Members Not Subject to Personal Liability for Authorized Investments if They Adhere to § 51.1-116 Standard of Care

Article 3 sets forth the types of securities in which the Board may invest. The Board's discretion in making investment decisions is further limited by the standard of care detailed in § 51.1-116. As quoted above, § 51.1-114(G) provides that "[n]o member of the Board, nor any member of the Investment Advisory Committee, shall be personally liable for losses suffered by the retirement system on investments made under the authority of this chapter."

By its plain language, therefore, § 51.1-114 insulates Board members from liability for their investment decisions if those investments specifically are authorized by law. The 1991 amendment to § 51.1-116 has given the Board specific authority to invest in a wholly owned real estate development corporation. In my opinion, therefore, as long as the Board adheres to its fiduciary responsibilities under § 51.1-116 and makes investments only within the statutory authority given to it, individual Board members will not incur personal liability for their investment decisions.

1This Opinion deals exclusively with the legal issues that you raise and not with the practical or financial advisability of the actions contemplated by VRS. The Board itself, of course, must make that business judgment, obtaining whatever expert advice it deems necessary to make a prudent investment decision on behalf of VRS and its members.

2In the 1991-1992 Appropriations Act, the General Assembly also released all the restrictions imposed by § 2.1-187 with reference to the ability of VRS to sell, pledge, encumber or otherwise dispose of the stock of RF&P held by VRS. Ch. 723 Item 78.1, 1991 Va. Acts 1414, 1456 (Reg. Sess.). This legislation effectively authorized VRS to purchase or sell the stock of RF&P without further restriction or impediment. Upon the transfer of the funds permitted by this legislation, VRS will own clear title to the shares of RF&P stock and may deal with these shares without restriction or prohibition.
The portion of the earlier Opinion that pertains to the new issue you raise concludes that, although a private corporation may build a correctional facility to house prisoners in the Commonwealth, no state has the inherent power to incarcerate violators of its laws outside its own boundaries, either in a prison owned and operated by that state or in a privately owned facility under contract. The earlier Opinion further concludes, therefore, that any state other than Virginia seeking to commit prisoners to a facility in Virginia would have to derive its authority to do so from Virginia law. The earlier Opinion also concludes that the Corrections Private Management Act, §§ 53.1-261 through 53.1-266 of the Code of Virginia, applies only to private facilities housing Virginia inmates. Your inquiry answered by the earlier Opinion did not include the use of the private correctional facility by the District of Columbia and, as a result, the earlier Opinion specifically reserves judgment on this issue. Id. at 3 n.2.

The earlier Opinion also discusses the power of employees of a private correctional facility to maintain order and concludes that these employees are not authorized under current Virginia law to use deadly force to prevent detainees from leaving the facility. Any legislative grant of authority to another state to incarcerate prisoners in a private facility in Virginia, therefore, would need to provide sufficient statutory authority for facility employees to exercise the law-enforcement powers now being exercised by state correctional officers. The earlier Opinion also finds that §§ 54.1-1900 through 54.1-1908, which regulate businesses providing private security services, apply to private correctional officers. The earlier Opinion notes, however, that these statutes provide only limited authority for a private security guard to effect an arrest and that this limitation reflects current legislative intent to preclude a private security guard from exercising the full powers and responsibilities of a state correctional officer.
You now ask whether these conclusions from the earlier Opinion also apply to two factual situations involving prisoners from the District of Columbia.

II. Facts

In the first factual situation you present, a private corporation would purchase property in a Virginia county and, in compliance with all applicable local ordinances, build a correctional facility. The firm then would convey title to the property and facility to the District of Columbia (the "District"). By agreement between the District and the private corporation, the facility would be managed by the private corporation, pursuant to the laws of the District. You indicate that other prisoners might be assigned to the facility from federal agencies under contractual agreements with the District. The District also would enter into agreements with the appropriate Virginia law-enforcement agencies to recapture escapees beyond the boundaries of the correctional facility's property.

In your second factual situation, the private corporation again would acquire property in a Virginia county and construct a correctional facility, subject to all applicable ordinances. Upon completion of the facility, the private corporation would enter into an agreement with the county providing that the county sheriff would deputize all of the guards of the facility and giving the county a priority call on an agreed-upon number of beds in the facility at a set daily rate. This agreement also would provide that the private corporation could contract, either with the District or with agencies of the federal government, for the incarceration of additional prisoners at the facility in compliance with the rules and regulations of the federal governmental agency assigning the prisoners. You also indicate that the county sheriff would enter into an agreement with the private corporation and state law-enforcement agencies, if necessary, to pursue and recapture escapees beyond the boundaries of the correctional facility property.

III. Applicable Statutes

Section 14.1-70 provides that the number of full-time deputies to be appointed by a county sheriff shall be fixed by the Compensation Board after receiving recommendations from the board of supervisors of the county.

Section 15.1-643 details the powers and duties of a county sheriff.

IV. Conclusion in Earlier Opinion Equally Applicable to District in First Factual Situation

In the first factual situation you present, the prison would be located in Virginia, owned by the District, and privately managed "under the rules and regulations of the District." I noted in the earlier Opinion that "no state has the inherent power to incarcerate violators of its laws outside its own boundaries, either in a prison owned and operated by that state or in a privately owned facility under contract." Id. at 3. Like a state, to be empowered to house and control its prisoners in the Commonwealth, the District not only must own property in Virginia, it must be able to exercise jurisdiction over that property. Land acquired by one state in another is held subject to the laws of the latter state and to all incidents of private ownership. Georgia v. City of Chattanooga, 264 U.S. 472 (1924). A state acquiring ownership of property in another state does not project its sovereignty into the state where the property is situated. State v. Holcomb, 85 Kan. 178, 116 P. 251 (1911) (Kansas constitutional provision exempting municipal property from taxation not applicable to property in Kansas owned by Missouri city). Accord Florida State Hospital v. Durham Iron Co., 194 Ga. 350, 354, 21 S.E.2d 216, 219 (1942). "The public and sovereign character of the state owning property in another state ceases at the state line, with the consequence that its ownership of property in the foreign state is in
its corporate capacity without any sovereign or public attributes." State v. City of Hudson, 231 Minn. 127, 130, 42 N.W.2d 546, 548 (1950).

Even when the Congress of the United States has enacted legislation applicable only to the District and tailored to meet the local needs of the District, federal courts have held that these enactments should be treated as local law, similar to any other state statute, absent evidence of contrary congressional intent. See, e.g., District Properties Associates v. Dist. of Columbia, 743 F.2d 21, 27 (D.C. Cir. 1984). Concerning your first factual situation, therefore, it is my opinion that the District should be considered as any other state, and that the conclusions reached in the earlier Opinion with respect to other states apply with equal force to the District.

IV. Deputization of Private Correctional Officers Alone Does Not Authorize Incarceration of Out-Of-State Prisoners in Virginia

The relevant differences in the second factual situation you present involve the private corporation's retaining ownership of the land and correctional facility it builds and obtaining an agreement from the county for the local county sheriff to deputize the private facility's employees.6

Under the plain language of § 14.1-70, the number of deputies a sheriff may appoint is fixed by the Compensation Board. Even assuming that the private correctional officers meet all the necessary training and employment requirements to be appointed full-time deputies of the sheriff, their use by a private company as correctional officers is beyond the scope of those duties imposed on a sheriff by § 15.1-643, unless otherwise specifically authorized by statute. As noted in the earlier Opinion, the Corrections Private Management Act authorizes private facilities only for Virginia prisoners under control of the Department of Corrections. Id. at 2. I am unaware of any other existing state statute that would grant the sheriff this authority to appoint deputies for this purpose.

Even if statutory authority were provided for the county sheriff to deputize the employees of the private corporation to act as correctional officers in the prison facility you describe, I can foresee many other unresolved legal issues that would arise from such an arrangement. For example, sheriffs may be held liable under 42 U.S.C. § 1983 for negligent failure to supervise and control persons they deputize as prison guards. See Davis v. Zahradnick, 600 F.2d 458, 459 n.1 (4th Cir. 1979). In my opinion, the sheriff would not be relieved of this liability for persons whom he deputized, simply because those individuals are the employees of the private corporation. As another example, determinations would need to be made whether these privately employed "deputies" would be covered under various other statutory provisions conferring special benefits or status on law-enforcement officers. See, e.g., §§ 15.1-136.1 to 15.1-136.7 (Line of Duty Act); § 18.2-308(B)(2) (exemption from prohibition on carrying concealed weapons).

Based on the above, it is my opinion that the second set of facts you describe does not provide a statutorily authorized or legally appropriate means for a private corporation to staff and operate a prison in Virginia for incarceration of District prisoners.

1. This conclusion assumes compliance with all applicable provisions of local zoning and other ordinances.

2. District ownership differentiates the correctional facility you describe from the federally owned Occoquan and Lorton facilities, both of which are located within the boundaries of the Commonwealth. See U.S. v. District of Columbia, 703 F. Supp. 982, 988-89 (D.D.C. 1988), aff'd as modified, 897 F.2d 1152 (D.C. Cir. 1990).

3. For purposes of this Opinion, I assume that the government of the District has the statutory authority to contract for the private operation of its prisons. This proposition is


D.C. Code Ann. § 24-425 (Repl. Vol. 1989) does provide that prisoners convicted in the District are committed to the custody of the Attorney General of the United States, who "may designate any available, suitable, and appropriate institutions, whether maintained by the District of Columbia government, the federal government, or otherwise, or whether within or without the District of Columbia." It has been held, however, that this statute does not authorize the Attorney General of the United States to force a state penal system to accept prisoners designated under the statute. U.S. v. District of Columbia 897 F.2d 1152, 1156 n.4 (D.C. Cir. 1990).

Prior Opinions of this Office consistently have concluded that local governing bodies may not unilaterally impose additional duties or obligations on the independently elected constitutional officers of their localities. See Att'y Gen. Ann. Rep.: 1990 at 21, 22; 1989 at 71; 1987-1988 at 161; 1986-1987 at 130, 131-32; id. at 69; 1985-1986 at 255; 1984-1985 at 285; 1982-1983 at 462, 463-64; 1976-1977 at 250. Any agreement such as the one you describe, therefore, would require the consent of the incumbent sheriff and of his successors in office.

PRISONS AND OTHER METHODS OF CORRECTION: CORRECTIONS PRIVATE MANAGEMENT ACT.

PROFESSIONS AND OCCUPATIONS: PRIVATE SECURITY SERVICES BUSINESSES.

CRIMINAL PROCEDURE: ARREST.

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

Corrections Private Management Act applies to facilities housing Virginia inmates under authority of Department of Corrections; no authority for construction, maintenance and operation of correctional facility in Virginia by private entity to house inmates from another state. Private corrections company that complies with applicable provisions of local zoning and other ordinances may build facility to house prisoners in Virginia. State seeking to commit prisoners to Virginia facility must derive authority to do so from Virginia law. Legislative grant of authority to another state to incarcerate prisoners in private facility in Virginia should provide sufficient statutory authority for facility's employees to exercise law-enforcement powers exercised by state correctional officers. Private security guard precluded from exercising necessary powers and responsibilities of state correctional officer.

June 21, 1991

The Honorable Clive L. DuVal 2d
Member, Senate of Virginia

You ask whether the Corrections Private Management Act, §§ 53.1-261 through 53.1-268 of the Code of Virginia, enacted by the 1991 Session of the General Assembly, authorizes and regulates the construction, maintenance and operation of a correctional facility in Virginia by a private entity, to be used exclusively for the incarceration of
offenders from out of state. If the Act does not apply, you ask whether there is any legal barrier to the construction and operation of such a facility in Virginia by a private entity under the direction and control of another state for incarceration of that state's prisoners. You also ask whether the requirements of §§ 54.1-1900 through 54.1-1908 concerning private security businesses would apply to a private entity operating a correctional facility in Virginia on behalf of another state.

I. Applicable Statutes

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 [the zoning laws], and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses.

Section 19.2-81.1 provides that correctional officers may arrest persons without a warrant for crimes involving escape, or assisting an escape, from a correctional institution, the delivery of contraband to an inmate and any other criminal offense that contributes to the disruption of a correctional institution.

Section 19.2-81.2(A) authorizes a correctional officer to detain anyone he suspects of aiding the escape of a prisoner.

Section 19.2-82 provides that "[a] person arrested without a warrant shall be brought forthwith before a magistrate or other issuing authority having jurisdiction who shall proceed to examine the officer making the arrest under oath."

Section 53.1-1 contains the definitions of a "local correctional facility," a "state correctional facility" and a "correctional officer."

Section 53.1-203 enumerates acts by prisoners relating to incarceration that are to be treated as felonies.

Chapter 15 of Title 53.1, §§ 53.1-261 through 53.1-266, enacted by the 1991 Session of the General Assembly, comprises the Corrections Private Management Act (the "Act"), and governs the construction, maintenance and operation of a private correctional facility operated by or under the authority of the Department of Corrections (the "Department"). Ch. 705, 1991 Va. Acts 1353 (Reg. Sess.).

Sections 54.1-1900 through 54.1-1908 establish certain regulations applicable to private security services businesses.

II. Act Only Applicable to Facilities Housing Inmates Under Authority of Department

Section 53.1-266 of the Act directs the State Board of Corrections (the "Board") to "promulgate regulations governing the . . . operation of prison facilities." 1991 Va. Acts, supra Pt. I, at 1355.

Section 53.1-261 of the Act defines a "prison facility" as "any institution operated by or under authority of the Department," and further defines a "prison contractor" as "any entity entering into or offering or proposing to enter into a contractual agreement

The express terms of §§ 53.1-261 and 53.1-266, therefore, limit the Act's application to institutions operated by the Department or by a contractor under agreement with the Department to provide correctional services to inmates under the custody of the Commonwealth. Regulations to be promulgated by the Board under the provisions of the Act similarly apply only to institutions operated by or under authority of the Department.

It is my opinion, therefore, that the Act only applies to facilities housing Virginia inmates under the authority of the Department, and does not provide authority for the private construction, maintenance and operation of a correctional facility in Virginia housing inmates from another state.

III. Private Concern that Complies with Local Zoning Requirements May Build Correctional Facility

Whether there are any legal restrictions on the construction of a private correctional facility is determined by the zoning ordinance of the locality where the facility seeks to locate. Section 15.1-486 provides that the governing body of any county or municipality may regulate the use and construction of land and buildings. Assuming that a private corrections company complies with all applicable provisions of local zoning and other ordinances, it is my opinion that a private concern may build a facility to house prisoners in Virginia. The ability to construct a prison facility is, however, separate and distinct from the authority of a private entity to operate such a facility or the power of another state to commit prisoners to it.

IV. State Laws Lack Extraterritorial Effect; in Absence of Virginia Statutory Authorization, Other States Not Empowered to Incarcerate Prisoners in Virginia

It is a firmly established principle that "the law of one state has no extraterritorial effect in another state." 16 Am. Jur. 2d Conflict of Laws § 7 (1979) (footnote omitted). It is equally well recognized that penal statutes "are strictly territorial, and cannot be enforced in any [state] other than that in which they originated." Samuels' Case, 110 Va. 901, 903-04, 66 S.E. 222, 223 (1909). "[T]he courts of one [state] will not enforce the penal laws of another," James-Dickinson Co. v. Harry, 273 U.S. 119, 125 (1927) (distinguishing enforcement of civil liability arising under law of another state). A New Jersey court has held that "one sovereign cannot impose punishment within the territory of another," nor can one sovereign "be compelled to impose punishment within its own territory on behalf of [another]." Application of Marino, 23 N.J. Misc. 159, 165, 42 A.2d 469, 472 (1945).

These recognized limitations on extraterritorial jurisdiction make it clear that no state has the inherent power to incarcerate violators of its laws outside its own boundaries, either in a prison owned and operated by that state or in a privately owned facility under contract. In my opinion, therefore, any other state seeking to commit prisoners to a facility in Virginia would have to derive its authority to do so from Virginia law. I am not aware of any Virginia statute or regulation granting such authority. The General Assembly could, however, grant another state on request, within carefully prescribed limits, the authority to use or operate a correctional facility within the Commonwealth.

V. Employees of Private Correctional Facility Without Authority to Incarcerate Detainees

Assuming the General Assembly authorized another state to incarcerate prisoners in a private correctional facility in Virginia, an additional problem to be addressed would
be the power of the employees of that facility to maintain order. As a general proposition, a private citizen may only effect an arrest for felonies which occur in his presence or for affrays or breaches of the peace committed in his presence. See 1978-1979 Att'y Gen. Ann. Rep. 13, 14. Pursuant to § 19.2-82, anyone arrested without a warrant must be brought before a judicial officer forthwith.

A private citizen may use deadly force to prevent the commission of a felony only in certain limited circumstances, and the use of such force must be reasonable and may be resorted to only in the case of the apprehension of the most serious felons. Hendricks v. Commonwealth, 163 Va. 1102, 178 S.E. 8 (1935); see also Tennessee v. Garner, 471 U.S. 1 (1985).

Section 53.1-203 enumerates acts by prisoners, relating to incarceration, that are to be treated as felonies. Section 53.1-1 defines "state correctional facility," "local correctional facility" and "community correctional facility." In my opinion, these definitions limit the proscription of some of the acts to occurrences in correctional institutions operated under Virginia governmental authority. See Hobson v. E. W. Murray, 485 F. Supp. 1340 (E.D. Va. 1980) (to be convicted of felony, escape must be from institution operated by Department); Mason v. Commonwealth, 217 Va. 321, 228 S.E.2d 683 (1976) (Code definitions determine whether escape is felony or misdemeanor).

As a practical matter, therefore, employees of a private correctional facility not operated under the Act would lack inherent authority under current Virginia law to exercise all of the necessary control over inmates in the facility. Thus, an "escape" from such facility would not be a violation of Virginia law, and employees of the facility would not be authorized under current law to use deadly force to prevent detainees from leaving.

It is my opinion, therefore, that any legislative grant of authority to another state to incarcerate prisoners in a private facility in Virginia also would need to provide sufficient statutory authority for the employees of that facility to exercise the law-enforcement powers now being exercised by state correctional officers.

VII. Sections 54.1-1900 Through 54.1-1908 Apply to Private Correctional Officers, but Do Not Give Them Arrest Powers

You ask whether §§ 54.1-1900 through 54.1-1908 are applicable to the facts you present. These sections provide for the regulation of businesses providing private security services. The definition of a "private security services business" includes "person[s] engaged in the business of providing . . . guards . . . under contract." Section 54.1-1900. This section would, therefore, be applicable to individuals employed as private correctional officers. Section 54.1-1907, however, again provides only limited authority for a private security guard to effect an arrest. This grant of limited authority is, in my opinion, further evidence of a current legislative intent to preclude a private security guard from exercising the necessary powers and responsibilities of a state correctional officer.

Although this Act becomes effective July 1, 1991, its provisions "shall be of no effect after the 1992 Session of the General Assembly unless reenacted by that Assembly." Ch. 705, 1991 Va. Acts 1353, 1355 (Reg. Sess.).

Your question does not mention the use of such a facility by the District of Columbia. The District of Columbia courts derive their authority directly from federal law. See Palmore v. United States, 411 U.S. 389 (1973); Edwards v. Sard, 250 F. Supp. 977 (D.C. 1966). This Opinion does not address, and I am specifically reserving judgment on, the District of Columbia government's use of a privately owned facility in Virginia.

Even assuming that foreign prisoners are committed to private institutions operating in Virginia under a court order from the foreign jurisdiction, the full faith and credit doctrine does not mandate that Virginia give that order full effect. White v. Thomas,
660 F.2d 680 (5th Cir. 1981) (Texas sheriff's discharge of deputy who failed to disclose juvenile offense did not violate full faith and credit doctrine, even where California court order expunged record); cf. Bigelow v. Virginia, 421 U.S. 809 (1975) (state cannot regulate or proscribe activities conducted in another state by organization located in other state).

4In Trevett v. Prison Ass'n., 98 Va. 332, 36 S.E. 373 (1900), the Supreme Court of Virginia tacitly acknowledged the existence of a privately owned prison. That case, however, dealt with the prison owners' liability in tort to a neighboring landowner, and did not address the private prison's jurisdiction to incarcerate or control inmates.

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES.

Newly enacted statute providing authority for sheriffs and jail superintendents, by mutual agreement, to transfer and transport prisoners between respective facilities without court order not in conflict with prior statute granting permissive authority to circuit courts to commit prisoners to jails outside jurisdiction in which court sits.

July 2, 1991

The Honorable Robert B. Ball Sr.
Member, House of Delegates

You ask whether there is a conflict between §§ 53.1-76 and 53.1-79.1 of the Code of Virginia concerning the authority of sheriffs and jail superintendents to transfer prisoners between their respective facilities without court approval.

I. Applicable Statutes

Section 53.1-76 provides, in part:

In any case should it become necessary or expedient for the safekeeping of any prisoner, or for good cause, a circuit court may commit such prisoner to a jail other than that located in its county or city.

Section 53.1-79.1 provides:

The sheriff or superintendent of any jail may enter into an agreement with the sheriff or superintendent of any other jail in the Commonwealth to transfer and transport prisoners between the respective facilities, and to confine such prisoners, unless such transfer is otherwise prohibited by law.

Section 53.1-119 provides:

The sheriff shall provide officers to attend the courts within his jurisdiction while such courts are in session as the respective judges may require. He shall receive into the jail all persons committed by the order of such courts, or under process issuing therefrom, and all persons committed by any other lawful authority.

II. Authority of Sheriffs to Transfer Prisoners Between Jurisdictions

Established by New § 53.1-79.1; Not in Conflict with § 53.1-76

It is a basic principle of statutory construction that statutes dealing with the same subject matter should be harmonized if possible. If apparently conflicting statutes can be
harmonized and effect given to them both, they will be so construed. Standard Drug v. General Electric, 202 Va. 367, 378-79, 117 S.E.2d 289, 297 (1960).  

Section 53.1-119 provides that a sheriff shall take into custody anyone committed by order or process issued by any court within his jurisdiction. A prior Opinion of this Office concludes that § 53.1-119 prohibits a county sheriff from refusing to accept a prisoner from a portion of a city of the second class that lies within the sheriff's statutory jurisdiction. See 1982-1983 Att'y Gen. Ann. Rep. 160, 161. Neither that Opinion nor § 53.1-119 itself, however, imposes any limitation on a sheriff's authority to transfer prisoners following their initial commitment to his custody.

Section 53.1-76 provides that, "[when] necessary or expedient for the safekeeping of any prisoner, or for good cause, a circuit court may commit such prisoner" to the jail of another county or city. (Emphasis added.) By the use of the word "may" in this statute, the General Assembly has granted permissive authority to circuit courts to commit prisoners to jails outside the jurisdiction in which the court sits. See 1990 Att'y Gen. Ann. Rep. 217, 219 (statute providing that locality "may" levy license tax deemed permissive). In my opinion, however, the granting of this option does not imply a restriction on the ability of the sheriff or jail superintendent receiving a prisoner to transfer that prisoner, when authorized to do so by another statute. Section 53.1-79.1 provides that express authority "unless such transfer is otherwise prohibited by law." Given this express authority for the transfer of prisoners by sheriffs and jail superintendents in § 53.1-79.1 and the fact that there is no express prohibition on such transfer in § 53.1-76 or § 53.1-119, the mandate to harmonize these statutes dictates the conclusion that § 53.1-79.1 has granted sheriffs and jail superintendents transfer authority.

Another fundamental rule of statutory construction is that, when a prior general statute appears to conflict with a subsequent specific statute, the more recently enacted specific statute will prevail. See South Norfolk v. Norfolk, 190 Va. 591, 58 S.E.2d 32 (1950); see also 1985-1986 Att'y Gen. Ann. Rep. 120, 121. Because § 53.1-79.1 was enacted by the most recent Session of the General Assembly and is more specific than § 53.1-76 in addressing the transfer of prisoners after their initial commitment to a local jail, this rule of construction means that, to the extent the two sections conflict, § 53.1-79.1 is controlling.

Based on the above, it is my opinion that § 53.1-79.1 authorizes sheriffs and jail superintendents, by mutual agreement, to transfer and transport prisoners between their respective facilities without a court order.  

1Section 53.1-79.1 was enacted by the 1991 Session of the General Assembly and became effective on July 1, 1991. See Ch. 192, 1991 Va. Acts 262 (Reg. Sess.).

2Section 53.1-109 gives jail superintendents of regional jails or jail farms the same control and authority over prisoners committed to those facilities as sheriffs have over prisoners committed to local jails.

3The fact that § 53.1-79.1 gives sheriffs and jail superintendents the authority to make agreements for such transfers does not preclude a circuit court from ordering a transfer pursuant to § 53.1-76 in the absence of such an agreement.

4A prior Opinion of this Office concludes that a sheriff may not accept a prisoner from a jail in another locality without a court order. See 1938-1939 Att'y Gen. Ann. Rep. 145. That Opinion interprets a predecessor statute to § 53.1-76 but obviously predates the adoption of § 53.1-79.1. I do not, therefore, view it as controlling your present inquiry.
August 1, 1991

The Honorable Charles W. Jackson
Sheriff for Westmoreland County

You ask whether, under § 53.1-81 of the Code of Virginia, two counties and a town located within one of those counties may agree to construct a regional jail. If so, you also ask whether the town may be reimbursed up to one-half of the contribution it makes to construction as the third partner in the regional jail facility.

I. Facts

You indicate that Westmoreland and Richmond Counties are considering the construction of a regional jail, and that the Town of Warsaw, in Richmond County, voted on July 3, 1991, to participate in this regional jail project. The regional jail will be located in Richmond County and will serve both counties and the town.

II. Applicable Statutes

Section 15.1-14 provides:
Every city and town may:

   * * *

3. Lay off public grounds and provide all buildings proper for the city or town, including a prison house and workhouse, and employ managers, physicians, nurses and servants for the same and prescribe regulations for their government and discipline and for persons therein . . . .

Section 53.1-73 provides:
Every town shall have the use of the jail of the county in which such town is located, to aid the constituted authorities of any such town in maintaining peace and good order, and generally for the enforcement of its ordinances, unless for good cause the judge of the circuit court of such county shall prohibit such use.

Section 53.1-80 establishes procedures for the Commonwealth's one-half reimbursement of a city's or county's cost of construction, enlargement or renovation of a local jail on a basis approved by the Board of Corrections (the "Board"). The Board is required to promulgate regulations to serve as guidelines in evaluating requests for such reimbursement. The Governor must approve all plans, specifications and construction. These reimbursements may not exceed the amount set forth in § 53.1-83 and are paid by the State Treasurer out of funds appropriated to the Department of Corrections.
Section 53.1-81 provides, in part:

Three or more cities, counties or towns, or any combination thereof, are authorized, pursuant to approval of the Board, to construct, enlarge or renovate a regional jail facility or to enlarge or renovate an existing jail for the purpose of establishing a regional jail facility. On and after December 1, 1989, the Commonwealth shall reimburse each such locality its pro rata share up to one-half of the cost of such construction, enlargement or renovation in accordance with the provisions of this section. The Board shall promulgate regulations, to include criteria which may be used to assess need and establish priorities, to serve as guidelines in evaluating requests for such reimbursement and to ensure the fair and equitable distribution of state funds provided for such purpose. The Department of Corrections shall apply such regulations in preparing requests for appropriations. No such reimbursement shall be had unless the plans and specifications, including the need for additional personnel, thereof have been submitted to the Governor and the construction, enlargement or renovation has been approved by him. The Governor shall base his approval in part on the expected operating cost-efficiency of the interior design of the facility. Such reimbursement shall be paid by the State Treasurer out of funds appropriated to the Department.

III. Town Located in Participating County Also May Participate in Construction of Regional Jail

Section 15.1-14(3) authorizes towns to build their own jails. A town is not obligated to build a jail, however, and may use its county's jail, because § 53.1-73 provides that "[e]very town shall have the use of the jail of the county in which such town is located." The authority of a town to build a jail, therefore, is permissive and not mandatory. Franklin v. Richlands, 161 Va. 156, 170 S.E. 718 (1933).

Section 53.1-81 expressly provides that "[t]hree or more cities, counties or towns, or any combination thereof, are authorized, [with] approval of the Board, to construct, enlarge or renovate a regional jail facility."

In the absence of a contrary definition, words in a statute should be given their common, ordinary meaning. Anderson v. Commonwealth, 182 Va. 560, 565-66, 29 S.E.2d 838, 840 (1944). The term "any combination" in § 53.1-81, therefore, indicates that the General Assembly intended to place no geographic limits on the cities, counties or towns of the Commonwealth that may participate in a particular regional jail.

"The purpose for which a statute is enacted is of primary importance in its interpretation or construction." Norfolk So. Ry. Co. v. Lassiter, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952). A prior Opinion of this Office concludes that the General Assembly intended by enacting §§ 53.1-80 and 53.1-81 to provide a means to reimburse localities that wish to improve their confinement facilities either by new construction or renovation. See 1983-1984 Att'y Gen. Ann. Rep. 227, 228 ("Slaughter Op."). By including towns as eligible for reimbursement when they join in constructing regional jails under § 53.1-81, while not including them in § 53.1-80, which governs reimbursement for local jails, moreover, it is clear that the General Assembly sought to encourage towns to participate in such regional jail projects. It would be contrary to that intent to exclude a town from participation in a regional jail simply because it is located in one of the participating counties.

In my opinion, therefore, § 53.1-81 authorizes a town, with the Board's approval, to participate in the construction of a regional jail even when the county in which the town is located is also a participant in the same regional jail project.
IV. Town Eligible for Reimbursement Under § 53.1-81; Board May Consider
Relevant Factors in Determining Amount, Within Statutory Limits

Section 53.1-80 authorizes the Commonwealth to reimburse up to one-half the cost of construction, enlargement or renovation of a city's or county's jail. Section 53.1-81 governs the Commonwealth's reimbursement of a locality's contribution to construction of a regional jail. While § 53.1-80 does not include towns, § 53.1-81 expressly provides that towns may be reimbursed for their participation in construction of a regional jail.

A prior Opinion of this Office concludes that the Board may reimburse localities for their pro rata shares, "up to one-half the cost of a regional jail," on a basis approved by the Board. Slaughter Op., supra Pt. III, at 228.

Section 53.1-81 provides, however, that the Board and the Governor must approve construction of a regional jail. Another prior Opinion of this Office concludes that the Board has broad discretion to consider cost analysis and any other relevant matters in determining the basis on which to approve the Commonwealth's reimbursement for local jail construction. 1985-1986 Att'y Gen. Ann. Rep. 223, 224.

The General Assembly's use of the phrase "pursuant to approval of the Board" in § 53.1-81, therefore, gives the Board the latitude to consider each participating locality's percentage contribution to construction and projected use of the regional jail, and the overall needs of the criminal justice system, in determining the appropriate amount of the Commonwealth's reimbursement for construction of a regional jail, up to one-half of the cost pursuant to § 53.1-81, and within the limits set by § 53.1-83.

1Section 53.1-83 sets forth the maximum rate of reimbursement to localities for construction, enlargement or renovation of individual or regional jails.

2This prior Opinion and the Slaughter Opinion specifically interpret § 53.1-80. Sections 53.1-80 and 53.1-81, however, both address and define the Board and Governor's authority to determine the appropriateness of the Commonwealth's reimbursement for jail construction. The reasoning and conclusions of these Opinions are applicable, therefore, to your inquiry.

PROFESSIONS AND OCCUPATIONS: CONTRACTORS.

Authority of Board for Contractors to promulgate regulations requiring certain provisions to be included in residential construction contracts: Mandating terms in contracts preventing deceptive and misleading practices by contractors consistent with Board's regulatory authority granted by General Assembly as of January 1, 1991; July 1, 1991, statutory amendment does not prohibit adoption of regulations that include mandatory terms in residential contracts other than those listed in amended statute; Board authorized to extend requirement for furnishing statement of protections only to contracts involving door-to-door solicitations.

May 31, 1991

The Honorable Elliot S. Schewel
Member, Senate of Virginia

You ask three questions concerning the authority of the Board for Contractors (the "Board") to promulgate regulations requiring certain provisions to be included in residential construction contracts. Your specific questions are:
1. As of January 1, 1991, did § 54.1-1102 of the Code of Virginia authorize the Board to impose the minimum requirements for residential construction and improvement contracts ("contract regulations") set forth in VR 220-01-2 Pt. V, § 5.1, ¶ 6?

2. Since the General Assembly specifically has addressed the subject of written contracts for residential construction in reenrolled Chapter 659 (1991 Reconvened Sess.), approved April 3, 1991, and effective July 1, 1991, may the Board by regulation require such contracts to contain terms and conditions in addition to those listed in that chapter?

3. In view of the specific provision in the amendment to § 54.1-1102 that contractors may be required to provide customers with a statement of protections in connection with contracts obtained by door-to-door solicitations, may the Board require by regulation, after July 1, 1991, that such statements of protections be given in other instances?

I. Applicable Statutes, Regulations and Legislative History

Section 54.1-201 authorizes all boards within the Department of Commerce to promulgate regulations "to prevent deceptive or misleading practices by practitioners." Sections 54.1-1000 through 54.1-1117 establish the Board and detail its powers and responsibilities.

Before 1991, § 54.1-1102 directed the Board to "promulgate regulations not inconsistent with statute necessary to regulate the practice of contracting."

The Board adopted the contract regulations effective January 1, 1991, and, for the first time, thereby required residential contractors to include certain terms in their contracts.

Chapter 659 was introduced in the 1991 Session of the General Assembly as Senate Bill No. 747 (offered January 22, 1991). As introduced, this bill amended § 54.1-1102 to provide, in part:

The Board may adopt regulations requiring all Class A and B contractors to use legible written contracts including only the following terms and conditions:

1. General description of the work to be performed;

2. Fixed price or an estimate of the total cost of the work, the amounts and schedule of progress payments and the amount of down payment;

3. Estimates of time of commencement and completion of the work; and

4. Contractor's name, address and license number.

Id. (emphasis added).

The original bill further provided that "[t]he Board shall have no authority to adopt regulations requiring the inclusion of any other specific terms or conditions in written contracts or to require that any publication or written materials, other than the contract, be provided by the contractor to the customer." Id.

Senate Bill No. 747 was amended in both the Senate and the House of Delegates, and was enrolled with the following language in § 54.1-1102:
The Board may adopt regulations requiring all Class A and B residential contractors, excluding subcontractors to the contracting parties and those who engage in routine maintenance or service contracts, to use legible written contracts including the following terms and conditions:

1. General description of the work to be performed;
2. Fixed price or an estimate of the total cost of the work, the amounts and schedule of progress payments, a listing of specific materials requested by the consumer and the amount of down payment;
3. Estimates of time of commencement and completion of the work; and
4. Contractor's name, address, office telephone number and license or registration number and class.

The Board shall have no authority to adopt regulations requiring the inclusion of any other specific terms or conditions in written contracts or to require that any publication or written materials, other than the contract or other standard manufacturer's warranties on appliances or other components, be provided by the contractor to the customer.

In transactions involving door to door solicitations, the Board may require that a statement of protections be provided by the contractor to the homeowner, consumer or buyer, as the case may be.

Id.

The Governor returned Senate Bill No. 747 to the General Assembly with a request that the following language be stricken from the enrolled bill:

The Board shall have no authority to adopt regulations requiring the inclusion of any other specific terms or conditions in written contracts or to require that any publication or written materials, other than the contract or other standard manufacturer's warranties on appliances or other components, be provided by the contractor to the customer.

Memo. from Gov. Lawrence Douglas Wilder to Senate of Virginia (Mar. 25, 1991). The Senate and the House both agreed to this change. As finally approved, therefore, Chapter 659 reflects the deletion of that paragraph expressly prohibiting the Board from expanding on the list of required contract terms and conditions. See Ch. 659, 1991 Va. Acts 1218 (Reg. Sess.)

II. Mandating Terms of Residential Construction Contracts Not Inconsistent with Board's Regulatory Authority Granted by General Assembly as of January 1, 1991

The law establishing the Board, §§ 54.1-1100 through 54.1-1117, as it existed on January 1, 1991, contained no specific language either authorizing the Board to require, or forbidding the Board from requiring, residential contractors to use written contracts or to include specific terms in those contracts. Section 54.1-201, however, authorizes all boards within the Department of Commerce, including the Board, to promulgate regulations "to prevent deceptive or misleading practices by practitioners." In my opinion, the Board reasonably could conclude that requiring mandatory terms in residential construction contracts would prevent deceptive and misleading practices by contractors. It is further my opinion, therefore, that the contract regulations were consistent with the Board's authority when they became effective on January 1, 1991.
III. Board May Require Written Contract Terms Other than Those in Chapter 659

The language in Senate Bill No. 747, as introduced and as enrolled the first time, expressed the clear intent of the bill's drafters that its list of contract provisions be exclusive, limiting the Board's regulation of residential construction contracts. "A statute which limits the manner in which something may be done . . . evinces the intent that it shall not be done otherwise." 1986-1987 Att'y Gen. Ann. Rep. 130, 131. If that limiting paragraph had remained in the adopted bill, therefore, the Board would have been authorized only to require written residential contracts to include the terms listed in § 5.1, ¶ 6(a)-(c) and (h) of the Board's regulations, because these terms are consistent with the bill's listed contract requirements. The Board would not have been authorized, however, to require written residential contracts to include the terms detailed in § 5.1, ¶ 6(d)-(g) and (i) of the Board's regulations, because those plainly would have exceeded the limitations imposed by the bill.

No such limiting intent, however, is evinced by § 54.1-1102, as amended by Chapter 659. The word "only," which clearly would have prohibited the Board from including other terms in residential construction contracts, was removed in the Senate Committee on General Laws. The critical limiting language,

[t]he Board shall have no authority to adopt regulations requiring the inclusion of any other specific terms or conditions in written contracts or to require that any publication or written materials, other than the contract or other standard manufacturer's warranties on appliances or other components, be provided by the contractor to the customer

was removed at the request of the Governor. Governor's memo., supra Pt. I. All the original language in Senate Bill No. 747 that expressly would have restricted the Board's regulatory authority, therefore, has been excised. See 1991 Va. Acts, supra (emphasis added).

There remains in Chapter 659 the provision that "[t]he Board may adopt regulations requiring all Class A and B residential contractors . . . to use legible written contracts including the following terms and conditions." 1991 Va. Acts, supra (emphasis added). The Supreme Court of Virginia has held that, as a general rule, the inclusion of one item in a statute implies the exclusion of other items. See Grigg v. Commonwealth, 224 Va. 356, 359, 297 S.E.2d 799, 803 (1982). That implication is overridden in this instance, however, by the clear legislative history of Chapter 659.

Based on this legislative history, it is my opinion that Chapter 659, as adopted, does not prohibit the adoption of regulations that include mandatory terms in residential contracts other than those listed in the § 54.1-1102 amendment.

IV. Board Not Empowered to Impose Requirement for "Statement of Protections" Except on Contractors Soliciting Door-to-Door

The specific authorization in § 54.1-1102 for the Board to require that a "statement of protections" be provided by a contractor entering into a contract obtained by door-to-door solicitation was in Senate Bill No. 747 as originally adopted by the General Assembly. That provision was not affected by the Governor's request that the limiting language applicable to minimum contract requirements be deleted. In my opinion, the provision concerning the "statement of protections" is still subject to the general principle, discussed in Part III, that the mention of one item in a statute implies the exclusion of other items. It is my further opinion, therefore, that the Board is not authorized to extend the requirement for furnishing a "statement of protections" to any contracts except those involving door-to-door solicitations.
The contract regulations provide that the following will be cause for disciplinary action:

"Failure of all those who engage in residential contracting, excluding subcontractors to the contracting parties and those who engage in routine maintenance or service contracts, to make use of a legible written contract clearly specifying the terms and conditions of the work to be performed. For the purposes of these regulations, residential contracting means construction, removal, repair, or improvements to single-family or multiple-family residential buildings, including accessory-use structures. Prior to commencement of work or acceptance of payments, the contract shall be signed by both the consumer and the licensee/registrant or his agent. At a minimum the contract shall specify or disclose the following:

1. When work is to begin and the estimated completion date;
2. A statement of the total cost of the contract and the amounts and schedule for progress payments including a specific statement on the amount of the down payment;
3. A listing of specified materials and work to be performed;
4. A 'plain-language' exculpatory clause concerning events beyond the control of the contractor and a statement explaining that delays caused by such events do not constitute abandonment and are not included in calculating time frames for payment or performance;
5. A statement of assurance that the contractor will comply with all local requirements for building permits, inspections, and zoning;
6. Disclosure of the cancellation rights of the parties;
7. A signed acknowledgement by the consumer that he has been provided with and read the Department of Commerce statement of protections available to him through the Board for Contractors;
8. Contractor's name, address, license/registration number, expiration date, class of license/registration, and license classifications or specialty services;
9. Statement providing that any modification to the contract, which changes the cost, materials, work to be performed, or estimated completion date, must be in writing and signed by all parties."


Various courts in other states have held that "[t]he term 'includes' can be a term of enlargement, not of limitation; a statutory definition of a thing as 'including' certain things does not necessarily impose a meaning limited to the inclusion." Schwab v. Ariyoshi, 58 Haw. 25, 35, 564 P.2d 135, 141 (1977); see also In re Maidman, 2 B.R. 569, 575 (1980).
The Honorable Elmon T. Gray  
Member, Senate of Virginia

You ask whether a directive in a declaration made pursuant to the Natural Death Act of Virginia, §§ 54.1-2981 through 54.1-2992 of the Code of Virginia (the "Act"), is valid if it requests a rescue squad to determine, without a contemporaneous express order of a physician, that the declarant is dying and to refuse to resuscitate.

I. Applicable Statutes

Section 54.1-2983 of the Act provides, in part, that

"It shall be the responsibility of the declarant to provide for notification to his attending physician that a declaration has been made. In the event the declarant is comatose, incompetent or otherwise mentally or physically incapable, any other person may notify the physician of the existence of a declaration. An attending physician who is so notified shall promptly make the declaration or a copy of the declaration, if written, a part of the declarant's medical records. If the declaration is oral, the physician shall likewise promptly make the fact of such declaration a part of the patient's medical record."

A "qualified patient" under the Act is one who has "made a declaration in accordance with [the Act],&quot; and has "been diagnosed and certified in writing by the attending physician . . . to be afflicted with a terminal condition." Section 54.1-2982.

Section 54.1-2987 requires an attending physician who refuses to comply with the declaration of a qualified patient to "make a reasonable effort to transfer the patient to another physician."

Section 54.1-2988 further provides that a person who authorizes the withholding or withdrawal of life-prolonging procedures from a patient with a terminal condition in accordance with a qualified patient's declaration "shall not be subject to criminal prosecution or civil liability for such action."

Section 37.1-134.4(B), which details an alternate means of delegating treatment decision authority, provides:

Whenever a licensed physician determines after personal examination that an adult . . . is incapable of making an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment, the physician may . . . provide to, withhold, or withdraw from the person that treatment upon the authorization of [certain persons] in the specified order of priority . . . .

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." Any individual, other than a licensed physician or doctor of osteopathic medicine, who performs or endeavors to perform these activities engages in the unlawful practice of medicine. See § 54.1-2902. Section 54.1-2901 provides certain exemptions to this prohibition, generally for persons acting under the direct supervision of a physician or within the limited bounds of their professions, and not including emergency medical technicians.

Section 54.1-2972 defines what constitutes a medical and legal determination of death:
A person shall be medically and legally dead if:

1. In the opinion of a physician duly authorized to practice medicine in this Commonwealth ... there is the absence of spontaneous respiratory and spontaneous cardiac functions and, because of the disease or condition which directly or indirectly caused these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation would not, in the opinion of such physician, be successful in restoring spontaneous life-sustaining functions, and, in such event, death shall be deemed to have occurred at the time these functions ceased....

Section 32.1-263(C) requires that a medical certification of death must be signed by a physician.

II. Decisions Concerning Provision, Withholding, or Withdrawal of Treatment May Be Made Only by Physician or Doctor of Osteopathic Medicine or by Individual Under Direct Supervision of Licensed Physician

Among practitioners of the healing arts, only licensed physicians and doctors of osteopathic medicine are qualified to diagnose. Compare § 54.1-2900 ("practice of medicine") with § 54.1-2902 (unlawful practice of medicine). A determination that a patient is suffering from a "terminal condition," as that term is defined in the Act, clearly is a medical diagnosis. Similarly, a determination that a patient is in cardiac arrest or has experienced an actual terminal event, whether or not associated with a "terminal condition," also is a medical diagnosis. Both require the direct observation of a physician or an individual acting under the physician's direct supervision, as permitted in § 54.1-2901. By statute, only a physician may make a determination of death, after which a resuscitation would be futile. See § 54.1-2972(1). It is my opinion, therefore, that a medical diagnosis or a determination of death made by a rescue squad member necessarily is outside his professional authority and would constitute the unlicensed practice of medicine.

The Act and § 37.1-134.4 both contemplate, incorporate and require physician involvement in any decision-making process at the time of implementation of a decision to withhold or withdraw treatment. By statute, only a physician is authorized to make a medical diagnosis necessary to that decision. See § 54.1-2902. This role has not been conferred by statute upon nurses, rescue squad members or any other health care practitioners.

Based on the above, it is further my opinion that a physician's general directive "not to resuscitate" in a patient's file, coupled with a declaration made pursuant to the Act, does not eliminate the need for a physician's direct involvement in the actual decision and order not to resuscitate in the circumstances you present. The declarant's request in a declaration that a rescue squad member perform the duties of a physician, therefore, is not authorized by statute and should not be honored.

PROFESSIONS AND OCCUPATIONS: PROFESSIONS AND OCCUPATIONS REGULATED BY THE DEPARTMENT OF COMMERCE AND BOARDS WITHIN THE DEPARTMENT.

Applicant required to take all four parts of examination during initial sitting to receive credit for Uniform Certified Public Accountant Examination.

April 5, 1991

The Honorable Charles J. Colgan
Member, Senate of Virginia
You ask whether the Board for Accountancy's Rules and Regulations require that an applicant take all four parts of the Uniform Certified Public Accountant Examination at his or her initial sitting, or whether an applicant may take two parts of the examination initially, pass them and take the remaining two parts at the next available examination date.

I. Applicable Statutes and Regulations

Section 54.1-201 of Code of Virginia provides, in part:

The powers and duties of [professional and occupational] regulatory boards shall be as follows:

1. To establish the qualifications of applicants for certification or licensure by any such board, provided that all qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation.

Pursuant to that authority, the Board for Accountancy has promulgated regulations adopting the Uniform Certified Public Accountant Examination (the "CPA Exam") that provide, in part:

1. Each applicant for an original CPA certificate in Virginia must pass a basic four-part, written national uniform examination in auditing, business law, theory of accounting, and accounting practice. Applicants who have no unexpired examination credits must sit for all parts of the basic examination. Each part of the basic examination must be passed with a grade of 75. The board may use all or any part of the Uniform Certified Public Accountant Examination and Advisory Grading Service of the American Institute of Certified Public Accounts to assist it in performing its duties.

2. Examination credits. Credit will be given for basic examination parts passed through five successive offerings subsequent to the first occasion when credit is earned, provided that:

a. No credit will be allowed until either accounting practice or two other parts are passed at a single sitting; and

b. The candidate sits for all parts for which credit has not previously been granted; and

c. The candidate receives a minimum grade of 50 in each part not passed, except if three parts are passed at a single examination no minimum grade shall be required on the fourth part.


The regulations in effect before October 1, 1990, likewise provided:

Examination credits -- Credit will be given for basic examination parts passed through five successive offerings subsequent to the first occasion when credit is earned, provided:

* * *
3. An applicant sits for all parts not credited.


II. Applicant Required to Take All Parts of CPA Exam During Initial Sitting

Both the current and the former regulations, by their plain language, require an applicant to sit for all parts of the CPA Exam for which he or she has not previously received credit. While the regulations do not expressly state that this requirement applies to the initial sitting for the examination, that conclusion is consistent with both language of the regulations and the Board's application of them.

During the past four years, the Board has denied certification to 27 applicants because they had failed, when sitting for the CPA Exam, to take all parts they had not previously passed. See Dep't. Com. Action Memo From Robbie Banning to Pat Johnson (Mar. 12, 1991). I am advised that several of those applicants were denied certification because they did not take all four parts during their initial sitting for the examination. "[T]he interpretation which an administrative agency gives its regulation 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); see also Op. to Hon. Stanley C. Walker, Va. Sen. (Apr. 8, 1990); 1985-1986 Att'y Gen. Ann. Rep. 239. Forty other jurisdictions also require applicants for the CPA Exam to take all four parts at the initial sitting. See Am. Inst. Cert. Accts. & Nat'l Ass'n St. Bds. Acct., Digest of State Accountancy Laws and State Board Regulations 80-83 (1990).

Based on the above, it is my opinion that, to receive basic credit for the CPA Exam, an applicant must take all four parts of the examination at the initial sitting.

PROPERTY AND CONVEYANCES: CONDOMINIUM ACT.

Act permits cable television expenses to be prorated as part of monthly assessment for condominium units receiving cable television service, if condominium instruments expressly so provide.

June 25, 1991

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

You ask whether a condominium unit owners' association may assess each owner, as part of the monthly fee for "common expenses," the owner's pro-rata share of services provided under a cable television contract.

I. Applicable Statutes

Liability for common expenses under the Condominium Act, §§ 55-79.39 through 55-79.103 of the Code of Virginia, is governed by § 55-79.83. Section 55-79.83(b1) provides:

To the extent that the condominium instruments expressly so provide, (i) any common expenses paid or incurred in making available the same off-site amenities or paid subscription television service to some or all of the unit owners shall be assessed equally against the condominium units involved ....
II. Condominium Act Authorizes Assessment for Cable Television Services if Condominium Instruments Expressly so Provide

In my opinion, the plain language of § 55-79.83(b1) permits cable television expenses to be prorated as part of the monthly assessment for condominium units receiving cable television service, if the condominium instruments "expressly so provide." You do not state whether the condominium instruments of the association described in your request expressly provide for cable television assessments to those unit owners receiving that service. In the absence of such an express requirement, the answer to your question must be determined from the terms of the private contracts among the several condominium owners and the cable service company. This Office historically has declined to render official Opinions interpreting the terms of private contracts and similar matters of a purely private nature, and has limited responses to requests for Opinions to matters that "concern an interpretation of federal or State law, rule or regulation." 1989 Att'y Gen. Ann. Rep. 293, 298 (quoting 1986-1987 Att'y Gen. Ann. Rep. 347, 348).

PROPERTY AND CONVEYANCES: FORM AND EFFECT OF DEEDS AND COVENANTS.

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

Circuit court clerk obligated to make marginal notation on recorded deed of trust in deed book, cross-referencing book and page where certificate of satisfaction affecting obligation recorded, except in county or city where (1) circuit court judges approve recording of land records by microphotographic process, or (2) existing deed books microfilmed for security reasons.

February 14, 1991

The Honorable W. Tayloe Murphy Jr.
Member, House of Delegates

You ask whether there is a statutory requirement that a circuit court clerk make a marginal notation, on a recorded deed of trust, cross-referencing the deed book and page number where a certificate of satisfaction affecting the deed of trust is recorded.

I. Applicable Statutes

Section 17-60 of the Code of Virginia provides for the recordation by circuit court clerks of

[a]ll deeds, deeds of trust, deeds of release, certificates of satisfaction ... and all other writings relating to ... real estate ... in a book to be known as the deed book. ... With the approval of the judges of a circuit court of any county or city, recording may be accomplished by a procedural microphotographic process which meets archival standards as recommended by the Archives Division of the State Library and Archives.

Section 55-66.6 provides, in part:

Whenever a release of a deed of trust or other obligation shall be admitted to record in the office of the clerk of any circuit court, such clerk shall make a memorandum on the margin of the page of the book upon which such deed or other obligation is recorded, stating that such deed or other obligation is released and referring to the page and number of the deed book upon
which such release is recorded or shall record a certificate of satisfaction or certificate of partial satisfaction, stating that such deed or other obligation is released. Such certificate shall be indexed in the name of the grantors and grantees of the instrument being released. Unless the deed of trust or other obligation has been microfilmed pursuant to § 17-60.1, the clerk shall make a marginal notation on the page of the book in which it has been recorded referring to the page and number of the deed book in which the certificate is recorded.

Section 17-60.1 provides:

Notwithstanding any other provision of law, whenever the writings required by law to be recorded in the deed book in the office of the clerk of the circuit court of any city or county are recorded by a microphotographic process or by any other method or process which renders impractical or impossible the subsequent entering of marginal notations upon a recorded instrument, an appropriate certificate, certificate of satisfaction, certificate of partial satisfaction, certified copy of order, or other separate instrument setting forth the necessary information shall be recorded and indexed according to law.

When existing deed books in the office of the clerk of the circuit court of any county or city are to be microfilmed for security purposes, the court, by order entered of record, may provide that marginal notations to accomplish the release of deeds of trust or other liens shall not be made in such deed book so microfilmed.

II. Marginal Cross-Reference to Certificate of Satisfaction

Not Required Where Deed Book Records Microfilmed

Before 1975, § 55-66.6 required circuit court clerks to indicate the release of a deed of trust by entering a memorandum of the release on the margin of the deed book page where the deed of trust is recorded. Effective July 1, 1975, the General Assembly amended § 17-60 to allow deed book records to be maintained on microfilm, amended both §§ 17-60 and 55-66.6 to permit the recording of certificates of satisfaction as an alternative method of indicating the release of deeds of trust, and added § 17-60.1 to make the use of the certificates of satisfaction, instead of marginal releases, mandatory where microfilming is used. Ch. 469, 1975 Va. Acts 805, 806, 809-10.

As one contemporary commentary notes, these 1975 revisions "facilitate[d] the microfilming of deed books. . . . Because this process would render the making of subsequent marginal notations in the deed book impossible, [§ 17-60.1] provides for new documents to replace those notations." Property, Twentieth Annual Survey of Developments in Virginia Law, 1974-1975, 61 Va. L. Rev. 1834, 1847 (1975).

A later amendment to § 55-66.6 added the requirement that

[unless the deed of trust or other obligation has been microfilmed pursuant to § 17-60.1, the clerk shall make a marginal notation on the page of the book in which it has been recorded referring to the page and number of the deed book in which the certificate of satisfaction is recorded.


A prior Opinion of this Office distinguishes between a marginal release, made on the page where the deed of trust is recorded, and a marginal cross-reference to another
instrument actually making a release, concluding that the latter does not "serve as a marginal release," is "made for the purpose of convenience," and does not entitle the clerk to the statutory marginal release fee of one dollar. 1987-1988 Att'y Gen. Ann. Rep. 570, 572.

The word "shall," used in § 55-66.6 with regard to the marginal cross-reference, however, implies that the obligation of the clerk to make this cross-reference is mandatory, "unless the deed of trust ... has been microfilmed pursuant to § 17-60.1." The word "shall" in a statute generally implies that its procedures are intended to be mandatory, rather than permissive or directive. 1989 Att'y Gen. Ann. Rep. 250, 252.

Section 17-60.1, in turn, provides for two instances in which the use of marginal notations is precluded by microfilming. The first occurs in a county or city where the recording process itself is performed by the use of microfilming, with the approval of the circuit court judges for the county or city, as provided in § 17-60. The second occurs in a county or city where the deed books are not initially maintained in microphotographic form, but the existing deed books are to be microfilmed for security purposes. In that case, the circuit court may order that future marginal releases shall not be made in any deed book so microfilmed. In the former instance, the entry of marginal cross-references obviously would be impossible. In the latter situation, the entry of the marginal cross-references to certificates of satisfaction, while not expressly prohibited by § 17-60.1, would frustrate the objective of preserving a complete microfilm record of the deed book for security reasons.

It is my opinion, therefore, that §§ 55-66.6 and 17-60.1, when read together, obligate a circuit court clerk to make a notation on the deed book margin of a recorded deed of trust or similar obligation, cross-referencing the book and page where a certificate of satisfaction affecting the obligation is recorded, except (1) in a county or city where the circuit court judges have approved recording of land records by a microphotographic process, or (2) in a county or city where, because the existing deed books are to be microfilmed for security reasons, the circuit court has ordered that no further marginal releases are to be made in them.

PROPERTY AND CONVEYANCES: RESIDENTIAL LANDLORD AND TENANT ACT.

Landlord must notify tenant that landlord reserves right to pursue claim for possession of property when tenant fails to comply with rental agreement, even when tenant has no responsibility for rent payment, payable by Virginia Housing Development Authority. When rent not paid in full, no waiver of landlord's rights occurs.

October 23, 1991

The Honorable Edgar L. Turlington Jr.
Judge, Richmond General District Court, Civil Division

You ask whether a landlord must notify a tenant that the landlord reserves the right to pursue a claim for possession of the property due to the tenant's noncompliance with the rental agreement, when the tenant has no responsibility for the rent payment because all rent is payable by the Virginia Housing Development Authority ("VHDA"). You also ask whether the landlord must give such a "reservation of rights" notice to the tenant when VHDA has failed to pay the rent when due.
I. Applicable Statutes

Section 55-248.4 of the Code of Virginia defines a "tenant" as "a person entitled under a rental agreement to occupy a dwelling unit" and "rent" as "all payments to be made to the landlord under the rental agreement other than security deposits."

Section 55-248.34 provides:

Unless the landlord accepts the rent with reservation, and gives a written notice to the tenant of such acceptance, acceptance of periodic rent payments with knowledge of a material noncompliance by the tenant constitutes a waiver of the landlord's right to terminate the rental agreement. If the landlord has given the tenant written notice that the periodic rental payments have been accepted with reservation, the landlord may accept full payment of all rental payments, damages and other fees and still be entitled to receive an order of possession terminating the rental agreement.

II. Landlord Must Reserve Right to Pursue Claim for Possession Even Where Tenant Has No Responsibility for Payment of Rent

Section 55-248.34 simply provides that the landlord's acceptance of periodic rent payments with knowledge of a material noncompliance by the tenant constitutes a waiver of the landlord's right to terminate the rental agreement unless the landlord accepts the rent with reservation, and gives a written notice to the tenant of such acceptance. The definition of "rent" in § 55-248.4 includes "all payments to be made to the landlord under the rental agreement," regardless of whether those payments are made by the tenant or by VHDA. In my opinion, therefore, if the tenant has failed to comply with the rental agreement under § 55-248.34, the landlord must reserve the right to pursue a claim for possession of the property by giving notice to the tenant, even when the tenant has no responsibility for payment of the rent.

III. When Rent Not Paid in Full, No Waiver Occurs Under § 55-248.34

You also ask whether the landlord must give notice to the tenant of the landlord's reservation of the right to terminate possession for noncompliance with the rental agreement, when the noncompliance in question is VHDA's failure to pay the rent (or VHDA's share of it) when due. Based on the language of §§ 55-248.4 and 55-248.34, quoted above, it is my opinion that "acceptance of periodic rent payments" in § 55-248.34 means acceptance of "all payments" due—i.e., acceptance of full payment of the periodic rent due—under the rental agreement. If the rent has not been paid in full, therefore, there has been no acceptance of the "periodic rent payment" due to the landlord. In that situation, it is further my opinion that no waiver of the landlord's rights occurs under § 55-248.34, regardless of whether the landlord has given any notice to the tenant of VHDA's nonpayment or of any other type of noncompliance by the tenant himself.
November 18, 1991

The Honorable Richard L. Saslaw  
Member, Senate of Virginia

You ask whether a county may agree with a private entity for the county to condemn land for use as a limited access highway, and then to convey the land, or a right to use it, to the private entity for construction and operation of a toll road.

I. Applicable Statutes

The 1988 Session of the General Assembly enacted the Virginia Highway Corporation Act of 1988, Chapter 20 of Title 56, §§ 56-535 through 56-552 of the Code of Virginia (the "Act"), to authorize the construction and operation of public roads by private entities and establish regulatory procedures for this process. The Act includes the legislative finding that

there is a compelling public need for rapid construction of safe and efficient highways for the purpose of travel within the Commonwealth, and that it is in the public interest to encourage construction of additional, safe, convenient, and economic highway facilities by private parties, provided that adequate safeguards are provided against default in the construction and operation obligations of the operators of roadways. The public interest shall include without limitation the relative speed of the construction of the project and the relative cost efficiency of private construction of the project.

Section 56-537.

Section 56-541, a portion of the Act, also provides that

[the power of eminent domain shall not be exercised by the operator for the purpose of acquiring any lands or estates or interests therein, nor any other property used by the operator for the construction or enlargement of a roadway pursuant to this chapter.

Section 56-546(B) authorizes the transfer of currently owned local government property to a private toll road operator, by providing:

When the operator wishes to occupy lands owned by any county, city, or town . . . it shall first obtain a franchise allowing such occupancy or it may obtain the necessary interests through grant or other appropriate conveyance to the operator for a period of time, in the case of a franchise, not to exceed the term of the certificate.

Subsection D of § 56-546 continues:

The operator and the county, city, or town may also agree on any supplemental or related matters in addition to the matters specified in § 15.1-16, according to such terms and conditions as are reasonable, appropriate, and in the public interest, and any such county, city, or town is hereby enabled to enter into such an agreement.

Section 15.1-16, referred to in § 56-546(D), provides, in part:
Cities and towns shall have the same power and authority with respect to the planning, designation, [and] acquisition ... of the use of limited access streets ... as the Commonwealth Transportation Board has under the provisions of article 4 ($ 33.1-57 et seq.) of chapter 1 of Title 53.1 of the Code of Virginia, or as the [State Corporation] Commission may be hereafter granted by amendment thereof or otherwise.

Section 33.1-58 authorizes the Commonwealth Transportation Board to plan, designate and acquire limited access highways in the same manner as other highways in the Commonwealth. "The Board shall also have any and all other additional authority and power relative to other highways, which shall include the right to acquire by purchase, eminent domain, grant or dedication title to such lands or rights-of-way for such limited access highways." Id.

II. County May Exercise Power of Eminent Domain for Private Toll Road Pursuant to Act

Even though $ 56-541 prohibits an operator of a private toll road from using the power of eminent domain, this section must be read together with $ 56-546(B) and (D), authorizing affected localities to make agreements with such operators. Section 56-546(B) clearly provides that land owned by a locality may be transferred to a private toll road operator. The only remaining question, therefore, is whether the local government may exercise its eminent domain power to acquire land for that purpose.

Section 56-546(D) authorizes localities to enter into agreements on matters concerning the development or operation of a private toll road. That statute specifically includes as appropriate matters of agreement those powers included in $ 15.1-16, which, in turn, authorizes localities to exercise the same powers as the Commonwealth Transportation Board exercises under $ 33.1-58. Section 33.1-58 authorizes the general use of eminent domain powers by the Commonwealth Transportation Board. By enabling local governments under $ 56-546 to enter into agreements with prospective private toll road operators, the General Assembly has conferred on localities the ability to exercise all authority detailed in $ 15.1-16, including eminent domain, in connection with a private toll road project.

Based on the above, it is my opinion that, while $ 56-541 prohibits the direct use of eminent domain power by a private toll road operator to acquire property for the construction or enlargement of a private toll road, a locality through which the toll road will pass may enter into an agreement with the operator that provides for the locality (1) to acquire property for the operator by eminent domain, if necessary, and (2) to convey that property, or any interest in the property, to the operator.

1An "operator" is defined as "the person who submits ... an application for authority to construct, operate or enlarge a roadway, and which, after issuance of a certificate of authority, is responsible for operation of any roadway under the provisions of this chapter," Section 56-536.

2Although the language of $ 15.1-16 specifically is limited to cities and towns, $ 56-546(D) provides that counties, as well as cities and towns, may enter into agreements relating to matters specified in $ 15.1-16. See also $ 15.1-522 (granting county boards of supervisors the same authority as city and town councils, with exceptions). Counties also have general statutory authority, independent of either $ 15.1-16 or $ 56-546, to acquire land for highway construction by eminent domain. See $ 15.1-236.
TAXATION: FOREST PRODUCTS TAX -- TANGIBLE PERSONAL PROPERTY, ETC.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

General Assembly has established separate classification for machinery and tools used in harvesting of forest products, for purposes of taxation; local governing body may set lower, but not higher, tax rate on machinery and tools used in harvesting forest products than rate imposed upon tangible personal property. Commissioner of revenue determines whether particular machinery and tools actually used for harvesting forest products. Situs for taxation of both machinery and tools and motor vehicles is locality where property normally kept or garaged, as determined to exist on January 1. Contract logger liable for forest products tax on unfinished logs and on machinery and tools used directly in logging operations only in years logs transported out of state.

January 10, 1991

The Honorable Hunt A. Meadows III
Commissioner of the Revenue for Pittsylvania County

You ask a number of questions concerning the Forest Products Tax Act, §§ 58.1-1600 through 58.1-1622 of the Code of Virginia, the classification under § 58.1-3508 of machinery and tools used directly in the harvesting of forest products and the situs for personal property taxation of motor vehicles pursuant to § 58.1-3511.

I. Applicable Constitutional Provision and Statutes

Article X, § 1 of the Constitution of Virginia (1971) provides that "[t]he General Assembly may define and classify taxable subjects."

Sections 58.1-1600 through 58.1-1622 impose a tax on forest products and detail the procedures for its reporting, calculation and collection. The forest products tax is paid by manufacturers and shippers of forest products for sale, profit, or commercial use. Section 58.1-1602. Section 58.1-1601 defines "shipper" as "any person in this Commonwealth who sells or ships outside the Commonwealth by railroad, truck, barge, boat or by any other means of transportation any forest product in an unmanufactured condition, whether as owner, lessee, woodyard operator, agent or contractor."

Section 58.1-3008 authorizes the governing body of any locality to "impose different rates of levy on . . . tangible personal property or any separate class thereof authorized under Chapter 35 (§ 58.1-3500 et seq.), and machinery and tools, or it may impose the same rate of levy on any or all of these subjects of taxation."

Section 58.1-3508 designates machinery, tools, repair parts and replacements "used directly in the harvesting of forest products" as a special classification of personal property or machinery and tools for local taxation. The provisions of § 58.1-3508 are applicable only to taxpayers liable for payment of the forest products tax.

Section 58.1-3511(A) generally establishes the locality in which the property is physically located on the tax day as the situs for the assessment and taxation of tangible personal property, merchants' capital and machinery and tools, but further provides that the situs for purposes of assessment of motor vehicles, travel trailers, boats and airplanes as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked. . . . In the event it cannot be determined where such personal property, described herein, is normally garaged, stored or parked, the situs shall be the domicile of the owner of such personal property.
II. General Assembly Has Authority to Define Classifications of Property for Tax Purposes

You first ask, who has the authority to apply the machinery and tools classification provided in § 58.1-3508?

Exercising the authority granted it by Article X, § 1 to "define and classify taxable subjects," the General Assembly has enacted § 58.1-3508, which designates machinery, tools and repair parts used directly in harvesting forest products as a separate classification of property for local taxation. Section 58.1-3008 authorizes, but does not require, a local governing body to impose different rates of tax on separate classes of tangible personal property and machinery and tools. Section 58.1-3508, read in conjunction with § 58.1-3507, provides that the tax rate imposed on machinery and tools used directly in the harvesting of forest products shall not exceed the rate imposed upon the general class of tangible personal property. Such machinery and tools, however, may be taxed at a lower rate than other tangible personal property.

Based on the above, it is my opinion that the General Assembly has established a separate classification for machinery and tools used in the harvesting of forest products. The governing body may set a different tax rate for this classification, which may be lower, but not higher, than the rate on other tangible personal property. Whether the particular machinery and tools are actually used for harvesting forest products, however, is a question of fact to be resolved by you, as the local assessing official.

III. Situs of Machinery, Tools and Motor Vehicles for Tax Purposes Is their Ordinary Location on Tax Day

You state that the property of the taxpayer about whom you inquire includes motor vehicles as well as machinery and tools. You then ask what local jurisdiction may tax such property when the vehicles and the machinery and tools are moved to various locations during the tax year. Section 58.1-3511(A) establishes the situs of machinery and tools for purposes of the tangible personal property tax. The first sentence of that section provides that the situs shall be the locality where the property is physically located on tax day. "Situs," however, means more than simply the momentary location of the property. See Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957). The actual physical presence on tax day is not conclusive. 1974-1975 Att'y Gen. Ann. Rep. 480. "Situs" implies permanent location, not the place where property is casually or incidentally located while in transit. See Hogan, 198 Va. at 735, 96 S.E.2d at 746. Thus, the place where machinery and tools are ordinarily kept or maintained is the situs for tax purposes. See 1980-1981 Att'y Gen. Ann. Rep. 358.

Likewise, § 58.1-3511 establishes the situs for taxation of motor vehicles in the locality where they are normally garaged or parked. Prior Opinions of this Office consistently conclude that the place where the property is normally located throughout the year, based upon the assessing officer's evaluation of the facts as they existed on January 1, is the situs for tax purposes. See, e.g., 1984-1985 Att'y Gen. Ann. Rep. 369, 370. Factors to be considered are the location, time, purpose, and use of the vehicle, all of which are relevant to a determination of situs. See Arlington County v. Stull, 217 Va. 238, 241-42, 227 S.E.2d 698, 700 (1976). If it cannot be determined where a motor vehicle is normally garaged, then, pursuant to § 58.1-3511, the situs is presumed to be the domicile of the owner.

Based on the above, it is my opinion that the situs for taxation of both machinery and tools and motor vehicles is the locality where such property is normally kept or garaged, as you determine those facts to exist as of tax day.
IV. Person Shipping Unmanufactured Forest Products Out of Commonwealth Is Liable for Forest Products Tax

You also ask whether a contract logger who fells trees and, occasionally but not always, hauls them to a destination outside the Commonwealth is liable for the tax upon forest products imposed by §§ 58.1-1600 through 58.1-1622. Under § 58.1-1602, that tax is payable by a manufacturer or shipper of forest products. I assume, for purposes of this Opinion, that the contract logger you describe does not do anything to the logs he cuts that would cause him to fall within the definition of a "manufacturer." A "shipper" is defined in § 58.1-1601 as any person who sells or ships unmanufactured forest products outside the Commonwealth. As to unfinished logs delivered for sale or processing within the Commonwealth, therefore, the contract logger is neither a "manufacturer" nor a "shipper" within the meaning of the definitions in § 58.1-1602. See also Dept' Tax'n, Va. Forest Products Tax Reg. § 630-19-1602 (Jan. 1, 1989).

Based on the above, it is my opinion that a contract logger is not liable for the tax on unfinished logs delivered in the Commonwealth, but is liable for the tax imposed by § 58.1-1602 on any quantity of logs that he transports out of state.

V. For Equipment to Be Classified as Machinery and Tools, Taxpayer Must Be Liable for Forest Products Tax

Finally, you ask whether the contract logger you describe is eligible for his machinery and tools to be classified as § 58.1-3508 property, if, as discussed in Part IV above, he pays the forest products tax only on a part of the logs he cuts.

Section 58.1-3508(B) specifically provides that the special machinery and tools classification applies "only to taxpayers liable for payment of forest product taxes." It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning. 1989 Att'y Gen. Ann. Rep. 153, 154. Among the dictionary definitions of "liable" is "[e]xposed or subject to a given contingency ... which is more or less probable." Black's Law Dictionary 915 (6th ed. 1990).

Based on the above, it is my opinion that the contract logger you describe is "liable" for the forest products tax, in years when he ships some logs out of state, even though he does not pay the tax on logs delivered within the Commonwealth. It is further my opinion, therefore, that the logger's machinery and tools used directly in logging operations are eligible for the special machinery and tools classification established by § 58.1-3508(A) in years when he ships logs out of state. Such machinery and tools, however, would not be eligible for that special classification in years when he ships no logs out of state.

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1 I assume for purposes of this Opinion that tax day in your jurisdiction is January 1. See § 58.1-3515.

2 Whether a particular item of equipment is a motor vehicle, taxed as tangible personal property, or is machinery and tools is a factual determination to be made by the commissioner of the revenue. See 1989 Att'y Gen. Ann. Rep. 339, 341 (commissioner of revenue must determine if certified property is used for pollution abatement); see also § 46.2-100 (definition of motor vehicle).

3 I assume that the motor vehicles are not operating over interstate routes in the rendition of common, contract or other private carrier service; if they are, property taxation is apportioned in the same percentage as miles traveled within the Commonwealth bear to the total number of miles traveled. See § 58.1-3511(B); 1987-1988 Att'y Gen. Ann. Rep. 578, 585.
TAXATION: INTANGIBLE PERSONAL PROPERTY TAX — REAL PROPERTY TAX.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

CORPORATIONS: VIRGINIA NONSTOCK CORPORATION ACT.

Membership rights in nonstock corporation generally constitute intangible personal property subject to state taxation. Localities not precluded from considering covenants that bind land in determining fair market value of real property for local real estate tax purposes.

September 13, 1991

The Honorable George F. Allen
Member, House of Delegates

You ask several questions concerning the proper classification of membership rights in Wintergreen Partners, Inc., for Virginia tax purposes. You specifically ask whether such membership rights, which are created under the charter and bylaws of this nonstock, nonprofit Virginia corporation, should be classified as intangible property and, if so, whether they are only subject to state taxation or may be valued as part of the real estate for local tax purposes.

I. Applicable Constitutional and Statutory Provisions

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 Virginia Nonstock Corporation Act, §§ 13.1-801 through 13.1-945 of the Code of Virginia, defines a nonstock "corporation" as "a corporation not issuing shares of stock irrespective of the nature of its business to be transacted," and a "member" as "one having membership rights in a [nonstock] corporation in accordance with the provisions of its articles of incorporation or bylaws." Section 13.1-803.

Section 58.1-1100 provides that "[i]ntangible personal property . . . is hereby segregated for state taxation only."

Section 58.1-3201 provides that "[a]ll real estate, except that exempted by law, shall be subject to such annual taxation," and requires that all assessments of real estate be at "100 percent fair market value."

II. Membership Rights in Nonstock Corporation

Generally Constitute Intangible Personal Property

"Intangible property" is property that "has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, and franchises." Black's Law Dictionary 809 (6th ed. 1990). The mere evidence of corporate ownership rights, such as shares of stock, therefore, does constitute intangible personal property. SUNRAY OIL CORPORATION v. OKLAHOMA TAX COMMISSION, 192 Okla. 159, 161, 134 P.2d 995, 997 (1943). In Virginia, the ownership of membership rights in a nonstock corporation is the legal equivalent of the ownership of stock in a for-profit corporation. See §§ 13.1-803, 13.1-814, 13.1-837. It is my opinion, therefore, that these membership rights in a nonstock corporation, as a general rule, constitute intangible personal property and that, as such, these membership rights have been segregated for state taxation. This fact alone, however, does not support your assumption that
certain real property benefits associated with these membership rights in the particular facts you present have been improperly taxed locally.

III. Real Property Taxed at 100% of Fair Market Value;
Covenants that Bind Land May Be Considered in Determining Value

Documents submitted with your inquiry, several pertinent deeds recorded in the local circuit court clerk's office, and the charter and bylaws of the nonstock corporation demonstrate that landowners who are members of Wintergreen Partners, Inc. unquestionably acquire certain real property rights as a benefit of membership. See, e.g., Revised Plan for the Organization of Wintergreen Partners, Inc. No. V (rev. June 22, 1984); three deeds recorded in Clerk's Office, Circuit Court of Nelson County Deed Books 235, 268, 277, at 157, 803, 12, respectively. Specifically, all deeds conveying property with which membership rights in Wintergreen Partners, Inc. are associated contain certain covenants that run with the land if the purchaser elects to become a member of the nonstock corporation prior to the conveyance.

Covenants that run with the land bind the land because "a person who in ordinary course gets title to the land may enforce the [covenant], even though he has received no express assignment of the right to do so." Lawrence Berger, Integration of the Law of Easements, Real Covenants and Equitable Servitudes, 43 Wash. & Lee L. Rev. 337, 355 (1986). It cannot legitimately be questioned that covenants that bind the land, like easements, can affect the fair market value of real property. James C. Bonbright, The Valuation of Real Estate for Tax Purposes, 34 Colum. L. Rev. 1397, 1436 (1934). Since all real property must be assessed at 100 percent of its fair market value pursuant to both Article X, § 2 and § 58.1-3201, local assessors legitimately may consider how covenants running with the land affect the fair market value of that real estate. Lake Monticello Assoc. v. Ritter, 229 Va. 205, 210, 327 S.E.2d 117, 120 (1985) (citing Bank v. Amherst County, 204 Va. 584, 132 S.E.2d 721 (1963)). Whether a particular covenant running with the land increases the fair market value of specific parcels of property involves a question of fact for the commissioner of revenue to resolve. See 1989 Att'y Gen. Ann. Rep. 336, 338.

As a result, although membership rights in the nonstock corporation constitute intangible personal property subject to state taxation, this conclusion does not affect the assessment of these real property rights that bind the land. Intangible rights or benefits associated with realty are not intangible personal property for tax purposes. At common law, these interests were distinguished from personal property and labeled "chattel[s] real," Moulton v. Long, 243 Mass. 129, 132, 137 N.E. 297, 298 (1922) (Intangible rights associated with lease of real property not taxable as intangible personal property). Since chattels real have distinguishing characteristics from other varieties of personal property, these assets are not intangible personal property. Id. Based on the above, it is my opinion that § 58.1-1100, which, by its terms, concerns only intangible personal property, does not preclude a locality from considering the real property rights in the facts you present when it determines the fair market value of that real property for local real estate tax purposes.

TAXATION: LICENSE TAXES.

Commissioner of revenue determines whether taxpayer, whose business provides computer hardware engineering, software development and consulting services, engaged in manufacturing for purposes of local license tax exemption. Substantial portion of business must involve manufacture of computer hardware, as opposed to design, modification or installation of such equipment, to be eligible for exemption.
March 14, 1991

The Honorable C.B. Harrell Jr.
Commissioner of the Revenue for the City of Newport News

You ask whether a particular corporation, in the facts you present, is a manufacturer exempt from local license tax pursuant to § 58.1-3703(B)(4) of the Code of Virginia.

I. Facts

You state that the corporation in question provides computer hardware engineering, software development and consulting services. On inspection of the corporation's workplace, your auditor observed a library area, desk and storage space, two work stations and numerous computer terminals. Various contracts with customers require the corporation to design, implement, furnish and deliver additional software and hardware. You estimate that software development accounts for approximately 75% of the firm's gross receipts.

II. Applicable Statutes

Section 58.1-3703(A) provides that

[the governing body of any county, city or town may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town subject to the limitations provided in subsection B of this section.]

Section 58.1-3703(B)(4), however, prohibits localities from imposing such a license tax "on a manufacturer for the privilege of manufacturing and selling goods, wares and merchandise at wholesale at the place of manufacture."

III. Manufacturing for Purposes of § 58.1-3703(B)(4) Requires Transformation of Raw Materials into Product of Substantially Different Character

The term "manufacturing" is not defined in the Virginia statutes on local license taxes. Section 58.1-602 defines "manufacturing, processing, refining, or conversion," for purposes of the Virginia Retail Sales and Use Tax Act. A prior Opinion of this Office concludes, however, that this definition (formerly in § 58-441.3(p)) is not controlling for purposes of the business license tax prohibition contained in § 58.1-3703(B)(4) (formerly § 58-266.1(A)(4)). 1983-1984 Att'y Gen. Ann. Rep. 372.

The Supreme Court of Virginia, in several cases, has interpreted the word "manufacturing" as it is used in the prohibition now found in § 58.1-3703(B)(4). In Prentice v. City of Richmond, 197 Va. 724, 90 S.E.2d 839 (1956), the Court set forth three essential elements of manufacturing: "(1) original material referred to as raw material; (2) a process whereby the raw material is changed; and (3) a resulting product which . . . is different from the original raw material." 197 Va. at 729-30, 90 S.E.2d at 843.

In Solite Corp. v. King George Co., 220 Va. 661, 261 S.E.2d 535 (1980), the Court held that "[t]he mere blending together of various ingredients, in the absence of a transformation into a product of substantially different character, is not manufacturing." 220 Va. at 665, 261 S.E.2d at 537. Mere manipulation or rearrangement of raw materials is insufficient; a substantial transformation in form, quality and adaptability into an article or product of substantially different character is required. Prentice, 197 Va. at 731,
90 S.E.2d at 843. In addition, to be exempt from license taxation, a taxpayer's manufacturing activities must be substantial in relation to its nonmanufacturing activities. County of Chesterfield v. BBC Brown Boveri, 238 Va. 64, 70, 380 S.E.2d 890, 893 (1989).

Whether a particular taxpayer is engaged in "manufacturing" within the meaning of § 58.1-3703(B)(4) is ultimately a factual determination to be made by the commissioner of the revenue. See Op. to Hon. Ray A. Conner, Comm'r Rev., City of Chesapeake (Dec. 14, 1990). In the facts you present, however, approximately 75% of the taxpayer's business is software development. In my opinion, the development of computer software does not involve the processing of "raw material" into a product of "substantially different character." The other portions of the firm's business are described as "consulting" and "hardware engineering." "Consulting" clearly is not "manufacturing." Your factual analysis, therefore, should focus on those aspects of the taxpayer's business described as "hardware engineering." Unless a substantial portion of the business involves the manufacture of computer hardware as defined in the cases discussed above, as opposed to the design, modification or installation of such equipment, the business would not, in my opinion, be excluded from local license taxation by § 58.1-3703(B)(4).

TAXATION: LICENSE TAXES.

Commissioner of revenue not authorized to give local department of social services computer access to master personal property tax file information not included in public assessment book to assist department in its determination whether welfare applicant owns personal property that affects applicant's eligibility for benefits. Situs of business or office in locality prerequisite to levy of license tax.

October 8, 1991

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You ask two questions, one concerning the confidentiality of taxpayer information and the other concerning situs for local business license tax purposes. You first ask if a commissioner of the revenue may give the local department of social services computer access to certain master files of tax information to assist that department in determining whether a welfare applicant owns personal property that affects the applicant's eligibility for benefits. Your second question is whether various taxpayers who reside in your locality and earn income from activities inside and outside the Commonwealth may be required to obtain local business licenses.

I. Applicable Statutes

Section 58.1-3(A) of the Code of Virginia provides, in part:

Except in accordance with proper judicial order or as otherwise provided by law, the ... commissioner of the revenue ... shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation.

This statutory prohibition does not apply to "[m]atters required by law to be entered on any public assessment roll or book." Section 58.1-3(A)(1).

Section 58.1-3(C) further provides that,
[n]otwithstanding the provisions of subsection A ... the Tax Commissioner is authorized to ... (ii) provide to the Commissioner of the Department of Social Services, upon written request, information on the amount of income reported by persons on their state income tax returns who have applied for public assistance benefits as defined in § 63.1-87.

Section 58.1-3(D) authorizes the commissioner of the revenue to provide "the chief executive officer of any county or city with [certain sales and use tax] information furnished to the commissioner of revenue by the Tax Commissioner."

Section 58.1-3703(A) authorizes localities to impose local license taxes on "businesses, trades, professions, occupations and callings." Section 58.1-3708(A) provides that "the situs for the local license taxation ... shall be the county, city or town ... in which the person so engaged has a definite place of business or maintains his office." Section 58.1-3708(C) provides that,

[i]f any such person has no definite place of business or office within the Commonwealth, the situs for the local license taxation of such a person shall be each locality in which he engages in such business, trade, occupation or calling, with respect to what is done in each such locality.

II. Disclosure of Unauthorized Information Prohibited


In the facts you present, the local department of social services is requesting information concerning the ownership of personal property. Prior Opinions of this Office conclude that the assessed value of personal property owned by a particular taxpayer constitutes a matter required to be entered in a public assessment book and, therefore, is not subject to the prohibition in § 58.1-3. See Att'y Gen. Ann. Rep.: 1985-1986 at 312; 1973-1974 at 412; 1964-1965 at 282; 1951-1952 at 158. The master files you describe, however, contain information that is not included in the personal property assessment book, and that is subject to the confidentiality provisions of § 58.1-3, unless some other statutory exemption applies. See 1985-1986 Att'y Gen. Ann. Rep., supra, at 313.

I am not aware of any other such exception that applies in the facts you present. The exception in § 58.1-3(C) authorizes disclosures by the Tax Commissioner to the State Department of Social Services only concerning the amount of income reported by applicants for public welfare benefits. The exception in § 58.1-3(D) authorizes a commissioner of the revenue to disclose only certain sales and use tax information and then only to the chief executive of a locality. It is my opinion, therefore, that a commissioner of the revenue is not authorized to disclose master personal property tax files to the department of social services of the commissioner's jurisdiction.

III. Situs Contemplates Definite Place of Business

Your second question identifies various persons engaged in a business, trade, occupation or calling, who reside in the county but derive income from activities both inside and outside the county. You indicate that these persons may or may not maintain offices in their county residences but also that they do not maintain offices outside the county.
You ask whether these persons have established a situs in the county for purposes of the business license tax.1

Situs for taxation of businesses is the locality where the person "has a definite place of business or maintains his office." Section 58.1-3708(A). The Code does not define the terms "definite place of business" or "office." A prior Opinion of this Office concludes that a continuous and regular course of dealing at one location establishes "situs" sufficiently to enable the locality to levy and collect a license tax on the business. See 1978-1979 Att'y Gen. Ann. Rep. 279, 280 (maintenance contractor with employees permanently assigned to job sites within locality subject to license tax). But see 1982-1983 Att'y Gen. Ann. Rep. 611 (disposal firm regularly servicing dumpsters at set locations not subject to license tax). To the extent any of the persons you describe conduct their business activities at specific locations within the county on a regular or permanent basis, therefore, they may be subject to local license taxes. This determination of fact, however, is one to be made by the commissioner of the revenue in the first instance. See 1986-1987 Att'y Gen. Ann. Rep. 288, 289-90.

A person who resides in the county but who does not conduct business activities within the county still may be subject to business license taxes if the person's home is considered a place of business or an office. The Supreme Court of Virginia has held that an "office," for license tax purposes, includes that part of a home set aside, equipped and regularly used to transact the taxpayer's business. Commonwealth v. Manzer, 207 Va. 996, 1001, 154 S.E.2d 185, 189 (1967). The extent of the use required necessarily will vary with the nature of the business. Using the principles enunciated by the Court, a prior Opinion of this Office concludes that a sufficient situs for license taxation exists for a commission salesman storing samples and paper needs in his home, updating the samples in his home, providing his home telephone number as a business number to customers and deducting home office expenses for federal income tax purposes. See 1985-1986 Att'y Gen. Ann. Rep. 288.

Determining whether the persons you identify have established a definite place of business or an office also is a question of fact to be determined by the commissioner of the revenue. See 1986-1987 Att'y Gen. Ann. Rep., supra. Whether the persons claim home office deductions for federal income tax purposes is only one relevant factor in that determination, which ultimately will depend on the nature of the business and the specific use the individual makes of the office in the home.2

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1 You state that you have determined, on the basis of information available to you, that the persons are engaged in a business or occupation. That conclusion also involves a factual determination. See 1987-1988 Att'y Gen. Ann. Rep. 513. You ask only whether the persons have established situs in Chesterfield County. For purposes of this Opinion, I assume that a local ordinance exists that would encompass the activities you describe as licensable businesses.

2 Although the person is engaged in a business in the Commonwealth, if you determine that he has no definite place of business or office in your locality or within any other locality in the Commonwealth, you may impose the license tax on the person only with respect to the portion of his business conducted in your locality. See § 58.1-3708(C).

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TAXATION: LICENSE TAXES.

Continuous and regular course of dealing in locality constitutes engaging in business for business license tax purposes. Person "engaged in business" in locality where office
maintained or definite place of business exists; commissioner of revenue makes determination. If no definite place of business or office exists in Commonwealth, person "engaged in business" in each locality where continuous and regular course of dealing for purpose of earning livelihood or profit conducted.

December 31, 1991

The Honorable J. Ronnie Minter
Commissioner of the Revenue for the City of Martinsville

You ask whether a person who does consulting work out of his home as an independent contractor is subject to the local business license tax.

I. Facts

The independent contractor (the "consultant") is a safety consultant who gives seminars worldwide. He conducts no seminars in your locality. The consultant resides in Martinsville and receives business mail, places and receives business calls, and plans and organizes his business activities in his home. He has no place of business in any other locality. The consultant does not claim any tax deduction for home office use on his federal or state income tax return.

II. Applicable Statutes

Section 58.1-3703(A) of the Code of Virginia provides:

The governing body of any county, city or town may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town subject to the limitations provided in subsection B of this section.

Section 58.1-3708(A) provides that "the situs for the local license taxation for any licensable business, trade, occupation or calling, shall be the county, city or town ... in which the person so engaged has a definite place of business or maintains his office."

Section 58.1-3708(B) provides that,

[w]here a local license tax imposed by any such other locality is measured by volume, the volume on which the tax may be computed shall be the volume attributable to the business, trade, occupation or calling in such other locality. All volume attributable to the business, trade, occupation or calling in any such other locality which levies a local license tax thereon shall be deductible from the "base in computing any local license tax measured by volume imposed on ... "all by the locality in which the first-mentioned definite place or office is located.

Under § 58.1-3708(C), if a person has no definite place of business or office within the Commonwealth, "the situs for the local license taxation of such a person shall be each locality in which he engages in such business, trade, occupation or calling, with respect to what is done in each such locality."

III. Regular and Continuous Course of Dealing in Locality

Constitutes Engaging in Business for Business License Tax Purposes

Section 58.1-3703 authorizes a locality to impose a license tax on persons engaged in business within that locality. Whether a person is engaged in business is a question of

Because a license tax is an excise tax imposed on the privilege of doing business within the taxing jurisdiction, a commissioner of the revenue must determine not just whether the person is engaged in a business in general but whether the person is engaged in the business within the commissioner's locality. See Att'y Gen. Ann. Rep.: 1990 at 220; 1974-1975 at 459.

A person may meet the requirement of being engaged in a business within a locality in two ways. First, the person may have a definite place of business or maintain an office in a locality within the Commonwealth. Section 58.1-3708(A). Second, if the person has no definite place of business within the Commonwealth, he may meet the requirement of being engaged in business by conducting a continuous and regular course of dealing within a locality. See § 58.1-3708(C); Krauss, supra.

IV. Person Engaged in Business in Locality Where Office Maintained or Definite Place of Business Exists

Section 58.1-3708(A) establishes that a person is engaged in a business in the jurisdiction where he has a definite place of business or maintains an office. While a person's home may constitute a place of business under certain facts, residency in a jurisdiction by a person who, in general, is engaged in business does not, by itself, establish situs for purposes of the business license tax, even if the person has no taxable situs elsewhere. See Commonwealth v. Manzer, 207 Va. 996, 154 S.E.2d 185 (1967) (definite place of business may include that part of home set aside, equipped and regularly used to transact business); see also Att'y Gen. Ann. Rep.: 1985-1986 at 288; 1982-1983 at 553, 554-55; 1981-1982 at 387.

Whether a person's home constitutes a definite place of business or an office ultimately is a question of fact to be determined by the commissioner of the revenue. The elements of this inquiry will vary depending on the nature of the business conducted. For example, a prior Opinion of this Office concludes that a commission salesman's home constitutes a definite place of business when the salesman uses his home to store sample and paper needs, uses his home telephone number as a business number for customers and deducts home office expenses for federal income tax purposes. See 1985-1986 Att'y Gen. Ann. Rep, supra; see also Carmichael Op., supra Pt. III.

V. If No Definite Place of Business or Office Exists in Commonwealth, Consultant Is Engaged In Business in Each Locality Where Continuous and Regular Course of Dealing for Purpose of Earning Livelihood or Profit Is Conducted

If you determine that the consultant in question does not have a definite place of business and does not maintain an office in Martinsville or within any other locality in the Commonwealth under § 58.1-3708(C), you nevertheless may impose your locality's license tax on the consultant to the extent he otherwise is engaged in business in Martinsville. To impose the license tax under such circumstances, you would need to determine that the consultant is engaged in business in Martinsville within the standard set out
You indicate that the consultant is engaged in the business of conducting safety seminars but conducts no seminars in your locality. Without other business activities in the locality that constitute a continuous and regular course of dealing, the consultant, therefore, is not engaged in business there within the meaning of § 58.1-3708(C). Accordingly, unless you determine that the consultant maintains an office in his home that constitutes a definite place of business, it is my opinion that he is not subject to a business license tax in Martinsville.

The salesman discussed in the prior Opinion sold from samples, stored the samples and paper goods in a portion of his home, arranged paper needs for travel to visit customers and updated samples in his home, treated a portion of his home expenses as business expenses for income tax purposes, and used his home telephone number on his calling cards and printed thank-you notes to his customers. See 1985-1986 Att'y Gen. Ann. Rep. 288. In the facts you present, the business activities conducted at home by the consultant appear to be less substantial than those in the prior Opinion to support a conclusion that the consultant's home is a place of business under the standards established in § 58.1-3708(A) and interpreted in Commonwealth v. Manzer, 207 Va. 996, 154 S.E.2d 185 (1967).

TAXATION: LICENSE TAXES.

Home may constitute definite place of business for purposes of imposition of tax when commissioner of revenue so determines after consideration of all facts and circumstances relating to nature of business conducted. Tax may be imposed on commissions received on sales occurring outside taxing jurisdiction if commissioner determines commission merchant has no other taxable situs outside commissioner's jurisdiction.

October 23, 1991

The Honorable J. Ronnie Minter
Commissioner of the Revenue for the City of Martinsville

You ask whether manufacturers' sales representatives who sell on a commission basis out of their homes in your jurisdiction are subject to the local business license tax. You state that the companies for which these representatives work may be located in the Commonwealth or in other states. You also ask whether the tax may be based on the representatives' total commission income.

I. Applicable Statutes

Section 58.1-3703(A) of the Code of Virginia authorizes the governing body of a locality to levy a license tax on businesses and on the persons engaged therein within the locality.

Section 58.1-3708(A) establishes that the situs for local license taxation of any licensable business as the locality "in which the person so engaged has a definite place of business or maintains his office."

Section 58.1-3733 provides:
Any person engaged in the business of selling merchandise on commission by sample, circular, or catalogue for a regularly established retailer, who has no stock or inventory under his control other than floor samples held for demonstration or sale and owned by the principal retailer, shall be classified as a commission merchant and taxed only on commission income as provided for in category A 4 of § 58.1-3706. Such person engaged in such business shall not be subject to tax on total gross receipts from such sales.

II. Home May Constitute Definite Place of Business for Purposes of Imposition of License Tax

Whether a manufacturer's representative has a definite place of business or maintains his office in a jurisdiction is, in the first instance, a question of fact for the commissioner of the revenue of that jurisdiction to determine. Both the Supreme Court of Virginia and prior Opinions of this Office have concluded that, under certain circumstances, a person's home may constitute a definite place of business.


III. Commissions Received on Sales Occurring Outside Taxing Jurisdiction Includable in Measure of License Tax if No Tax Situs Elsewhere

Whether you may include all commissions received by a commission merchant in the measure of the license tax due depends on whether that individual has established a tax situs elsewhere. If a commission merchant has a definite place of business in your city and has not established a tax situs elsewhere, there is no risk of multiple taxation, and apportionment of his commission receipts is not required. See Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 (1981); see also Braniff Airways v. Nebraska Board, 347 U.S. 590, 601-02 (1954) (state of domicile may tax full value of personal property as long as no tax situs has been established elsewhere). The fact that the measure of the license tax includes commissions on sales occurring outside your jurisdiction or outside the Commonwealth does not invalidate the tax. See Commonwealth Edison Co., 453 U.S. at 629; see also Att'y Gen. Ann. Rep.: 1989 at 311, 312-13 (receipts from seminars conducted outside Commonwealth includable in gross receipts if no other regular business location); 1981-1982 at 390, 391 (fees for services performed outside jurisdiction includable in gross receipts if partnership has no other taxable situs or location).

The answers to the questions you present depend, therefore, on factual determinations to be made by you as commissioner of the revenue. If you determine that a commission merchant has a definite place of business or maintains an office in his home in your jurisdiction, your jurisdiction may impose a license tax on the merchant. If you determine
that a commission merchant has no other taxable situs, you may calculate the license tax due on all commissions that individual receives.

TAXATION: LICENSE TAXES.

Locality that adopted ordinance imposing oil severance tax may not levy tax on oil severed on or after July 1, 1992, date on which tax expires.

August 6, 1991

The Honorable W. Tayloe Murphy Jr.
Member, House of Delegates

You ask whether a locality that before July 1, 1992, adopted an ordinance pursuant to § 58.1-3712.1 of the Code of Virginia, imposing an oil severance tax, may continue to impose that tax after July 1, 1992.

I. Applicable Statutes

Section 58.1-3712.1 authorizes a city or county to "levy a license tax on every person engaging in the business of severing oil from the earth." This license tax is based on a percentage of gross receipts from the sale of oil severed within the locality.

The General Assembly has enacted a "sunset" provision, specifying that the oil severance tax may not be levied after July 1, 1992; localities, however, may collect oil severance taxes that were assessed before that date. See Ch. 120, 1985 Va. Acts 142, 144.

II. Tax Imposed upon Severance of Oil; May Not Be Imposed on Oil Severed After "Sunset" Date of Enabling Act

An oil severance tax imposed pursuant to § 58.1-3712.1 is based on the gross receipts derived from the sale of oil severed within the locality. There is no basis on which the tax may be levied, therefore, until oil actually is severed from the earth. The plain, unambiguous language of § 58.1-3712.1 makes clear that the tax is incurred upon the severance of oil, and not upon the exploration for oil. If the language of a statute is clear and unambiguous, effect must be given to its plain and ordinary meaning. Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982). The plain language of the "sunset" provision, moreover, means that the oil severance tax may not be levied on or after July 1, 1992. 1985 Va. Acts, supra, at 144. A legislature may "specify the time or circumstances when the effect of a statute should cease." 2 Norman J. Singer, Sutherland Statutory Construction § 34.04, at 33 (Sands 4th ed. 1986).

Based on the above, it is my opinion that a locality that adopted an ordinance imposing an oil severance tax before July 1, 1992, may not levy that tax on oil severed on or after that date.

TAXATION: LICENSE TAXES.

CORPORATIONS: VIRGINIA STOCK CORPORATION ACT - FOREIGN CORPORATIONS.
Contractor's license tax calculated on lump sum turnkey amount of design-build contract included in gross receipts; application of county's license tax to full contract amount meets U.S. Constitution commerce clause criteria.

June 21, 1991

The Honorable Lois B. Chenault
Commissioner of the Revenue for Hanover County

You ask how to calculate the contractor's license tax due under a "design-build" contract for the construction of a cogeneration plant in Hanover County.

I. Facts

The taxpayer, Fluor Daniel, Inc., a foreign corporation (the "Corporation"), has undertaken a design-build contract for the construction of a cogeneration plant in Hanover County that includes certain design, procurement and other services performed by subcontractors or offices of the Corporation that, in some instances, are not located in the Commonwealth. Agreement for Engineering, Procurement & Construction Between Doswell Ltd. Partnership & Fluor Daniel, Inc. (Apr. 23, 1990) ("EPC Agt."). The contract also includes the provision of certain major components, such as turbines, that are manufactured and purchased outside Virginia and delivered to the plant site for assembly and installation. You ask whether the contract amount used to calculate the license tax owed by the Corporation should be reduced by the portion of the total contract amount attributable to these design and procurement services and major components obtained outside the Commonwealth.

II. Applicable Statutes and Local Ordinances

Section 58.1-3703 of the Code of Virginia authorizes a county to "levy and provide for the assessment and collection of county ... license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county."

For the purpose of license taxation pursuant to § 58.1-3703, § 58.1-3714(B) defines the term "contractor" as any person, firm or corporation:

1. Accepting or offering to accept orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, or other metal or any other building material;

2. Accepting or offering to accept contracts to do any paving, curbing or other work on sidewalks, streets, alleys, or highways, or public or private property, using asphalt, brick, stone, cement, concrete, wood or any composition;

3. Accepting or offering to accept an order for or contract to excavate earth, rock, or other material for foundation or any other purpose or for cutting, trimming or maintaining rights-of-way;

4. Accepting or offering to accept an order or contract to construct any sewer of stone, brick, terra cotta or other material;
5. Accepting or offering to accept orders or contracts for doing any work on or in any building or premises involving the erecting, installing, altering, repairing, servicing, or maintaining electric wiring, devices or appliances permanently connected to such wiring, or the erecting, repairing or maintaining of lines for the transmission or distribution of electric light and power; or


Section 6-31 of the Hanover County, Virginia, Code (1982) defines the term "contractor" for business license tax purposes in substantively the same way as § 58.1-3714. Section 6-33(1) of the Hanover County Code imposes a license tax on contractors "for the privilege of transacting business in this county," equal to "the sum of twenty-five dollars ($25.00), plus ten cents ($0.10) for each one hundred dollars ($100.00) of the gross amount of all orders or contracts accepted."

III. Total Amount of Design-Build Contract Included in Gross Receipts Subject to License Tax

The design-build contract in question requires the Corporation to provide all labor and materials, including without limitation procuring and supervising the labor and equipment provided by subcontractors and vendors, necessary or appropriate for the design, erection, construction and fabrication of a turnkey facility. EPC Agt. art. I, § 1.1 (definition of "work"); id. art. III. The Corporation, therefore, clearly serves as a "contractor" under the design-build contract. Thus, § 6-33(1) imposes a tax on the gross receipts realized under the contract.

The Supreme Court of Virginia has held that "gross receipts," for local license tax purposes, include the "whole, entire, total receipts" of the licensed undertaking. Alexandria v. Morrison-Williams, 223 Va. 349, 351, 288 S.E.2d 482, 484 (1982) (quoting Savage v. Commonwealth, 186 Va. 1012, 1018, 45 S.E.2d 313, 317 (1947)). In Morrison-Williams, the taxpayer, an advertising agency, sought to exclude from its gross receipts for license tax purposes the amount of contracts the agency placed with various advertising media on behalf of its clients, for which the clients ultimately reimbursed the agency. In deciding in favor of the city, the Court stated:

In Virginia, "[t]axation is the rule, not the exception. Therefore, tax statutes are strictly construed against the taxpayer." We therefore conclude that amounts paid to Taxpayer by its clients constitute gross receipts to Taxpayer and that deductions permitted by the Alexandria ordinance do not embrace sums paid by Taxpayer to media sources.

223 Va. at 353, 288 S.E.2d at 485 (citation omitted).

The payments made by the taxpayer in Morrison-Williams to advertising media are analogous to the payments made by the Corporation for the design services and equipment purchases the Corporation seeks to exclude from its license tax basis. While they involve goods or services purchased from others, in both instances they represent payments received by licensed businesses; they must, therefore, be included as part of the gross receipts of those businesses. See also Att'y Gen. Ann. Rep.: 1990 at 224 (no deduction from auto dealer's gross receipts for costs of reconditioning used cars for resale); 1989 at 310 (no deduction from auto dealer's gross receipts for amounts allowed for trade-in of used vehicles); 1985-1986 at 287, 288 (license tax on "employee leasing" company calculated on entire sum received, including salaries of "leased" employees, not solely on company's fees); 1984-1985 at 349, 350 (gross receipts of securities broker trading for own account include entire sum received, not just amount of gain realized);
A prior Opinion of this Office concludes that when a contractor accepts a single contract, amounts in that contract attributable to services that, standing alone, might not fall within the definition of services provided by a "contractor" are not deducted from the gross amount of the contract used to calculate the license tax. See 1962-1963 Att'y Gen. Ann. Rep. 268 (the "Boothe Opinion"). In the Boothe Opinion, a structural steel company accepted a single contract to procure, fabricate and put in place the steel for a new building for a contract price of $120,000. The company procured the necessary materials and fabricated the steel in one Virginia locality and transported the fabricated steel to a second Virginia locality where the new building was to be built. The company hired a subcontractor for $15,000 to put the steel in place on site in the second locality. One of the inquiries in the Boothe Opinion was whether the license tax should be based on the full contract price of $120,000, or only on the $15,000 cost of putting the steel in place. The Opinion concludes that the license tax should be based on the full contract price. Id. at 269.

In the facts you present, the Corporation acknowledges that it accepted a single contract to act as the contractor on the project. In these circumstances, it is irrelevant that the contract provides for some services that, standing alone, may not fall within the statutory definition of services provided by a "contractor." See Att'y Gen. Ann. Rep.: 1972-1973 at 381 (contract providing generally for excavation of earth, rock or other material subject to license tax, notwithstanding inclusion of test borings and soil analysis); see also Boothe Op. at 268. It is my opinion, therefore, that the license tax in the facts you present should be calculated on the "lump sum turnkey amount" due under the contract.

You indicate further that the Corporation claims that including the cost of equipment it procures from other states and foreign countries in the license tax base violates the commerce clause of the Constitution of the United States. In my opinion, that claim is not persuasive.

The Supreme Court of the United States has identified the criteria that a state tax statute must meet to withstand a challenge based on the commerce clause. Specifically, (1) there must be a substantial nexus between the taxpayer and the taxing state; (2) the tax must be apportioned fairly; (3) there must be no discrimination against interstate commerce; and (4) the tax must be related fairly to the benefits provided by the taxing state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); 1989 Att'y Gen. Ann. Rep. 313, 314. In the facts you present, it is my opinion that the application of Hanover County's license tax to the full contract amount meets those four criteria.

First, since the cogeneration plant will be built in Hanover County, there is clearly a sufficient nexus between the Corporation and the taxing authority.

Second, by its express terms, the design-build contract provides for the project owners to pay a lump sum "turnkey amount" in return for the Corporation's providing all labor and materials, including without limitation the Corporation's procurement of labor and equipment from all subcontractors and vendors necessary or appropriate for the design, erection, construction and fabrication of the "turnkey" facility. EPC Agt. art. Ill. There is no basis for apportionment of the total compensation under the all-encompassing language of the contract.

Third, there is no discrimination against interstate commerce; indeed, the Boothe Opinion, in which the structural steel company procured and fabricated steel in one Virginia locality and shipped it to another Virginia locality where the building was erected,
demonstrates that local license taxes in Virginia apply equally to intrastate and interstate commerce.

Finally, the Corporation's extended presence in the taxing locality for construction of the project and its resulting "receipt of police and fire protection, the use of public roads . . . and the other advantages of civilized society satisf[y] the requirement that the tax be fairly related to benefits provided by the [locality]." Goldberg v. Sweet, 488 U.S. 252, 267 (1989).

Based on the above, it is my opinion that, in a unified "design-build" contract, the cost of designing the project and of equipment purchased outside the Commonwealth for installation at a Virginia site are not excludable from the gross receipts on which the general contractor's license tax is based.

1For purposes of this Opinion, I assume that the Corporation has obtained a certificate of authority to transact business in Virginia pursuant to § 13.1-757 of the Code of Virginia.

2There is nothing in the contract to negate the implication inherent in a "design-build" contract that the contractor will render significant design services at the job site throughout the construction of the turnkey facility. The Corporation, therefore, has failed to establish its entitlement to any reduction of the local license tax. Norton Co. v. Dept. of Revenue, 340 U.S. 534, 538 (1951).

This conclusion is supported by Hanover County, Va., Code § 6-33(1) (1982), which provides that the gross receipts generated by the accepted contract form the basis for calculating the license tax due.

TAXATION: LICENSE TAXES.

WELFARE (SOCIAL SERVICES): HOMES FOR AGED, INFIRM, ETC. - LICENSING OF HOMES FOR AGED, INFIRM OR DISABLED ADULTS.

Owner of facility licensed as home for adults by Department of Social Services not engaged in business of renting real property; not exempt from local business license taxation. Business classified as "personal service" business, subject to imposition of tax.

October 23, 1991

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether the owner of a certain facility licensed as a home for adults by the Department of Social Services is engaged in the business of "renting real property" and thereby exempted from local business license taxation pursuant to § 58.1-3703(B) of the Code of Virginia.

I. Applicable Statutes

Section 58.1-3703(A) authorizes the governing body of any locality to levy license taxes on "businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein" subject to the limitations provided in § 58.1-3703(B).
Section 58.1-3703(B)(7) prohibits a locality from levying any license tax "[u]pon any person, firm or corporation for engaging in the business of renting, as the owner of such property, real property," with certain exceptions not applicable to your inquiry.

Article 1, Chapter 9 of Title 63.1, §§ 63.1-172 through 63.1-182.1 ("Article 1"), establishes requirements for the licensing of homes for adults by the Department of Social Services (the "Department"). Section 63.1-172(A) defines a "home for adults" as a "place, establishment, or institution, public or private... operated or maintained for the maintenance or care of four or more adults who are aged, infirm or disabled..." "'Maintenance or care' means the protection, general supervision and oversight of the... aged, infirm or disabled individual." Section 63.1-172(B).

II. Licensed Home for Adults Not Exempt from Local Business License Tax Pursuant to § 58.1-3703(B)(7)

You ask whether the business you describe is exempt from the local business license tax pursuant to § 58.1-3703(B)(7). You indicate that the business operates a home for adults licensed under Article 1, and that a resident of the facility executes a "Resident Agreement" that provides for the business to furnish to the resident "room and board, laundered towels and linens, equipment, facilities and services as may be required for the health, safety and well-being of the resident while living at the home."

The Supreme Court of Virginia has held that statutes granting tax exemptions must be strictly construed against the taxpayer. "'When a tax statute is susceptible of two constructions, one granting an exemption and the other not granting it, courts adopt the construction which denies the exemption.'" Solite Corp. v. King George Co., 220 Va. 661, 662-63, 261 S.E.2d 535, 536 (1980) (quoting Commonwealth v. Community Motor Bus, 214 Va. 155, 157, 198 S.E.2d 619, 621 (1973)).

Section 58.1-3703(B)(7) exempts from local business license taxation only persons, firms or corporations engaged in the business of renting real property they own. Section 58.1-3703 provides no definition of what constitutes "the business of renting" real property.

The terms of the "Resident Agreement" signed by the residents of the adult home you describe make it clear, however, that those residents are contracting for more than the mere rental of an apartment or room in the facility. The definition of "maintenance or care" in § 63.1-172(B) also clearly indicates that a licensed adult home furnishes services beyond those provided to mere tenants. Indeed, if the business you describe were acting solely as a landlord, it would not constitute a "home for adults" within the meaning of § 63.1-172(A), and would need no license from the Department.

The guidelines issued by the Department of Taxation for use by localities in classifying businesses, professions and occupations for license tax purposes define a "personal service" business as one engaged in "[a]ny service rendered... upon or for persons, animals or personal effects." Dept' of Tax'n, Guidelines for Local Business, Professional and Occupational License Taxes 22 (1984). The listing of various personal service businesses under that definition includes "[n]ursing and personal care facilities including nursing homes, convalescent homes, homes for the retarded, old age homes and rest homes." Id. at 25.

Based on the above, it is my opinion that the adult care home you describe is not "engaged in the business of renting" as contemplated within § 58.1-3703(B)(7), and, therefore, is subject to its locality's imposition of a business license tax as a personal service business.
The prohibition does not apply to those localities which imposed such a license tax on January 1, 1974. Section 58.1-3703(B)(7). You state that the locality did not have a tax on rental income as of January 1, 1974.

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TAXATION: LICENSE TAXES — RETAIL SALES AND USE TAX.

COUNTIES, CITIES AND TOWNS: TRANSPORTATION DISTRICT ACT OF 1964.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE - EXEMPT PROPERTY.

HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD AND HIGHWAYS GENERALLY.

CIVIL REMEDIES AND PROCEDURE: ACTIONS - TORT CLAIMS AGAINST THE COMMONWEALTH OF VIRGINIA.

CORPORATIONS: VIRGINIA STOCK CORPORATION ACT.

Transportation district commissions may enter into "cross-border" leases to finance acquisition of rolling stock for commuter rail service which guarantee expected return and provide indemnity against tort liabilities to extent of insurance coverage. Commissions' acquisition and lease of rolling stock exempt from sales and use taxation. Foreign investors' acquisition of rolling stock for lease to commissions constitutes nontaxable sale for resale to political subdivision of Commonwealth; sale of rolling stock to third party upon default by commissions subject to state and local sales taxes. Rolling stock qualifies for exemption from local property taxation due to ownership interest of commissions. Foreign investors not subject to local license taxation absent nexus.

February 23, 1991

The Honorable David G. Brickley
Member, House of Delegates

You ask a series of questions concerning "cross-border" leasing, a financing technique that the Northern Virginia Transportation Commission and the Potomac and Rappahannock Transportation Commission ("NVTC," "PRTC" and the "Commissions") propose to use in acquiring equipment for a commuter rail service from Fredericksburg and Manassas to Washington, D.C.

Your first four questions concern the authority of NVTC and PRTC to use "cross-border" leasing to acquire the railway cars and other vehicles to be used for the commuter service ("rolling stock"). Specifically, you ask whether the Commissions may (1) acquire rolling stock and subsequently sell it to an investor in a foreign country; (2) agree to lease the rolling stock back from the investor, under a lease that would require the Commissions to repurchase the rolling stock in the event of early termination; (3) indemnify the investor for losses if certain stipulated tax benefits to the investor are not realized; and (4) indemnify the foreign investor against potential tort liabilities arising out of the leases of rolling stock.

You also ask whether the proposed transaction will result in the imposition of sales and use taxes, local property taxes and local license taxes. You state that, to the extent any of these taxes are imposed on the lessor, the lease provides that they will be passed through to the Commissions as lessees.
I. Facts

NVTC and PRTC have joined together to provide a commuter rail service, the Virginia Railway Express (the "Express"). NVTC has issued bonds to finance the acquisition of rolling stock for the Express. Part of the debt service on these bonds will be paid with grants from the Department of Transportation ("VDOT"). As a condition of its capital assistance grants, VDOT requires that it be granted a security interest in any equipment purchased wholly or partly with the granted funds.

The Commissions propose the use of cross-border leasing as an alternative financing technique to reduce substantially the overall cost of the rolling stock. The proposed cross-border lease arrangement involves a series of transactions in which rolling stock purchased by either the Commissions or a foreign investor is leased to the Commissions for a term of 10 to 15 years; the Commissions are obligated to purchase the rolling stock for agreed prices upon the conclusion or early termination of the lease. If the Commissions default, the foreign investor may sell the rolling stock to a third party and the Commissions are liable for the investor's loss (i.e., the difference between the agreed price and the amount realized from a sale to a third party). In the case of rolling stock purchased by the Commissions, a bank may be substituted for the Commissions' obligations under the leases, but the Commissions remain obligated to purchase the rolling stock or to pay the investor's loss in the event of sale to a third party.

The leases would require the Commissions to indemnify the lessor against certain losses, including the loss of expected tax benefits, as well as potential tort liabilities arising out of the leases of rolling stock. The Commissions have contracted for $200 million in liability insurance coverage for the Express.

In the facts you present, the purpose of the proposed cross-border lease arrangement is to finance the Commissions' acquisition of the rolling stock needed to operate the new commuter transportation service. The foreign investors providing the financing will not be involved in operating the rail service. The proposed arrangement, therefore, is similar to a conditional sale with the seller retaining title as security for the performance of the purchaser's financial obligations.

II. Applicable Statutes and Constitutional Provisions

The authority of NVTC and PRTC is detailed in Chapter 32 of Title 15.1 of the Code of Virginia, cited as the "Transportation District Act of 1964," §§ 15.1-1342 through 15.1-1372 ("the Act"). Section 15.1-1357 of the Act authorizes NVTC, as the governing body of a transportation district located within a metropolitan area encompassing contiguous states, to coordinate and contract with other commissions and surrounding localities to develop mass transportation facilities:

(b) When the transportation district is located within a metropolitan area, which includes all or a portion of a state or states contiguous to Virginia, the commission:

* * *

(5) Notwithstanding any other provision herein to the contrary:

* * *

(iv) May prepare a plan for mass transportation services with cities, counties, agencies, authorities, or commissions and may further contract with
transportation companies, cities, counties, commissions, authorities, agencies, and departments of the Commonwealth and appropriate agencies of the federal government and/or governments contiguous to Virginia to provide necessary facilities, equipment, operations and maintenance, access, and insurance pursuant to such plan.

Section 15.1-1357(a)(4) authorizes PRTC, as the governing body of a nonmetropolitan transportation district, to contract with NVTC for the provision of transportation facilities, and provides that PRTC may enter into contracts or agreements with the counties and cities embraced within the transportation district, or with counties and cities which are adjoining the transportation district and within the same planning district, or with other commissions of adjoining transportation districts, to provide, or cause to be provided, transit facilities and service to such counties and cities, or to provide transit facilities, and other modes of transportation between adjoining transportation districts, and such contracts or agreements, together with any agreements or leases for the operation of such facilities, may be utilized by the transportation district to finance the construction and operation of transportation facilities and such contracts, agreements or leases shall inure to the benefit of any creditor of the transportation district.

Section 15.1-1344(i) defines the term "transportation facilities" to include "rolling stock for rail."

Section 15.1-1357(a)(2) authorizes PRTC to acquire or lease transportation facilities to implement a transportation plan developed in cooperation with the affected localities and the Commonwealth Transportation Board pursuant to Article 6 of the Act, §§ 15.1-1365 through 15.1-1366. Section 15.1-1357(a)(2) provides that "[t]he [PRTC] may, when such a transportation plan is adopted in the manner set forth in Article 6 hereof, construct or acquire, by purchase or lease, the transportation facilities specified in such transportation plan."

Section 15.1-1358 grants to transportation district commissions certain incidental powers which may be exercised in furtherance of the general functions and duties detailed in § 15.1-1357(a)-(b). Section 15.1-1358 provides:

Without in any manner limiting or restricting the general powers created by this chapter, the commission shall have power:

* * *

4. To make and enter into all contracts or agreements, as the commission may determine, which are necessary or incidental to the performance of its duties and to the execution of the powers granted under this chapter;

* * *

7. To exercise any power usually possessed by private corporations, including the right to expend, solely from funds provided under the authority of this chapter, such funds as may be considered by the commission to be advisable or necessary in the performance of its duties and functions;

* * *
10. To execute any and all instruments and do and perform any and all acts or things necessary, convenient or desirable for the purposes of the commission or to carry out the powers expressly given in this chapter....

Section 15.1-1350(13) further authorizes transportation district commissions to contract to indemnify any person against liability arising out of the commission's exercise of its statutory powers to the extent of the commission's liability insurance coverage. Section 15.1-1358(13) provides that a commission has authority, notwithstanding the provisions of § 8.01-195.3, to contract to indemnify, and to obtain liability insurance to cover such indemnity, any person who is liable, or who may be subjected to liability, regardless of the character of the liability, as a result of the exercise by a commission of any of the powers conferred by this chapter. No obligation of a commission to indemnify any such person shall exceed the combined maximum limits of all liability policies, as defined in § 15.1-1364(c), maintained by the commission. [3]

The tax treatment of transportation districts established under the Act is set forth in § 15.1-1370. Pursuant to Article X, § 6(a)(1) of the Constitution of Virginia (1971), § 15.1-1370 provides the following exemption from taxation:

It is hereby found, determined, and declared that the creation of any transportation district hereunder and the carrying out of the corporate purposes of any such transportation district is in all respects for the benefit of the people of this Commonwealth and is a public purpose and that the transportation district and the commission will be performing an essential governmental function in the exercise of the powers conferred by this chapter. Accordingly, the transportation district shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of any transportation facilities or upon any revenues therefrom and the property and the income derived therefrom shall be exempt from all state, municipal and local taxation. This exemption shall include, without limitation, all retail sales and use taxes....

Sections 58.1-603 and 58.1-604 impose a tax on the retail sale or consumption of tangible personal property within the Commonwealth. Pursuant to § 58.1-605, cities and counties may also impose sales and use taxes to be collected with the state tax imposed under §§ 58.1-603 and 58.1-604.

Section 58.1-602 defines the term "sale" for purposes of the Virginia Retail Sales and Use Tax Act, §§ 58.1-600 through 58.1-639, to include "any transfer of title or possession, or both... lease or rental, conditional or otherwise... of tangible personal property.... A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale." Section 58.1-602 defines the term "retail sale" as "a sale to any person for any purpose other than for resale...." Section 58.1-608(1)(e) exempts from sales and use taxation "[t]angible personal property for use or consumption by... any political subdivision of the Commonwealth."

Section 58.1-3703(A) authorizes localities to impose 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 58.1-3708(C) provides that the situs for local license taxation of a person having no definite place of business or office within the Commonwealth "shall be each locality in which he engages in such business, trade, occupation or calling, with respect to what is done in each such locality."
III. Commissions May Use Cross-Border Leasing to Acquire Rolling Stock and May Agree to Provide Indemnity to Extent of Liability Insurance

Subdivisions (a)(2) and (b)(5)(iv) of § 15.1-1357 authorize NVTC and PRTC to cooperate and acquire, by purchase or lease, transportation facilities, including rolling stock, for the planned commuter rail service. Under § 15.1-1358(4) and (7), the Commissions, in exercising their statutory functions and duties, may expend funds, execute contracts and exercise any power usually possessed by private corporations. Section 15.1-1358(10) further authorizes the Commissions to execute all instruments and perform all acts "necessary, convenient or desirable" to carry out the powers expressly granted to them in the Act. Pursuant to § 15.1-1372, these powers are to be construed liberally to further the public interest in developing efficient and convenient transportation facilities.

The general authority of a private corporation includes the power to purchase, lease and otherwise deal with personal property wherever located, and to sell, pledge, lease and otherwise dispose of property. See § 13.1-627(A)(4)-(5). Because the Commissions, acting together under §§ 15.1-1357 and 15.1-1358(7), have the authority to contract for rolling stock in a manner similar to a private corporation, it is my opinion that the Commissions may enter cross-border leases of the type you describe, provided the actual terms of the agreements that are negotiated otherwise comply with applicable law.

Negotiated terms of the proposed cross-border leases include provisions in which the Commissions will agree to indemnify the lessors against certain losses, including the loss of expected tax benefits, as well as potential tort liabilities. A prior Opinion of this Office concludes that a transportation district commission such as NVTC may not agree to indemnification provisions that constitute a waiver of sovereign immunity absent specific statutory authorization. See 1986-1987 Att'y Gen. Ann. Rep., supra, at 141, 142-43 (NVTC may agree to provide indemnity from tort liability only to extent sovereign immunity has been legislatively abrogated in § 8.01-195.3).

In the facts you present, however, the lease provision pursuant to which the Commissions would agree to "indemnify" the lessors against the loss of certain expected tax benefits, in my opinion, does not involve any waiver of sovereign immunity. This provision is simply a method of guaranteeing the foreign investors a certain rate of return in which the expected tax benefits are a major component. Assuming that the investors' overall expected return can be determined, the Commissions could agree to pay the investor a specified maximum sum in periodic installments that could vary within a specified range upon the occurrence of enumerated contingencies affecting expected tax benefits (e.g., a change in applicable tax laws). Such an agreement would leave the Commissions with a known contingent liability and would not involve the type of open-ended assumption of liability that this Office has previously deemed to lack the prudence required of stewards of public funds. See 1986-1987 Att'y Gen. Ann. Rep., supra, at 143 (even where waiver of sovereign immunity is not involved, open-ended indemnification agreements are disfavored).

Specific statutory authority for the Commissions to contract to indemnify third parties against tort liability is contained in § 15.1-1358(13). Section 15.1-1358(13) expressly authorizes a transportation district commission to contract to indemnify, and to obtain liability insurance to cover such indemnity, any person who is liable, or who may be subjected to liability, regardless of the character of the liability, as a result of the exercise by a commission of any of the powers conferred by this chapter.

The only limitations on the extent of the indemnity that may be provided are the amount and coverage limitations of the Commissions' liability insurance, including self-insurance as provided in § 15.1-1384(e).
The provision you describe by which the Commissions would agree to indemnify the foreign investors against potential tort liabilities falls squarely within the scope of the contractual authority provided in § 15.1-1358(13). It is my opinion, therefore, that the Commissions may agree to indemnify the foreign investors against potential tort liability arising out of the leases of rolling stock, to the extent of the Commissions' liability insurance coverage for the Express.

IV. Cross-Border Leases Not Subject to Sales and Use Taxation or Local Property Taxation; Not Subject to Local License Taxation Absent Facts Establishing Nexus

A. Commissions' Acquisition and Lease of Rolling Stock
Exempt from Sales and Use Taxation

Sections 15.1-1370 and 58.1-608(1)(e) exempt the acquisition or lease of property by a transportation district commission operating a transportation facility from sales and use taxation. Section 58.1-602 further provides that a sale for resale is not a retail sale for purposes of the Virginia Retail Sales and Use Tax Act.

The purpose of the cross-border lease arrangements you describe is to finance the Commissions' acquisition of rolling stock for the Commissions' use in operating the new rail service. These transactions, therefore, fall squarely within the scope of the specific tax exemption in § 15.1-1370 for property acquired by the Commissions or under their "jurisdiction, control, possession or supervision" in operating a transportation facility. The transactions also are within the scope of the more general sales and use tax exemption in § 58.1-608(1)(e) for tangible personal property used or consumed by a political subdivision of the Commonwealth. Based on the above, it is my opinion that the Commissions' acquisition and lease of the rolling stock are exempt from sales and use taxation.

It is further my opinion that the foreign investors' acquisition of rolling stock for lease to the Commissions is a nontaxable sale for resale to a political subdivision of the Commonwealth within the meaning of §§ 58.1-602 and 58.1-608(1)(e). See 2 Va. Tax Rep. (CCH) ¶ 201-588 (May 12, 1988) (purchase of equipment for lease to federal government in operating telecommunications systems nontaxable as sale for resale to government entity).

I am not aware of any exemption that would apply, however, in the event the rolling stock were sold to a third party upon default by the Commissions. It is my opinion, therefore, that such a sale would be subject to state and local sales taxes. See Op. to Hon. Arthur L. Shoemake, Comm'r Rev., City of Manassas (May 9, 1990) (bank's sale of repossessioned automobiles upon purchaser's default constitutes sale of tangible personal property for purposes of local business license taxation).

B. Rolling Stock Owned Directly or Indirectly by Commissions
Exempt from Local Property Taxation

Section 15.1-1370 provides an exemption from local property taxation for property "acquired by . . . or under [the] jurisdiction, control, possession or supervision" of a local transportation district established under the Act. The property tax exemption in § 15.1-1370 must be construed in light of Article X, § 6(a)(1) of the Constitution of Virginia, which requires that property must be "owned directly or indirectly" by a political subdivision of the Commonwealth to be exempt from taxation. The threshold question presented by this inquiry, therefore, is whether the proposed cross-border lease arrangement gives the Commissions an ownership interest sufficient to satisfy the "owned directly or indirectly" requirement in Article X, § 6(a)(1).
Prior Opinions of this Office have examined numerous factors in determining the ownership of leased property for tax purposes, including (1) the extent and duration of the lease; (2) the existence of an option to renew or purchase the property for a nominal sum; (3) the allocation of the risk of loss; (4) the relationship between the agreed rental and depreciation; (5) economic compulsion; and (6) facts indicative of an equity interest such as control and the right of beneficial use. See, e.g., Att’y Gen. Ann. Rep.: 1983-1984 at 396; 1982-1983 at 573; 1977-1978 at 433. These Opinions also recognize that legal title alone does not control the determination of ownership for tax purposes. See Op. to Hon. Bernard S. Cohen, H. Del. Mbr. (Jan. 30, 1991).

While it is not possible to determine all the incidents of ownership without examining the actual terms of the cross-border lease agreements, the facts you present suggest that the Commissions, as lessees, will have an ownership interest sufficient to satisfy the "owned directly or indirectly" requirement of Article X, § 6(a)(1). You indicate, for example, that the Commissions will have the beneficial use and right to control the property for a substantial portion of its useful life, as well as an "economic compulsion" to purchase the property at the conclusion or early termination of the lease. See 1983-1984 Att’y Gen. Ann. Rep. 396. The facts presented also suggest that the Commissions will bear the risk of loss. In these circumstances, the fact that the foreign investors hold legal title would not preclude a determination that the Commissions hold an ownership interest sufficient to satisfy the direct or indirect ownership requirement in Article X, § 6(a)(1).

Based on the above, and assuming that the Commissions will have substantial beneficial ownership rights, it is my opinion that rolling stock subject to the proposed cross-border lease arrangement qualifies for exemption from local property taxation pursuant to Article X, § 6(a)(1) and § 15.1-1370.

C. Foreign Investors Not Subject to Local License Taxation Absent Facts Establishing Nexus

A prior Opinion of this Office concludes that the term "business," as it is used in § 58.1-3703(A) authorizing the imposition of local license taxes, is broad and includes "everything about which a person can be employed." Op. to Hon. Joyce K. Crouch, H. Del. Mbr. (July 18, 1990); see also Op. to Hon. Arthur L. Shoemake, supra Pt. IV(A) (bank's sales of repossessed automobiles under financing agreements subject to local license taxation); 1985-1986 Att’y Gen. Ann. Rep. 314 (out-of-state employee leasing company having no definite place of business or office in Commonwealth is subject to local license taxation pursuant to § 58.1-3708(C)).

License taxes imposed under the authority of Virginia law, of course, are subject to federal constitutional limitations. A primary limitation is the requirement that the taxed activity have a "substantial nexus" with the taxing state or locality. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). While actual physical presence within the taxing jurisdiction is not always required, some minimal contact such as the ownership of property, the presence of agents or employees, or the making of sales or leasing property within the taxing jurisdiction is required.

In the facts you present, the foreign investors will have no offices, agents or employees in the Commonwealth. It is apparent that the foreign investors will merely hold legal title and that the Commissions will have most, if not all, of the significant incidents of ownership in the rolling stock. Whether the foreign investors will actually have sufficient contacts with Virginia to permit local license taxation of their leasing activities, however, is a question of fact to be determined by the local commissioner of the revenue in the first instance. See, e.g., 1987-1988 Att’y Gen. Ann. Rep. 578, 589 n.12
(factual issue of ownership to be determined by commissioner of revenue). The commissioner's determination whether a sufficient nexus exists should be based on the facts discussed in the preceding paragraph and on a detailed examination of the actual lease documents and the foreign investors' activities in the Commonwealth.


2 Section 15.1-1344(g) defines the term "person" to include "an individual, partnership, association, corporation, or any governmental agency or authority."

3 Section 8.01-195.3 defines the extent to which the General Assembly has waived the sovereign immunity of transportation districts. For causes of action accruing after July 1, 1988, a transportation district's liability is limited to $75,000 or the maximum limits of any liability insurance coverage. Section 15.1-1364(c) defines the term "liability policy" to include "any program of self-insurance maintained by a district."

4 Article X, § 6(a)(1) exempts from taxation "[p]roperty owned directly or indirectly by the Commonwealth or any political subdivision thereof."

5 The general authorization provided in § 58.1-3703(A) is subject to specific statutory limitations enumerated in subsection B. None of those specific limitations applies to the facts you present.

6 The Commission's authority to contract is not affected by the fact that a portion of the debt service on the bonds NVTC has issued to acquire rolling stock may be paid with grants from VDOT. The terms of the grants, however, may restrict the Commission's ability to negotiate certain lease terms. For example, VDOT may require that it be granted a security interest in the rolling stock.

7 The 1988 Session of the General Assembly amended §§ 15.1-1358(13) and 8.01-195.3 to extend authorization to certain transportation districts to contract to assume liability for punitive damages and interest to the extent of $75,000 or applicable insurance coverage. Ch. 834, 1988 Va. Acts 1662, 1666-67; Ch. 884, 1988 Va. Acts 1831.


9 Exempt treatment is conditioned, of course, upon the submission of the required documentation in accordance with the applicable regulations. See Va. Dep't Tax'n, Va. Retail Sales & Use Tax Reg. §§ 630-10-45(D), 630-10-113 (Jan. 1, 1985). With respect to property initially purchased by the foreign investors, both a resale certificate of exemption Form ST-10 and documentation showing the required public funding and government purchase order should be submitted. You indicate that the required documentation will be available.

10 Sections 58.1-2655(D) and 58.1-2658 prohibit localities from taxing the rolling stock of certificated common carriers, railroads and freight companies subject to state tax under § 58.1-2652. See Att'y Gen. Ann. Rep.: 1987-1988 at 593, 595 n.1; 1985-1986 at 285, 286. This prohibition has no application to the facts you present.

11 The exception in Article X, § 6(c) permitting the General Assembly to extend exemptions is limited to "property of the Commonwealth." The Commissions, as governing bodies of transportation districts established pursuant to the Act, are political subdivisions of the Commonwealth. See 1971-1972 Att'y Gen. Ann. Rep. 436, 437.

TAXATION: MISCELLANEOUS TAXES - CONSUMER UTILITY TAXES — TAXATION OF PUBLIC SERVICE CORPORATIONS.
CORPORATIONS: VIRGINIA STOCK CORPORATION ACT.

State Corporation Commission responsible for administering state taxes on public service corporations. Privately owned water system not required to incorporate as public service corporation not subject to annual state license tax. County may only impose consumer utility tax on consumers of water service provided by privately owned water system if system also subject to state taxation as public service corporation.

December 13, 1991

The Honorable C. Richard Cranwell
Member, House of Delegates

You ask whether a county may impose a consumer utility tax on consumers of water service provided by a small, privately owned subdivision water system in the county.

I. Applicable Statutes

Article 4, Chapter 38 of Title 58.1, §§ 58.1-3812 through 58.1-3816.1 of the Code of Virginia, details the authority of local governing bodies to impose consumer utility taxes on consumers of certain utility services, including services provided by water or heat, light and power companies described in § 58.1-3814. Section 58.1-3814(A) provides that a locality may impose a tax on the consumers of utility services provided by "any water or heat, light and power company or other corporations coming within the provisions of Chapter 26 [of Title 58.1]." Section 58.1-3814(B) allows the locality to impose the tax following notice to "the registered agent of the utility corporation that is required to collect the tax."

Chapter 26 of Title 58.1, §§ 58.1-2600 through 58.1-2690 ("Chapter 26"), provides for state taxation of public service corporations, including water companies. Under § 58.1-2626(A), "[e]very corporation doing in the Commonwealth the business of furnishing water" is subject to an annual state license tax.

Sections 13.1-620(G) and 13.1-626 require a water or sewer company established after 1970 that serves more than fifty customers to file articles of incorporation stating that the corporation is to conduct business as a public service company. Under § 13.1-620(G), a water or sewer company established before 1970 that serves over fifty customers is subject to rate regulation upon application of the company or a majority of its customers.

II. Privately Owned Unincorporated Water System

Not Public Service Corporation for Tax Purposes

Section 58.1-3814(A), by its plain language, limits the authority for local consumer utility taxes to those utility services provided by public service corporations subject to state taxation under Chapter 26. Statutes imposing taxes are strictly construed, with any reasonable doubt resolved against taxation. See, e.g., Commonwealth v. General Electric Company, 236 Va. 54, 64, 372 S.E.2d 599, 605 (1988); see also Att'y Gen. Ann. Rep.: 1971-1972 at 418 (before 1971 amendment, county could not impose consumer utility tax on utility services provided by municipality); 1969-1970 at 255, 256 (predecessor statute to § 58.1-3814 did not authorize tax on consumers of bottled gas because sale of bottled gas is not utility service).

The State Corporation Commission (the "Commission") is the agency responsible for administering state taxes on public service corporations under Chapter 26. The Commission's Office of General Counsel advises me that an unincorporated water system serving
a private subdivision would not be treated as a public service corporation subject to the annual state license tax imposed by § 58.1-2626. Under the Commission's long-standing administrative interpretation, the filing of articles of incorporation with the clerk of the Commission pursuant to §§ 13.1-620(G) and 13.1-626 triggers taxation under § 58.1-2626.

The administrative interpretation of tax statutes is entitled to great weight. See, e.g., Commonwealth v. General Electric Co., 236 Va. at 64, 372 S.E.2d at 605; Commonwealth v. Stringfellow, 173 Va. 284, 289, 4 S.E.2d 357, 359 (1939); 3A Norman J. Singer, Sutherland Statutory Construction § 66.04 (Sands 4th ed. 1986). The General Assembly is also presumed to be aware of long-standing administrative interpretations. See 17 M.J. Statutes § 58, at 345 & n.3 (1979) (collecting cases).

Section 58.1-3814(A) links authority for local consumer utility taxes to whether the private entity providing the service also is taxable by the Commonwealth under Chapter 26. Under the Commission's administrative interpretation, a privately owned water system that is not required to incorporate as a public service corporation under §§ 13.1-620(G) and 13.1-626 is not subject to state taxation under § 58.1-2626.

In my opinion, therefore, a county may only impose a consumer utility tax under § 58.1-3814 on consumers of water service provided by a privately owned water system if that system, also is subject to state taxation as a public service corporation under § 58.1-2626.¹


TAXATION: REAL PROPERTY TAX — REVIEW OF LOCAL TAXES — TANGIBLE PERSONAL PROPERTY, ETC.

Tax refund generally made to property owner as of January 1 rather than to mortgage lender or other person/entity that paid tax on owner's behalf, unless taxpayer assigns right to receive refund to mortgage lender or other third party; local treasurer may pay refund approved in statutorily prescribed manner to taxpayer's assignee. Tenant to whom lease transfers financial responsibility for tax payment considered "taxpayer" entitled to refund.

October 9, 1991

The Honorable Richard A. Cordle
Treasurer for Chesterfield County

You ask two questions concerning the proper procedure for the payment of certain tax refunds. Specifically, if a mortgage lender pays the real estate tax on a particular property from an escrow fund on behalf of the property owner, you ask whether your office should direct the refund due to the mortgage lender or to the property owner. You also ask if a personal property tax refund should be directed to the person or entity that actually made the payment of the tax or to the person in whose name the property is listed on the personal property tax book.
1. Applicable Statutes

Section 58.1-1 of the Code of Virginia defines a "taxpayer" as "every person ... subject to taxation under the laws of this Commonwealth, or under the ordinances, resolutions or orders of any county, city, town or other political subdivision of this Commonwealth."

Section 58.1-3281 provides that real estate taxes shall be assessed to the owner of the real estate as of January 1 of the tax year. Section 58.1-3516 makes a similar provision for the assessment of personal property.

The first paragraph of § 58.1-3981 provides that "the governing body of the county ... shall, upon the certificate of the commissioner with the consent of the ... county attorney ... that such assessment was erroneous, direct the treasurer of the county ... to refund the excess to the taxpayer ...."

Section 58.1-3987 further provides in its first paragraph: "If the court is satisfied from the evidence that the assessment is erroneous ... the court shall order that [the tax] be refunded to the taxpayer ...."

Section 58.1-3990, in its first paragraph, authorizes a county to "provide ... for the refund of any local taxes ... erroneously paid. If ... the commissioner of the revenue is satisfied that he has erroneously assessed any applicant ... the tax-collecting officer ... shall refund to the applicant the amount erroneously paid ...."

II. Property Owner Is "Taxpayer" and Should Receive Any Refund Due

With the exception of § 58.1-3990, all the relevant statutes, quoted above, identify the "taxpayer" as the recipient of any refund when taxes have been overpaid. Although § 58.1-3990 uses the term "applicant," since the "applicant" has been assessed with tax, any such applicant must, by definition, be a "taxpayer." See § 58.1-1 (defining "taxpayer" as every person subject to local tax). Sections 58.1-3281 and 58.1-3516 make it clear that the "taxpayer" assessed with real or personal property taxes is the person or entity that owned the property on January 1 of the tax year. It is my opinion, therefore, that the payment of tax refunds generally should be made to the property owner as of January 1, rather than to a mortgage lender or some other person or entity that may have paid the tax on the owner's behalf.

III. Lease May Transfer Tax Obligation and Refund Right to Tenant; Taxpayer May Assign Right to Refund

It is possible, of course, that by a lease or other contractual agreement, the holder of legal title may have transferred both possession of the property and the obligation to pay the tax on the property to a tenant or other party to such contract, who would then become the "taxpayer" for refund purposes.

In addition, a taxpayer may assign the right to receive a tax refund. See, e.g., Judd v. First Federal Sav. and Loan Ass'n, 710 F.2d 1237 (7th Cir. 1983) (clause in deed of trust giving lender sole discretion to credit excess escrow funds to loan balance or return funds to borrower indicative of borrower's surrender of control over escrowed funds). A contractual agreement, therefore, between a taxpayer and a third party, such as a mortgage lender, may control which party is entitled to receive a refund of local real estate taxes. Similarly, a taxpayer may authorize the direct payment of the refund to a third party.
As discussed in Part I above, the "taxpayer," as defined in § 58.1-1, ordinarily will be the owner of real or personal property. In my opinion, however, where a lease or other document makes it clear that a tenant or other third party is financially responsible for payment of the tax, and that person actually has paid the tax, he or she should be considered the "taxpayer" entitled to the refund. Similarly, it is my opinion that, when the treasurer has clearly documented evidence that the taxpayer has assigned the right to a refund to a mortgage lender or other third party, the treasurer may pay any refund approved in the statutorily prescribed manner to the taxpayer's assignee.

TAXATION: RETAIL SALES AND USE TAX — DEPARTMENT OF TAXATION.

If taxable event (sale) occurs in Virginia, subsequent delivery of gift to out of state recipient does not render it nontaxable. Retailer must collect sales tax when nonresident purchaser orders property by telephone or mail and directs seller to send item directly to another out-of-state resident. Neither use nor consumption required when sale takes place within Commonwealth; sale is taxable event.

February 23, 1991

The Honorable Richard J. Holland
Member, Senate of Virginia

You ask several questions concerning the exemption from sales tax provided in § 58.1-608(10)(d) (formerly § 58.1-608(20)) of the Code of Virginia. First, you ask whether a transaction in which an out-of-state resident purchases an item by telephone or mail from a Virginia retailer, for delivery as a gift to another out-of-state resident, is subject to sales tax. You also ask whether the answer to your first question would differ if the recipient of the purchased gift is a resident of Virginia. For each of these factual situations, you ask what use or consumption of the property purchased occurs within the Commonwealth. You next ask whether § 58.1-608(10)(d) differentiates between out-of-state deliveries directly to the purchaser and deliveries to a third party designated by the purchaser. Finally, you ask whether the 1987 ruling by the Circuit Court of the City of Alexandria in Hennage Creative Printers, Inc. v. Department of Taxation, Commonwealth of Virginia is applicable to any of the questions you raise.

I. Applicable Statutes and Regulations

Section 58.1-603 imposes a sales tax upon every person who engages in the business of selling tangible personal property at retail in the Commonwealth. Section 58.1-602 defines a "sale" to include "any transfer of title or possession . . . in any manner or by any means whatsoever, of tangible personal property."

Section 58.1-608(10)(d) exempts from the sales tax transactions in which tangible personal property is delivered "outside the Commonwealth for use or consumption outside of the Commonwealth."

Pursuant to the authority granted by § 58.1-203, the Tax Commissioner has issued sales and use tax regulations, one of which provides that the sales tax does not apply to "[t]he sale of tangible personal property delivered by the seller to a common carrier or to the U.S. Post Office for delivery to the purchaser outside of the state." Va. Dept't Tax'n, Va. Retail Sales & Use Tax Reg. ("Tax Reg.") § 630-10-51(A)(3) (Jan. 1, 1985) (emphasis added).

Tax Reg. § 630-10-44.1 provides, in part:
If a resident or nonresident buys a gift in Virginia and requests the seller to ship or mail such gift to another person, the purchaser is deemed to receive title to the gift at the time of purchase and the transaction is therefore taxable in Virginia. The location of the recipient of the gift has no bearing upon the taxability of the transaction; therefore, even if the recipient is located outside Virginia the sale is not a sale in interstate commerce.

II. Exemption of § 58.1-608(10)(d) Requires Purchased Property to Be Mailed or Shipped to Purchaser

You ask whether a retailer is required to collect sales tax when an out-of-state purchaser buys an item from a Virginia retailer by telephone or mail and directs delivery of the item as a gift to an out-of-state third party. Under Tax Reg. § 630-10-51(A)(3), the sales tax applies unless the property is placed in interstate commerce for delivery to the purchaser. This construction of the § 58.1-608(10)(d) sales tax exemption recognizes that the sale, the taxable event in the facts you present, occurs in Virginia.

"Sale" is defined in § 58.1-602 to include any transfer of title or possession of tangible personal property in any manner whatsoever. In the transaction you describe, the purchaser never takes actual possession of the tangible personal property. Title and constructive possession, however, are transferred to the purchaser in Virginia when, at the direction, and for the benefit of the purchaser, the Virginia retailer mails the property or delivers it to a common carrier for distribution as a gift to a recipient outside the Commonwealth. This conclusion is consistent with Tax Reg. § 630-10-44.1 and is supported by decisions of the Supreme Court of Virginia in similar contexts. See, e.g., WTAR Radio-TV Corp. v. Commonwealth, 217 Va. 877, 884, 234 S.E.2d 245, 249 (1977) (absent actual delivery to purchaser, showing of films tantamount to delivery of possession to purchaser); Commonwealth v. Pounding Mill Quarry, 215 Va. 647, 651-52, 212 S.E.2d 428, 431 (1975) (if taxable event occurs in Virginia, subsequent delivery outside State does not render it nontaxable); see also Media Graphics v. Director, Div. of Tax’n, 7 N.J. Tax 23 (1984) (taxable sale occurred at time in-state retailer completed performance by delivery of goods at post office in New Jersey).

The interpretation given to a statute by the state agency charged with its administration is entitled to great weight. See Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); Att’y Gen. Ann. Rep.: 1989 at 354, 356; 1983-1984 at 331, 332. The General Assembly is presumed to be cognizant of an agency’s construction of a particular statute, and, when such construction continues without legislative alteration, the General Assembly is presumed to have acquiesced in it. See Peyton v. Williams, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965); 1989 Att’y Gen. Ann. Rep., supra.

Based on the above, it is my opinion that § 58.1-608(10)(d) does not exempt a retailer from collecting sales tax when a nonresident purchaser orders the property by telephone or mail and directs the seller to send the item directly to another out-of-state resident. It is further my opinion that, because the taxable event, the sale, occurs in Virginia, it is immaterial whether the donee recipient is located within or outside the Commonwealth. It is also my opinion that Tax Reg. §§ 630-10-51(A)(3) and 630-10-44.1 are reasonable interpretations by the Tax Commissioner of § 58.1-608(10)(d) and are consistent with the established principle that tax exemptions are to be construed narrowly. See Commonwealth v. Research Analysis, 214 Va. 161, 163, 198 S.E.2d 622, 624 (1973).

III. Sale Is Taxable Event; Use or Consumption Within Commonwealth Is Not Required for Sales Tax to Apply

You next ask where, in the facts you present, use or consumption occurs in Virginia. Section 58.1-603 imposes the sales tax upon "every person who engages in the business of
serving at retail... in this Commonwealth.

Pursuant to § 58.1-602, a "sale" includes any transfer of title or possession. In the facts you present, the sale takes place within the Commonwealth as detailed in the preceding section of this Opinion. In contrast, "use" and "consumption" are terms applicable to the use tax imposed by § 58.1-604. Neither use nor consumption within Virginia is required when the sale takes place in Virginia. See *Pounding Mill Quarry Corp.*, 215 Va. at 651-52, 212 S.E.2d at 431.

Based on the above, it is my opinion that the transactions you describe constitute taxable sales in Virginia, as defined by § 58.1-602. As a result, no actual consumption or use of the property within the Commonwealth is required to make the transactions taxable.

IV. Great Weight Accorded Agency Construction of Statute Without Legislative Alteration

You next ask whether § 58.1-608(10)(d) differentiates between deliveries out of state directly to the purchaser and deliveries to the purchaser's designee.

Section 58.1-608(10)(d) contains no such express differentiation. Tax Reg. § 630-10-51(A)(3), however, requires delivery by common carrier or postal service to the purchaser. As discussed above, the construction given a statute by the agency charged with its administration is entitled to great weight. This principle applies with particular force to published regulations that continue in effect for a period of time without legislative alteration. *Peyton v. Williams*, 206 Va. at 600, 145 S.E.2d at 151.

V. Hennage Decision Not Controlling Since Adoption of 1985 Regulation

Finally, you ask whether *Hennage etc. Inc. v. Dept. of Taxation*, 9 Va. Cir. 104 (1987), is applicable to the previous questions you raise. The taxpayer in *Hennage* printed materials for nonresident customers and mailed them directly to the customers' nonresident designees. The taxpayer argued that neither § 58-441.6(r) (now § 58.1-608(10)(d)) nor Tax Reg. § 1-51 (1979) required delivery to the purchaser.

In ruling for the taxpayer, the court held that it could not "re-write the statute or regulation," neither of which required delivery to the purchaser. *Hennage*, 9 Va. Cir. at 104. Unlike its predecessor (Tax Reg. § 1-51), Tax Reg. § 630-10-51(A)(3) expressly requires mailing to the purchaser to make the sale exempt, and has contained this requirement since its adoption in 1985.

Based on the above, it is my opinion that *Hennage* does not apply to the issues you raise.

1 This interpretation also is consistent with the purpose of the exemption—not to tax interstate sales of tangible personal property. See Tax Reg. § 630-10-51(A). "A sale in interstate commerce... occurs only when title or possession to the property being sold passes to the purchaser outside of Virginia." *id.; see also Commonwealth v. Miller-Morton*, 220 Va. 852, 858, 263 S.E.2d 413, 418 (1980) (purpose of former § 58-441.6(r), predecessor statute to § 58.1-608(10)(d), is to avoid possible constitutional problems in taxing interstate sales).

2 *See McLeod v. Dilworth Co.*, 322 U.S. 327, 329-30 (1944) (sale takes place in state where order is received by phone or mail and from which goods are shipped out of state). The Supreme Court of the United States has held that a state tax is valid under the commerce clause if "the tax is applied to an activity with a substantial nexus with the taxing State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The Court
in Complete Auto Transit enunciated a four-pronged test, no part of which requires consumption within the taxing state. Id. at 282.

TAXATION: REVIEW OF LOCAL TAXES.

Determining whether failure to pay correct tax amount is fault of taxpayer is question of fact decided by local treasurer; waiver of interest and penalty on local tax levy applicable only when failure to pay tax not fault of taxpayer. Taxpayer may challenge local treasurer's assessment of such interest and penalties by timely filing of application in appropriate circuit court.

October 8, 1991

The Honorable Alfred C. Anderson
Treasurer for Roanoke County

You ask whether § 58.1-3916 of the Code of Virginia authorizes a local treasurer to waive the penalty for late payment of taxes when the taxpayer has misread the amount of tax shown as due on the tax bill and has paid the tax by the due date, but in less than the correct amount. You also ask what legal recourse is available to the taxpayer if the penalty is not waived by the treasurer.

I. Facts

The corporate taxpayer in the facts you present contends that the form of the tax bill does not provide a legible identification of the amount of tax due and that its accounts payable clerk, who in fact made the tax payment, was a new, inexperienced employee. You state that this tax bill format has been used by your office and other local treasurers for ten years.

II. Applicable Statutes

Section 58.1-3916, which authorizes local governments to set penalties and interest on late tax payments, provides in the first sentence of the fifth paragraph that "[p]enalty and interest for failure to file a return or to pay a tax shall not be imposed if such failure was not the fault of the taxpayer...." This statute also designates the treasurer as the official to make the determination of fault relating exclusively to failure to pay a tax.

Section 58.1-3916 further provides in the last sentence of the second paragraph that "[a]ny such penalty when so assessed shall become a part of the tax." Section 58.1-3984(A) permits "[a]ny person assessed with local taxes [to] apply for relief to the circuit court of the county or city wherein such assessment was made."

III. Determination of Fault Is Factual Inquiry for Treasurer

The waiver of penalty provision in § 58.1-3916 applies only when the failure of a taxpayer to pay a tax is not the fault of the taxpayer. Compare Att'y Gen. Ann. Rep.: 1987-1988 at 559 with 1980-1981 at 348, 349. The determination whether the failure to pay is the fault of the taxpayer necessarily is a question of fact to be decided by the local treasurer. Prior Opinions of this Office discuss the definition of the term "fault" for purposes of § 58.1-3916 and conclude that, if the treasurer determines from all the facts and circumstances that the taxpayer (1) did not failpurposefully in his duty to report and pay the taxes due or (2) did not engage in conduct that materially contributed to the failure to report and pay the tax when due, then the treasurer must waive the penalty. See Att'y Gen. Ann. Rep.: 1986-1987 at 321, 322; 1983-1984 at 387.
IV. Taxpayer May Apply to Circuit Court to Correct Penalty Assessment

You also ask what legal recourse is available to a taxpayer if the local treasurer declines to waive the interest and penalty on a local tax levy when the taxpayer claims not to be at fault for failing to pay. A prior Opinion of this Office concludes that the determination whether relief from interest and penalties is available to the taxpayer in such an instance must be made by the courts. See 1976-1977 Att'y Gen. Ann. Rep. 289, 291. Interest and penalties, when assessed, become part of the tax. See § 58.1-3915. It is my opinion, therefore, that a taxpayer may challenge the local treasurer's assessment of such interest and penalties by timely filing an application in the appropriate circuit court in accordance with the provisions of § 58.1-3984.

TAXATION: REVIEW OF LOCAL TAXES.

Federal law controls when state law conflicts. Federal Deposit Insurance Corporation not subject to delinquent tax penalties on real property it holds as receiver for insolvent bank, despite provision of Virginia law that penalties assessed for nonpayment of real estate taxes become part of tax.

April 25, 1991

The Honorable Joseph T. Fitzpatrick
Treasurer for the City of Norfolk

You ask whether the Federal Deposit Insurance Corporation (the "FDIC") is responsible for the payment of penalties on delinquent taxes on real property that the FDIC holds as receiver of an insolvent bank. You state that the FDIC is willing to pay the delinquent taxes owed on the property, but has refused to pay the penalties assessed.

I. Applicable Federal and State Statutes

The FDIC has the powers granted in 12 U.S.C.A. §§ 1811-1833e (West 1989 & Supp. 1991). The FDIC, when acting as receiver, is exempt from all taxation imposed by any state, county, municipality, or local tax authority, "except that any real property of the [FDIC] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." Section 1825(b)(1) (West 1989). Section 1825(b)(3) further provides: "The [FDIC] shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property ... tax ... when due."

Section 58.1-3916 of the Code of Virginia authorizes the governing body of a locality to provide by ordinance for the assessment of penalties for nonpayment of real estate taxes when due, and provides that "[a]ny such penalty when so assessed shall become a part of the tax."

II. Federal Law Controls When State Law Conflicts

A federal law supplants a conflicting state law, by virtue of the supremacy clause of the Constitution of the United States. U.S. Const. art. VI; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824); see also Att'y Gen. Ann. Rep.: 1990 at 259 (federal statute prohibiting taxation of National Consumer Cooperative Bank prevails over state statute imposing recordation tax on beneficiary of deed of trust); 1987-1988 at 504, 508 (federal statute exempting Farm Credit Banks from certain federal, state and local taxation prevails over conflicting state statutes). States and localities generally are prohibited from

III. FDIC Not Liable for Penalties on Delinquent Taxes Despite Provisions of § 58.1-3916

Section 1825(b)(3) exempts the FDIC from the payment of any amount "in the nature of penalties" imposed because of failure to pay real estate taxes when due. I am aware of only one court decision applying this provision in § 1825(b)(3). In that case a federal district court concluded that both penalties and interest imposed on delinquent taxes under Texas law were "in the nature of penalties" and, therefore, uncollectible from the FDIC under § 1825(b)(3). Irving Indep. School Dist. v. Packard Properties, 741 F. Supp. 120, 124 (N.D. Tex. 1990).

The court in Packard Properties concluded that whether the amounts in question were penalties within the meaning of § 1825(b)(3) was "a federal question, the resolution of which is guided by reference to . . . state law," 741 F. Supp. at 123. Unlike § 58.1-3916, the Texas statutes involved in Packard Properties did not provide that the penalties "shall become a part of the tax." Id. at 123-24 nn. 5-7. I am not persuaded, however, that this distinction is sufficient to exclude penalties imposed under § 58.1-3916 from the meaning of § 1825(b)(3), because the latter statute refers to amounts "in the nature of penalties." In my opinion, the plain language of these two provisions dictates the conclusion that a "penalty," even if it becomes "part of the tax," is still "in the nature of [a] penalty." It is further my opinion, therefore, that the FDIC is not subject to delinquent tax penalties on real property it holds as receiver for an insolvent bank.

1Although the court in Packard Properties held that "interest" and "penalties" were equivalent for purposes of § 1825(b)(3), other courts have distinguished between "interest" and "penalties" on delinquent taxes in other contexts. See, e.g., In re Brinegar, 76 B.R. 176, 178 (1987) (pre-petition interest on federal taxes not "penalty" for purposes of priority classification in bankruptcy proceeding); In re E.A. Nord Co., Inc., 75 B.R. 634 (1987) (penalty portion of state claim for unpaid workers' compensation premiums distinguished from interest). Because you have not asked whether the FDIC is subject to interest charges on delinquent real property taxes, I express no opinion on that question.

TAXATION: REVIEW OF LOCAL TAXES - COLLECTION BY TREASURERS, ETC.

Penalty and interest waived when failure to pay local taxes not fault of taxpayer or was fault of treasurer. Treasurer makes determinations of fault relating to taxpayer's failure to pay tax; penalty and interest may be waived if treasurer determines clerical error materially contributed to taxpayer's failure to pay.

November 12, 1991

The Honorable Francis X. O'Leary Jr.
The Treasurer for Arlington County

You ask whether an amendment to § 58.1-3916 of the Code of Virginia adopted during the 1991 Session of the General Assembly makes a substantive change in the standard under which a treasurer may assess interest and penalties for late payment of local taxes.
1991 REPORT OF THE ATTORNEY GENERAL

I. Applicable Statutes

Effective July 1, 1991, § 58.1-3916, which authorizes local governments to charge penalties and interest on late tax payments, provides that the "[p]enalty and interest for failure to file a return or to pay a tax shall not be imposed if such failure was not the fault of the taxpayer, or was the fault of the commissioner of revenue or the treasurer, as the case may be." Ch. 464, 1991 Va. Acts 740, 750 (Reg. Sess.). Pursuant to § 58.1-3916, the treasurer is required to make determinations of fault relating to failure to pay a local tax.

II. Penalties and Interest for Failure of Taxpayer to Pay Tax May Be Waived if Treasurer at Fault

Before July 1, 1991, § 58.1-3916 authorized a local treasurer to waive penalty and interest for failure to pay a tax only when that failure was not the fault of the taxpayer. Section 58.1-3916 was amended at the 1991 Session of the General Assembly also to permit the waiver of penalty and interest when the taxpayer's failure to pay is "the fault of ... the treasurer." 1991 Va. Acts, supra Pt. I.

In making that amendment to § 58.1-3916, however, the General Assembly retained the language authorizing penalty and interest unless the failure to pay a tax "was not the fault of the taxpayer." The 1991 amendment, therefore, does not reduce the responsibility of the taxpayer for the failure to pay a tax. Instead, the use of the disjunctive "or" in the amendment indicates the General Assembly's intent to provide a second and separate instance justifying waiver of penalties and interest. See 1990 Att'y Gen. Ann. Rep. 223, 224. Accordingly, it is my opinion that § 58.1-3916, as amended in 1991, authorizes the waiver of penalty and interest when the failure to pay either (1) was not the fault of the taxpayer or (2) was the fault of the treasurer. See 1986-1987 Att'y Gen. Ann. Rep. 228, 229 (statute to be construed to give effect to all of its provisions).

III. Purposefully Failing in Duty to Pay or Engaging in Conduct that Materially Contributed to Failure to Pay Constitutes Fault

Prior Opinions of this Office discuss the definition of the term "fault" for purposes of § 58.1-3916 and conclude that it means "purposefully fail[ing] in a duty or engag[ing] in conduct that materially contributed to the problem complained of." 1981-1982 Att'y Gen. Ann. Rep. 393, 394 (quoting Garcia v. Rosewell, 43 Ill. App. 3d 512, 517, 2 Ill. Dec. 392, 559 N.E.2d 563 (1976)). This standard applies to the actions of both the taxpayer and the treasurer in determining fault pursuant to § 58.1-3916. Section 58.1-3916, as it was amended in 1991, authorizes the waiver of penalties and interest in instances when, although a taxpayer may have been at fault, a local treasurer's conduct materially contributed to the taxpayer's failure to pay a tax.

Section 58.1-3916 requires the treasurer to make determinations of fault relating to failure to pay a tax. These determinations should be based on the particular facts and circumstances presented. In one circumstance, you state that a taxpayer alleges that payment was late because, although the bill was mailed by the treasurer's office on August 30, the taxpayer did not receive the bill until September 17, after the due date. In my opinion, these facts alone do not support a waiver of penalty and interest on the basis that the failure to pay was not the fault of the taxpayer or was the fault of the treasurer. See 1987-1988 Att'y Gen. Ann. Rep. 536, 537 (taxpayer's failure to pay taxes when due simply because taxpayer did not receive tax bill does not relieve taxpayer from imposition of penalties and interest) (citing 1981-1982 Att'y Gen. Ann. Rep., supra).

You also indicate, however, that, due to a clerical error in your office, the tax bill in question stated that penalties and interest would be imposed after September 17,
although the correct date should have been September 16. It is further my opinion that, pursuant to the 1991 amendment to § 58.1-3916, you may waive the penalty and interest if you determine that this erroneous date on the tax bill "materially contributed" to the taxpayer's failure to pay the tax.

The conclusion reached in this Opinion and in the 1982 Opinion is not affected by the 1991 amendment to § 58.1-3916, because neither Opinion indicates that the failure of the taxpayer to receive the tax bill was the fault of the local treasurer. See 1981-1982 Att'y Gen. Ann. Rep. 393. As a result, a taxpayer remains liable for payment of the tax, whether or not he actually receives a tax bill, unless it is determined that the taxpayer's failure to receive the bill was the fault of the treasurer.

TAXATION: REVIEW OF LOCAL TAXES - COLLECTION BY TREASURERS, ETC. — REAL PROPERTY TAX - BOARDS OF EQUALIZATION — LOCAL OFFICERS - COMMISSIONERS OF THE REVENUE.

Commissioner of revenue not precluded from employing part-time employees to conduct personal property audits. Commissioner may disclose confidential tax information both to local tax collector employed by county board of supervisors to collect delinquent taxes other than real estate and to local board of equalization required to equalize assessments and where commissioner may be requested to call inequalities to attention of board. No authority for commissioner to engage outside auditors; commissioner may not provide private firm confidential tax information necessary to conduct audit.

June 6, 1991

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You ask whether persons conducting business personal property audits on behalf of a commissioner of the revenue must be full-time employees of the commissioner or whether a commissioner may employ either (1) part-time employees to conduct the audits or (2) private firms either to conduct the audits or to provide personnel to work with a commissioner in conducting the audits. You state that your concern about this issue involves the confidentiality provisions of § 58.1-3 of the Code of Virginia. If a commissioner of the revenue may employ a private firm, you ask whether the firm may be paid an hourly rate, a flat fee for each audit, or a percentage of the increased taxes recovered as a result of an audit.

I. Applicable Statute

Section 58.1-3(A) provides that, subject to certain exceptions and "[e]xcept in accordance with proper judicial order or as otherwise provided by law," a commissioner of the revenue "shall not divulge any information acquired by him in the performance of his duties with respect to the transactions, property, including personal property, income or business of any person, firm or corporation." The prohibition does not apply to "[a]lso performed or words spoken or published in the line of duty under the law." Section 58.1-3(A)(2).

II. Commissioner May Disclose Confidential Tax Information to Part-Time Employees

Prior Opinions of this Office conclude that the confidentiality provisions of § 58.1-3 (former § 58-46) are not violated by disseminating protected information to tax or revenue employees, including part-time employees, for the performance of their public
duties. See Att'y Gen. Ann. Rep.: 1982-1983 at 505; 1974-1975 at 524, 525. It is my opinion, therefore, that § 58.1-3 does not preclude a commissioner of the revenue from employing part-time employees to conduct personal property audits.

II. Commissioner May Not Divulge Confidential Tax Information to Private Firm Employed to Conduct Personal Property Audit

Prior Opinions of this Office further have addressed whether a commissioner of the revenue may disclose confidential tax information to third parties in connection with the collection of taxes. Several of these prior Opinions conclude that, under certain circumstances, a commissioner of the revenue may disclose confidential tax information to third parties, and one concludes that, under other circumstances, the commissioner may not disclose such information. Compare Att'y Gen. Ann. Rep. 1974-1975 at 490 and 1957-1958 at 275 with 1976-1977 at 34.

The different conclusions reached by these prior Opinions are based on the existence or nonexistence of the statutory authority for the third party to perform duties which require access to the tax information. If such statutory authority exists, the information is disclosed "in the line of duty under the law," as provided in § 58.1-3(A)(2). As a result, a commissioner of the revenue may disclose confidential tax information to a local tax collector employed by a county board of supervisors pursuant to the authority granted in § 58.1-3934 (former § 58-991). See 1957-1958 Att'y Gen. Ann. Rep. 275. See also 1982-1983 Att'y Gen. Ann. Rep. 603 (disclosure of information to attorney hired to collect delinquent local taxes permitted). Likewise, a commissioner may provide confidential tax information to a local board of equalization pursuant to a statute, § 58.1-3379 (former § 58-904), requiring such boards to equalize assessments in the county and requiring local commissioners to call inequalities to the attention of the board. See 1974-1975 Att'y Gen. Ann. Rep. 490.

In contrast, a commissioner of the revenue may not disclose confidential tax information to outside assessors engaged to audit taxpayers, to verify returns and to make statutory assessments for omitted items. See 1976-1977 Att'y Gen. Ann. Rep. 34 (the "1976 Opinion"). The function of an outside assessor would be limited to appraising property voluntarily exhibited by the taxpayer and to submitting his appraised value to the commissioner. Id. at 35. Based on the conclusion in the 1976 Opinion, it is my opinion that, because there is no statute that authorizes a commissioner of the revenue to engage outside auditors and thus to disclose confidential tax information pursuant to the commissioner's or the auditor's performance of his statutory duties, a commissioner is prohibited by § 58.1-3 from granting an outside auditing firm access to such information.

Since I conclude that a commissioner may not provide a private firm information necessary to conduct an audit, a response to your questions concerning the method of payment to such private firms is not necessary.

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1Any such outside firm would have none of the authority given to a commissioner of the revenue to compel taxpayers to exhibit property or to answer questions concerning their tax liabilities. See §§ 58.1-3109(6), 58.1-3110.
GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

ADMINISTRATION OF GOVERNMENT GENERALLY: HOLIDAYS AND SPECIAL DAYS; HOURS OF WORK, ETC.

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

Commissioner of revenue required to correct erroneous personal property tax assessments resulting from taxpayer's mistaken classification of property. Assessments made before July 1, 1989, governed by former three-year limitation period; timely application for correction of assessment for 1987 could have been filed by taxpayer during normal business hours of commissioner's office on January 2, 1991 (inability to comply with December 31, 1990, deadline because local courthouse closed by order of circuit court). Application for correction of 1985 and 1986 assessments made before July 1, 1989, barred before December 31, 1990.

February 7, 1991

The Honorable Ralph D. Vanover
Commissioner of the Revenue for Dickenson County

You ask two questions concerning the application of §§ 58.1-3980 and 58.1-3981 of the Code of Virginia. You first ask whether a taxpayer who filed returns erroneously classifying certain real property as personal property is entitled to correction of personal property tax assessments made on the basis of those returns, if the taxpayer makes a timely application for correction to the commissioner of the revenue. You also ask whether an application for correction of the assessment was made in timely manner when the taxpayer had a deputy sheriff hand-deliver the application to the commissioner of the revenue at his home at 7 p.m. on December 31, 1990, a day the county courthouse was closed by order of the local circuit court judge. The earliest year covered by the application is 1985.

I. Applicable Statutes

Sections 58.1-3980 through 58.1-3983 provide an administrative procedure for taxpayers to seek relief from allegedly erroneous local personal property tax assessments. Before July 1, 1989, § 58.1-3980 authorized taxpayers to apply to the local commissioner of the revenue for administrative correction of erroneous local personal property tax assessments,1 "within three years from the last day of the tax year for which such assessment is made." Effective July 1, 1989, § 58.1-3980 was amended to extend the applicable limitation period from three to five years. Ch. 86, 1989 Va. Acts 128, 129 (Reg. Sess.).

Section 58.1-3981 provides, in part:

If such commissioner of the revenue, or other official performing the duties imposed on commissioners of the revenue under [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.
II. Administrative Correction Required upon Timely Application Satisfactorily Establishing Error

Section 58.1-3981 requires the commissioner of the revenue to correct local personal property tax assessments when he is satisfied that he has erroneously assessed the applicant-taxpayer. Attorney Gen. Ann. Rep.: 1986-1987 at 315, 316; 1984-1985 at 316, 319 n.7; see also Attorney Gen. Ann. Rep.: 1985-1986 at 256, 257 (former § 58-1142 required correction of erroneous assessment upon timely application); 1983-1984 at 405 n.1 (§ 58-1142, predecessor statute to § 58.1-3981, provides remedy for erroneous local tax assessments). No correction may be made, however, unless the taxpayer complies with the mandatory time limitation prescribed in § 58.1-3980. 1986-1987 Attorney Gen. Ann. Rep. 319, 320. Section 58.1-3980 places the responsibility on taxpayers to discover errors in their tax bills within the allotted statutory period, and protects the locality from any refund obligation after the expiration of the statutory period. Id.

The fact that a taxpayer's mistake causes the commissioner of the revenue erroneously to assess the taxpayer's property does not relieve the commissioner of the revenue of his statutory duty under § 58.1-3981 to correct an erroneous assessment of local personal property taxes when the taxpayer makes a timely application satisfactorily establishing that an error has been made. In providing for the administrative correction of erroneous local personal property tax assessments, § 58.1-3981 explicitly uses the mandatory term "shall," and does not allow the commissioner of the revenue the discretion to deny a correction based on equitable factors such as the taxpayer's mistake. See 17 M.J. Statutes § 75 (Repl. Vol. 1979) (mandatory term connotes imperative command). It is my opinion, therefore, that § 58.1-3981 requires the commissioner of the revenue to correct the erroneous personal property tax assessments resulting from the taxpayer's mistaken classification of property, if the taxpayer has made a timely application for such correction. See 1983-1984 Attorney Gen. Ann. Rep. 346 (§ 58-1142, predecessor statute to § 58.1-3981, requires commissioner to correct erroneous assessment resulting from taxpayer's mistaken overvaluation of its property); see also 1975-1976 Attorney Gen. Ann. Rep. 225, 227 (statute requires commissioner to correct erroneous assessment of local license tax resulting from misclassification of mobile homes actually subject to real property tax); see infra note 1.

III. Statutory Amendment Enlarging Limitation Period Not Retroactive

Whether a timely application was made for 1985 and later years depends initially on whether the 1989 amendment to § 58.1-3980 extending the limitation period from three to five years applies retroactively. If the amendment is not retroactive, assessments made before the July 1, 1989, effective date of the amendment are governed by the former three-year limitation period. See, e.g., Ferguson v. Ferguson, 169 Va. 77, 192 S.E. 774 (1937) (nonretroactive amendment reducing limitation period applies only to causes of action arising after the enactment); see also State Bd. of Equal. v. American Airlines, 773 P.2d 1035, 1040-41 (Colo.) (en banc) (federal statute inapplicable to state property tax assessments completed before effective date of enactment), cert. denied, 493 U.S. 851 (1989).

Section 1-16 codifies a general presumption against retroactivity of legislative amendments. Section 8.01-234 makes this presumption absolute in the case of amendments repealing the bar of a statute of limitations with respect to claims already barred. Prior Opinions of this Office conclude that whether a statute may be given retroactive effect requires a two-step analysis—it first must be determined whether the General Assembly intended the statute in question to have retroactive effect and, if so, the statute may be applied retroactively only if such application does not impair substantive or vested rights. See Op. to Hon. Robert T. Andrews, H. Del. Mbr. (Mar. 21, 1990); see also Phipps, Adm'r v. Sutherland, 201 Va. 448, 452, 111 S.E.2d 422, 425 (1955) (legislature may...
expressly provide for retroactivity of amendments affecting procedural matters as opposed to vested rights).

Nothing in the language of the 1989 amendment to § 58.1-3980 suggests that the General Assembly intended the new limitation period to apply retroactively to assessments made before the amendment became effective. With respect to erroneous tax assessments, for which there was no remedy at common law, the limitation period is not merely procedural, but is an integral part of the substantive right to apply for correction of the assessment. See *Leesburg v. Loudoun Nat. B'k*, 141 Va. 244, 126 S.E. 196 (1925). It is my opinion, therefore, that the 1989 amendment to § 58.1-3980 does not apply retroactively to assessments made before July 1, 1989, with the result that correction of such assessments is governed by the former three-year limitation period. In the facts you present, the application could not be considered timely as to 1985 and 1986 assessments made before July 1, 1989. The correction of those assessments, governed by the former three-year limitation period, was barred before December 31, 1990.

IV. Application Due on Day Office Closed May Be Timely Filed on Next Day Office Open; Application in Facts Presented Was Timely if Filed by Commissioner on January 2, 1991

Whether the taxpayer's application may be considered timely for a 1987 assessment made before July 1, 1989, depends upon whether the taxpayer satisfactorily complied with the applicable three-year limitation period. Before its amendment in 1989, § 58.1-3980 allowed taxpayers "three years from the last day of the tax year for which such assessment is made [to] apply to the commissioner of the revenue." In the case of an assessment for 1987 made before July 1, 1989, the deadline for application to the commissioner of the revenue was December 31, 1990.

Section 58.1-3980 does not specify the manner in which an application for correction of an erroneous assessment should be presented to the commissioner of the revenue or other official responsible for making the correction. Guidance about the proper application of § 58.1-3980 may be found, however, in § 58.1-3984, which specifies the limitation period for applications seeking judicial correction of erroneous local tax assessments. See 2A Norman J. Singer, *Sutherland Statutory Construction* §§ 51.02, 51.03 (Sands 4th ed. 1984) (statutes having same object or purpose should be construed together); 1985-1986 Att'y Gen. Ann. Rep. 296 (statutes dealing with related subjects should be harmonized if possible). Because §§ 58.1-3980 and 58.1-3984 both have as their object the setting of a time limitation for correction of local tax assessments, it is my opinion that these statutes properly may be construed together with regard to the procedure for filing an administrative application for correction of an assessment.

Section 58.1-3984(A) provides that an application seeking judicial correction "shall be before the court when it is filed in the clerk's office." Under § 1-13.3:1, an act required to be done on a day when the clerk's office is closed may be done on the next day that the clerk's office is open. A timely application for the judicial correction of an assessment for 1987 made before July 1, 1989, therefore, could have been filed in the clerk's office on January 2, 1991.3

Construing §§ 58.1-3980 and 58.1-3984 together in light of §§ 1-13.3:1 and 17-41(8), it is my opinion that a timely application seeking correction of an assessment for 1987 made before July 1, 1989, could have been filed in the office of the commissioner of the revenue on January 2, 1991. In this case, although the taxpayer did not file the application in the office of the commissioner of the revenue, the application was served on the commissioner of the revenue at his home at 7 p.m. on the evening of December 31, 1990.
The taxpayer in the facts you present used a method of "filing" an application that was neither statutorily permitted nor appropriate. The application could have been filed by the taxpayer during the normal business hours of the office of the commissioner of the revenue on January 2, 1991. When the taxpayer adopted the inappropriate service procedure used here, he did so at his peril. If the application was, in fact, filed by the commissioner of the revenue on January 2, 1991, however, it is my opinion that the statutory requirement was satisfied.

1. Section 58.1-3980 provides that the procedure for administrative correction pursuant to §§ 58.1-3980 to 58.1-3983 applies to assessments of local taxes on tangible personal property, machinery and tools, or merchants' capital, and local license taxes; the procedure also applies to real estate assessments, but only if the error sought to be corrected was made in the office of the commissioner of the revenue or other official to whom the application is made. See 1973-1974 Att'y Gen. Ann. Rep. 392 (§§ 58-1141 and 58-1142, predecessor statutes to §§ 58.1-3980 and 58.1-3981, do not authorize commissioner of revenue to correct error by board of assessors in assessing real estate).

2. Regardless of the applicable limitation period, a timely application may still be made for years after 1987.

3. Although December 31, 1990, was not a legal holiday as defined in § 2.1-21, you indicate that the local courthouse was closed by order of the circuit court pursuant to § 17-41(8). Such a closing has the effect of a legal holiday under § 1-13.3:1. For the purposes of this Opinion, I assume that the office of the commissioner of the revenue was located in the courthouse and, therefore, also was closed.

**TAXATION: REVIEW OF LOCAL TAXES - CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS - LICENSE TAXES.**

Assessment at beginning of year and payment of local license taxes erroneous as to portion of year business ceases operations in locality. Taxpayer may apply to commissioner of revenue for correction of erroneous assessments within five years from last day of tax year for which assessment made. Statutory reference to refunds being made in ensuing fiscal year only addresses locality's authority to defer payment of refund owed business ceasing operation until next fiscal year.

February 22, 1991

The Honorable Maxwell Brown
Commissioner of the revenue for the City of Salem

You ask the length of the applicable limitation period within which a taxpayer may file an application with a commissioner of the revenue for refund of a local business license tax. You explain that the refund in question is for the prorated portion of the tax for an entity ceasing its business operation in your jurisdiction during a tax year for which a license tax already has been paid. You specifically ask whether a provision in § 58.1-3710 of the Code of Virginia, authorizing a locality to remit such refunds in the ensuing fiscal year, imposes a one-year limitation period for a taxpayer to file an application for this type of refund.

1. **Applicable Statutes**

Section 58.1-3703 authorizes the governing body of any locality to levy and provide for the assessment and collection of a license tax on "businesses, trades, professions, occupations and callings."
Section 58.1-3710 provides, in part:

In the event a person, firm or corporation ceases to engage in a business, trade, profession or calling within a county, city or town during a year for which a license tax 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, city or town. The county, city or town may elect to remit any refunds in the ensuing fiscal year . . . . [Emphasis added.]

Section 58.1-3980 authorizes any person, firm or corporation aggrieved by an assessment of local license tax to apply to the commissioner of the revenue for a correction of the assessment "within five years from the last day of the tax year for which such assessment is made."

II. Section 58.1-3710 Language Addresses Only Delay of Refund Payment by Locality

No Opinion of this Office has interpreted the language of S 58.1-3710 as it pertains to remitting license tax refunds to a business ceasing to operate during a tax year. The primary objective of statutory construction, however, is to ascertain and give effect to legislative intent. See 1987-1988 Att'y Gen. Ann. Rep. 364, 365. A plain reading of S 58.1-3710 indicates a legislative purpose to allow the locality to delay payment of a license tax refund until the next fiscal year. The obvious and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction. Id. There is nothing in S 58.1-3710 to indicate that a taxpayer must submit a refund application within the taxable year or the subsequent one. It is my opinion, therefore, that the reference to refunds being made "in the ensuing fiscal year" in S 58.1-3710 only addresses the locality's authority to defer its payment of the refund owed to a business ceasing operation until the next fiscal year.

III. Limitation Period in S 58.1-3980 Controls Time for Taxpayer to Make Application for Refund of License Tax

Section 58.1-3710 prohibits a locality from imposing a license tax based upon gross receipts for any portion of a year for which a business permanently ceased operation. When a company ceases doing business in a locality during a tax year, the locality's earlier assessment of license taxes at the beginning of the year, and the payment of those taxes, would be erroneous as to the portion of the year in which the business was not operating in the locality.

Section 58.1-3980 expressly addresses the time period in which a taxpayer may make application for refunds of erroneously assessed local taxes. It allows an aggrieved taxpayer to apply for correction of erroneous assessments within five years from the last day of the tax year for which such assessment is made. 1 See 1984-1985 Att'y Gen. Ann. Rep. 316, 317. Local license taxes are specifically included within the provisions of S 58.1-3980.

Based on the above, it is my opinion that S 58.1-3980 provides the applicable limitation period in which a taxpayer may file an application for a prorated refund of a local business license tax payment, pursuant to S 58.1-3710, when the taxpayer's business has ceased to operate in the locality during the tax year.

1 In 1989, the limitation period in S 58.1-3980 was extended from three to five years. Ch. 86, 1989 Va. Acts 128, 129 (Reg. Sess.). Because the taxpayer in the facts you
present filed his application with the commissioner of the revenue within three years of the last day of the year for which the assessment was made, it is not necessary to address whether the three- or five-year limitation period is applicable.

TAXATION: STATE LOTTERY LAW.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY — GAMBLING.

Virginia corporation acting as pooling agent for anyone purchasing Virginia lottery tickets or shares of tickets considered form of gambling, in violation of State Lottery Law; participants in pool engaged in illegal gambling.

April 2, 1991

The Honorable Joseph P. Johnson Jr.
Member, House of Delegates

You ask whether a Virginia corporation violates certain provisions of the State Lottery Law, §§ 58.1-4000 through 58.1-4028 of the Code of Virginia, if it acts as a "pooling agent" for anyone purchasing Virginia lottery tickets or shares of these tickets.

I. Facts

You describe a Virginia corporation (the "pooling agent") that proposes to accept cash for the purchase of Virginia lottery tickets from players and purchase a pool of these tickets for all the participants who have paid into the lottery pool. At the conclusion of a particular lottery game, the pooling agent would collect any prizes won as a result of the tickets purchased and pay winnings to the pool participants under a pro-rata formula based on the number of tickets purchased by each player in the pool. You state that the pooling agent would not purchase Virginia lottery tickets with its own funds and then market and sell shares of these tickets. You also state that the pooling agent would not operate by having all of its stockholders or owners pool their money as capital for the pooling agent-corporation to purchase Virginia lottery tickets. The pooling agent would charge a fixed fee in advance to each player for its services. The pooling agent you describe has not been licensed as a lottery sales agent by the State Lottery Department.

II. Applicable Statutes

Section 18.2-325(1) defines the term "illegal gambling" as follows:

The making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling.

Section 18.2-334.3 provides that "[in]nothing in [the 'Gambling' statutes] shall apply to any lottery conducted by the Commonwealth of Virginia pursuant to [the State Lottery Law]." Section 58.1-4015 prohibits the sale of a lottery ticket to any person "under the age of eighteen years."

Section 58.1-4014, a portion of the State Lottery Law, provides:
A. No person shall sell a ticket or share at any price other than that fixed by rules and regulations of the [State Lottery] Department. No person other than a licensed lottery sales agent or his employee shall sell lottery tickets or shares, except that nothing in this section shall be construed to prevent any person from giving lottery tickets or shares to another person over the age of eighteen years as a gift.

B. Any person convicted of violating this section shall be guilty of a Class 1 misdemeanor.

III. Lottery Ticket "Pooling" Arrangement Constitutes Gambling Within Definition in § 18.2-325(1)

The Supreme Court of Virginia has held that the essential elements of a lottery are "(1) the distribution of money or property; (2) chance; and (3) a valuable consideration paid, or agreed to be paid, for the chance." Maughs v. Porter, 157 Va. 415, 424, 161 S.E. 242, 245 (1931).

In various methods of gambling, a "pool" is a sum of money made up of the stakes contributed by various persons, the whole of which is then wagered as a stake on the event of a race, game, or other contest, and the winnings (if any) are divided among the contributors to the pool pro rata.


Prior Opinions of this Office likewise consistently have concluded that activities combining the three elements of prize, chance and consideration constitute illegal gambling. See, e.g., Att'y Gen. Ann. Rep.: 1987-1988 at 282, 283 (game involving selection of winner based on heifer's random deposit of "cow pie" not "raffle," and, therefore, is illegal gambling); 1986-1987 at 169, 170 (charitable organization's use of spinning wheel to determine prize winner not permitted under gambling statutes); 1977-1978 at 238, 239 (retail promotional drawing requiring consideration in form of purchase as condition of prize eligibility constitutes illegal lottery). Compare Att'y Gen. Ann. Rep.: 1977-1978 at 238 (use of "slot machine" that awards additional games in lieu of cash prize not illegal gambling); 1972-1973 at 258 (promotional "sweepstakes" not illegal gambling if no purchase required to win prize).

The activity proposed by your constituent clearly falls within the definition of a gambling pool discussed above. It also indisputably involves the three elements of chance, prize and consideration. It is, therefore, a form of gambling that is defined as illegal by § 18.2-325(1), unless it is a "lottery conducted by the Commonwealth of Virginia pursuant to [the State Lottery Law]." Section 18.2-334.3.

IV. Proposed Pooling Scheme in Violation of State Lottery Law; Participants Would Be Engaged in Illegal Gambling

Although § 18.2-334.3 exempts the state lottery from the general prohibition on illegal gambling, that exemption, by its own express terms, incorporates the provisions of the State Lottery Law. One of those provisions, § 58.1-4014, makes it a Class 1 misdemeanor to sell a state lottery ticket or a share of such a ticket at a price other than that established by the State Lottery Department. Section 58.1-4014 also makes it unlawful for anyone other than an agent licensed by the Department to sell tickets or shares of tickets.

In the arrangement proposed by your constituent, the pooling agent obviously would be selling shares of the lottery tickets purchased with the funds contributed by the
participants in the pool. Because of the fee charged by the pooling agent, the total amount paid by the participants for the tickets in the pool, and for the individual participants' respective shares of such tickets, would be greater than the official price of the tickets established by the State Lottery Department. You have stated, moreover, that the proposed pooling agent is not a licensed lottery sales agent.

It is my opinion, based on the above, that, under the proposed arrangement, the pooling agent would be in violation of § 58.1-4014. It is further my opinion that, because the pooling scheme would not be in compliance with the State Lottery Law, it would lose the benefits of the exemption in § 18.2-334.3, and that participants in the pool, therefore, would be engaged in illegal gambling.¹

¹You state that the pooling agent will not purchase lottery tickets from other states.

²A prior Opinion of this Office concludes that a corporation does not violate § 18.2-325(1) when "it purchases out-of-state lottery tickets, redeems the winning tickets, and forwards the proceeds to the Virginia customers." 1989 Att’y Gen. Ann. Rep. 181, 182. The facts presented in your constituent's proposal are distinguishable, however, from those in that Opinion. In the situation described in that Opinion, the corporation purchased individual tickets for individual players by their order, and the prize from any winning ticket went only to the purchaser of that specific ticket. Id. at 181. That situation did not constitute "pooling"; the only gambling involved was the lawful purchase of the out-of-state lottery tickets. That prior Opinion also did not involve the limitations in § 58.1-4014(A) concerning either license or price, because the tickets involved were not Virginia lottery tickets.

TAXATION: STATE RECORDATION TAX.

Deed conveying property to wholly owned subsidiary of lending institution pursuant to settlement agreement which specifies conditional release from liability subject to grantee's tax based on current fair market value of property. Conditional nature of release and fact that property remains subject to lien of deed of trust affects calculation of grantor's tax; tax determined by reducing current market value of property by value of encumbrance to which property remains subject.

July 3, 1991

The Honorable J. Curtis Fruit
Clerk, Circuit Court for the City of Virginia Beach

You ask whether, in a particular set of facts, the recordation taxes for grantees and grantors under §§ 58.1-801 and 58.1-802 of the Code of Virginia should be based on the outstanding balance due under a deed of trust or the current fair market of the property conveyed.

I. Facts

The conveyance in question was made by a partnership to the wholly owned subsidiary of the financial institution holding the note secured by a deed of trust encumbering the property. The deed provides that the balance due on the deed of trust is $3,504,726, and that the grantor-partnership is conditionally released from liability pursuant to a settlement agreement with the lender. The settlement agreement specifies that "the conditional release . . . shall not constitute and shall not be deemed a discharge of the indebtedness evidenced and secured by the Loan Documents." Settlement Agreement between
II. Applicable Statutes

Section 58.1-801(A) generally imposes a recordation tax, known as the grantee's tax, based on the greater of "the consideration of the deed or the actual value of the property conveyed." Section 58.1-802(A) imposes a separate tax, known as the grantor's tax, measured by the "consideration or value of the interest" conveyed, "exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale."

III. Grantee's Tax Based on Fair Market Value of Property When Consideration Cannot Be Determined

The deed in the facts you present reflects a settlement agreement between the parties, under which the grantor-partnership is conditionally released from liability on the outstanding debt. The deed resembles a deed in lieu of foreclosure that a lender may accept to satisfy an outstanding mortgage debt in lieu of its right to sell. The transaction differs from a deed in lieu of foreclosure, however, in that the release referenced in the deed of the grantor-partnership is expressly made conditional upon the terms of the settlement agreement between the parties which specifies that the conditional release does not constitute a discharge of the underlying indebtedness. The deed further specifies that the property is conveyed "subject to the lien of the Deed of Trust." Deed, supra Pt. I, at 1.

Prior Opinions of this Office conclude that the term "consideration," for purposes of the recordation taxes imposed by §§ 58.1-801 and 58.1-802, includes the value resulting from the cancellation of an existing indebtedness. See Att'y Gen. Ann. Rep.: 1983-1984 at 407, 408; 1982-1983 at 590 (construing §§ 58-54 and 58-54.1, predecessor statutes to §§ 58.1-801 and 58.1-802). These Opinions, however, involve situations in which the mortgage debt actually was canceled and the consideration received by the defaulting borrower was readily determinable.

The value of the conditional release of the grantor-partnership in the facts presented, however, cannot readily be determined. The release is expressly conditional on the terms of a settlement agreement between the parties which provides that the conditional release does not constitute a discharge of the underlying indebtedness. Whether the grantor-partnership actually will be released from liability depends on future events. In the facts presented, therefore, it is my opinion that the true value of the consideration received by the grantor-partnership cannot be measured in terms of the undischarged indebtedness. Rather, the current fair market value of the property must be utilized as the most definite and reliable basis for calculating the grantee's tax in the facts presented. Cf. 1987-1988 Att'y Gen. Ann. Rep. 572, 574 (grantor's tax should be based on value of land and any improvements at time of delivery of deed if consideration exists but cannot be determined).

IV. Grantor's Tax Determined by Reducing Current Market Value of Property by Value of Deed of Trust Encumbrance

The conditional nature of the release and the fact that the property remains subject to the lien of the deed of trust also affect the calculation of the grantor's tax imposed under § 58.1-802. Section 58.1-802(A) provides that the "consideration or value of the interest" must be measured "exclusive of the value of any lien or encumbrance remaining
thereon at the time of the sale." The deed in the facts you present provides that the
property remains "subject to" the lien of the deed of trust. It is my opinion, therefore,
that the "value of the interest," measured in terms of the current fair market value of
the property, must be reduced by the value of the deed of trust encumbrance to which
the value of this encumbrance exceeds the current fair market value of the property, the
calculation results in a value of zero for purposes of measuring the grantor's tax imposed
under § 58.1-802.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

Assessment method for valuing truck each year from 1975 through 1989 may be based on
actual sales price when commissioner of revenue determines percentage of original cost
method fails to reach reasonable expectation of fair market value. Alternate method
must be uniform for all property within same classification in order not to violate Vir-
ginia Constitution. Commissioner may adjust assessment to take into account condition
of property if condition atypical of property of like age in classification, taken as whole.

October 10, 1991

Mr. Douglas W. Napier
County Attorney for Warren County

You ask whether a commissioner of the revenue may assess certain personal prop-
erty based on the amount the taxpayer paid for the property and the condition of the
property.

I. Facts

The property in question is a 1975 truck weighing more than two tons. You state
that no recognized pricing guide exists for trucks of this size. The commissioner of the
revenue assessed the value of the truck each year from 1975 through 1989 at a per-
centage of the original cost, decreasing each succeeding year's assessment to reflect
depreciation.

In April 1989, the original owner sold the truck, and, in November 1989, the new
purchaser resold the truck to the present owner. In December 1990, the commissioner of
the revenue assessed the value of the truck to the present owner at an amount based on
the price paid by the present owner and the apparent condition of the truck. That amount
was significantly higher than the previous year's assessment based on depreciated original
cost.

II. Applicable Constitutional and Statutory Provisions

Article X, § 1 of the Constitution of Virginia (1971) provides that "[a]ll taxes . . .
shall be uniform upon the same class of subjects," and Article X, § 2 provides that "[a]ll
assessments of real estate and tangible personal property shall be at their fair market
value, to be ascertained as prescribed by law."

Section 58.1-3503(A) of the Code of Virginia classifies tangible personal property
for valuation purposes. Section 58.1-3503(A)(5) provides that a truck of more than two
tons "shall be valued by means of either a recognized pricing guide using the lowest value
specified in such guide or a percentage or percentages of original cost."
Section 58.1-3503(B) provides, in part:

Methods of valuing property may differ among the separate categories, so long as each method used is uniform within each category, is consistent with requirements of this section and may reasonably be expected to determine actual fair market value. Nothing herein shall be construed to prevent a commissioner of revenue from taking into account the condition of the property.

III. Assessment Method Must Be Reasonably Related to Fair Market Value and Uniformly Applied

Section 58.1-3503(A)(5) specifically requires that, in the absence of a recognized pricing guide, the commissioner of the revenue must assess trucks by a percentage of original cost method. A method different from that detailed in this statute may be used only if the statutory method may not be expected reasonably to determine actual fair market value. Att'y Gen. Ann. Rep.: 1987-1988 at 595; 1984-1985 at 371. Any such alternate method must be uniform for all property within the same classification.

The determination of fair market value is a factual one to be made by the commissioner of the revenue. It is my opinion that a method based on actual sales price may be used if the commissioner determines that the percentage of original cost method fails to reach a reasonable expectation of fair market value. Unless this method can be applied uniformly to all like property in the classification, however, the method will violate Article X, § 1. The Supreme Court of Virginia has held that, when it is impractical or impossible to achieve both the standard of fair market value and the standard of uniformity, the standard of uniformity is to control. Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 881, 44 S.E.2d 437, 439 (1947). Regardless of the method of valuation employed, § 58.1-3503(B) allows the commissioner of the revenue to adjust an assessment to take into account the condition of the particular property if the condition is atypical of property of like age in the classification, taken as a whole. See 1987-1988 Att'y Gen. Ann. Rep., supra, at 597 n.3.

The Supreme Court of Virginia has defined fair market value as "'the price which [property] will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.'" Woman's Club v. City of Richmond, 199 Va. 734, 737, 101 S.E.2d 571, 574 (1958) (citation omitted).

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE - EXEMPT PROPERTY.

Lessee's use of leased tangible personal property controls local tax classification. Leased dairy equipment used by farmer to feed dairy herd classified as farm equipment exempt from taxation under local ordinance adopted pursuant to statutory authority.

March 15, 1991

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You ask whether a New York corporation that leases dairy feeding equipment to a farmer in Franklin County is subject to local personal property taxation on the leased equipment.
I. Applicable Constitutional and Statutory Provisions

Article X, § 6(e) of the Constitution of Virginia (1971) authorizes the General Assembly to define certain classes of tangible personal property as separate subjects of taxation, and by general law to exempt such defined classes of property from taxation or authorize local governing bodies to do so.

Pursuant to Article X, § 6(e), the General Assembly has adopted § 58.1-3505 of the Code of Virginia authorizing local governing bodies to adopt ordinances exempting various classes of "farm animals, farm machinery, implements or equipment" from local property taxation. Section 58.1-3505(B).

You state that the Board of Supervisors of Franklin County, acting pursuant to § 58.1-3505, has adopted an ordinance exempting farm animals and farm equipment.

II. Lessee's Use of Tangible Personal Property Controls Local Tax Classification

Prior Opinions of this Office conclude that a lessee's use of leased tangible personal property controls its classification for tax purposes. See, e.g., Att'y Gen. Ann. Rep.: 1987-1988 at 578, 586 (§ 58.1-3511(B) applies to leased property used in rendition of common, contract or other private carrier service); id. at 589 (§ 58.1-3507 applies to property used by lessee in manufacturing process even though the taxpayer-lessee is not manufacturer and derives all revenues from leasing activities); 1976-1977 at 274, 276 (lessee's use of machinery and tools determines whether property is taxable to lessor as machinery and tools under predecessor statute to § 58.1-3507); accord City of Martinsville v. Tultex Corporation, 238 Va. 59, 381 S.E.2d 6 (1989).

The Code of Virginia does not define the terms "farm machinery" and "farm implement" for local tax purposes. These terms, however, generally have been held to connote usage by a farmer in farming activities. See, e.g., Utah Farm Bureau v. Orville Andrews & Sons, 665 P.2d 1308, 1310 (Utah 1983) (liability policy covering "farm implements" extended to feeder truck modified for use solely to feed cattle and used exclusively for that purpose); Ammon v. Bowles, 154 F.2d 698, 699-700 (8th Cir. 1946) ("farm equipment" for purposes of Emergency Price Control Act of 1942, as amended, includes equipment used primarily in production, farm processing for market and farm use of agricultural products); In re Mahon, 82 B.R. 33, 34 (1988) ("farm equipment" in context of financing statement collectively described "tractor, cultivator, plow, disc, corn picker and tobacco settler" used by debtor farmers).

In the facts you present, the leased equipment will be used by a farmer in feeding his dairy herd. Based on the cases and prior Opinions discussed above, therefore, it is my opinion that the leased equipment must be classified as farm equipment, exempt from taxation under the Franklin County ordinance adopted under the authority of § 58.1-3505.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. - SITUS FOR TAXATION.

MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES.

Situs of motor vehicles for local license tax purposes does not affect situs for local personal property tax purposes.

June 13, 1991

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County
You ask whether 1991 amendments to the provisions of the Code of Virginia governing the situs of motor vehicles for local vehicle license tax purposes affect the determination of situs for purposes of the local personal property tax on motor vehicles.

I. Applicable Statutes

Section 58.1-3511(A) of the Code of Virginia establishes the situs of motor vehicles for local personal property tax purposes as "the county, district, town or city where the vehicle is normally garaged...or parked" or "the domicile of the owner of such personal property" when it cannot be determined where the vehicle is normally garaged or parked. Section 46.2-752(A), as amended by the 1991 Session of the General Assembly, establishes the same basic situs rules for local license tax purposes, but also provides that the domicile of the owner shall control situs "if the owner is a student attending an institution of higher education." Ch. 622, 1991 Va. Acts 1140, 1141 (Reg. Sess.).

II. Situs Provisions of §§ 46.2-752 and 58.1-3511 Operate Independently

Amended § 46.2-752, effective July 1, 1991, establishes the owner's domicile as the local motor vehicle license tax situs of vehicles owned by college and university students, regardless of where the vehicle is normally garaged or parked. The General Assembly made no corresponding amendment to § 58.1-3511 governing the situs of motor vehicles for personal property tax purposes. A prior Opinion of this Office recognizes that the situs provisions of § 46.1-65 (predecessor of § 46.2-752) and § 58-834 (predecessor of § 58.1-3511) operate independently. See 1972-1973 Att'y Gen. Ann. Rep. 292 (for company-owned, employee-operated vehicles, locality where vehicles normally garaged collects personal property taxes, while locality where owner resides collects license taxes). There is no constitutional objection to this inconsistency because the statutes involve different taxes: § 46.2-752 and its predecessors involve a license tax for the privilege of operating a vehicle on the locality's highways; § 58.1-3511 and its predecessor involve a direct tax on property (i.e., the vehicle). See Town of Ashland v. Supervisors, 202 Va. 409, 413, 117 S.E.2d 679, 682 (1961) (recognizing distinction between license tax for privilege of operating vehicle on streets and tax on property itself).

Based on the above, it is my opinion that the 1991 amendment to § 46.2-752 does not affect the determination of the situs of motor vehicles under § 58.1-3511.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. - SITUS FOR TAXATION - LOCAL TAXES.

Locality generally must prorate and refund personal property tax collected for balance of tax year on vehicle that loses situs within prorating locality; no refund permitted if new situs established in nonprorating Virginia locality. Proration required when vehicle with situs in prorating locality sold or disposed of after tax or situs day. Proration of taxes not required on motor vehicle disposed of after relocating from prorating to nonprorating Virginia locality.

September 6, 1991

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You ask two questions concerning the proration of personal property taxes on motor vehicles pursuant to § 58.1-3516(A) of the Code of Virginia. Your questions arise in the context of a taxpayer who disposes of his vehicle after moving from a prorating to a
nonprorating Virginia locality during the tax year. You first ask whether proration is required if the taxpayer immediately acquires a replacement vehicle. You next ask whether proration is required if the taxpayer does not acquire a replacement vehicle.

I. Applicable Statute

Section 58.1-3516(A) authorizes certain localities, including Chesterfield County, to enact an ordinance providing for the collection of personal property tax on motor vehicles on a pro rata basis—that is, generally for the portion of the year that the motor vehicle has its situs in that locality. Section 58.1-3516(A) further provides:

Such ordinance shall also provide for relief from tax and a refund of the appropriate amount of tax already paid, which shall be prorated on a monthly basis, where any motor vehicle, trailer, or boat loses its situs within such locality after the tax day or after the day on which it acquires a situs (hereafter "situs day"). No refund shall be made if the motor vehicle, trailer or boat acquires a situs within the Commonwealth in a nonprorating locality. When any person sells or otherwise transfers title to a motor vehicle... with a situs in the locality after tax day or situs day, the tax shall be relieved, prorated on a monthly basis....

II. Proration Not Required After Taxpayer Moves to Nonprorating Virginia Locality

Under § 58.1-3516(A), once a vehicle loses its situs within the prorating locality, the locality generally must prorate and refund any tax collected for the balance of the tax year. No refund is permitted, however, if the new situs is a nonprorating Virginia locality. Proration also is required under § 58.1-3511(A) where a vehicle with situs in the proration locality is sold or disposed of after tax or situs day.

In the facts you present, the taxpayer does not dispose of the vehicle until after relocating from a prorating to a nonprorating Virginia locality. Under the express terms of § 58.1-3516, therefore, it is my opinion that proration of personal property taxes on the motor vehicles you describe is not required because refunds are not permitted where the new situs acquired after tax or situs day is a nonprorating Virginia jurisdiction. Subsequent disposition of the vehicle and acquisition of a replacement vehicle do not affect this conclusion since proration is required under § 58.1-3516 only upon disposition of vehicles with a situs in the prorating locality.

1"Tax day" is generally defined as January 1, except in localities that have adopted a June 30 fiscal year pursuant to § 58.1-3010, or which are authorized to tax certain property on a proportional monthly or quarterly basis. "Situs day" is the day on which the vehicle acquires a situs in the locality. See § 58.1-3516(A); see also 1987-1988 Att'y Gen. Ang. Rep. 578, 581.

2This express prohibition on refunds was enacted by the 1991 Session of the General Assembly. See Ch. 624, 1991 Va. Acts 1143 (Reg. Sess.).

3Acquisition of a replacement vehicle is relevant in the case of a taxpayer who moves from a nonprorating to a prorating locality within the same tax year. Language added to § 58.1-3516(A) by the 1991 Session of the General Assembly entitles such a taxpayer to a property tax credit in the prorating jurisdiction if certain statutory conditions are met. 1991 Va. Acts, supra note 2.

1991 REPORT OF THE ATTORNEY GENERAL
CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

Cogeneration firm's sales of excess power to public utility qualify for exemption from local license taxation as wholesale sales of valuable commodity by manufacturer at place of manufacture. Capacity payments firm receives for making agreed quantity of power available to public utility classified for local license taxation. Cogeneration equipment purchased by firm engaging exclusively in cogeneration not qualified for special classification providing for reduced tax rate; cogeneration equipment in place and ready for use on tax day (January 1) assessable as machinery and tools.

June 21, 1991

The Honorable Dianna W. Robbins
Commissioner of the Revenue for the City of Hopewell

You ask several questions concerning local taxation of a cogeneration facility.

I. Facts

The firm that operates the facility deals exclusively in cogeneration—that is, the combined production of electrical power and useful thermal energy, such as heat or steam. The firm is not a public service corporation regulated by the State Corporation Commission pursuant to Chapter 10 of Title 56, §§ 56-232 through 56-265 of the Code of Virginia, governing heat, light, power, water and other utility companies. The firm sells steam to large industrial users and excess electricity generated incidental to the production of steam to a Virginia public service-corporation that does provide electric utility service at retail rates to consumers. The cogeneration firm's wholesale rates for electric power provided to the public utility are regulated by the Federal Energy Regulatory Commission.

The firm receives two types of payments from the public utility: (1) capacity payments for making an agreed quantity of power available to the utility; and (2) payments for electricity actually consumed by the utility. The capacity payments are solely for the availability of power and do not include any charge for the power actually consumed by the utility. The utility's consumption of power is measured at the cogeneration facility.

You first ask whether the firm's sales of capacity and excess electricity to the public utility are subject to local license taxation under § 58.1-3703 and, if so, the applicable classification for purposes of the rate limitations provided in § 58.1-3706(A). You also ask whether the firm's equipment, including installation, engineering and construction costs, qualifies for a reduced local property tax rate provided in a local ordinance adopted pursuant to § 58.1-3506(A)(7), which creates a separate classification for certain cogeneration equipment. Finally, you ask whether cogeneration equipment that is located on site, but not operational as of January 1, may be classified and taxed as personal property.

II. Applicable Statutory and Constitutional Provisions

Section 58.1-3703(A) authorizes a local governing body to levy a license tax 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 other limitations, § 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."
Section 58.1-3706(A) imposes further limitations on the rates of local license taxes. As relevant here, § 58.1-3706(A)(4) limits the license tax applicable to business services and all other businesses and occupations not otherwise specifically classified to the higher of thirty dollars or "thirty-six cents per $100 of gross receipts."

Article X, §§ 1 and 4 of the Constitution of Virginia (1971) segregate tangible personal property for local taxation and authorize the General Assembly to define and classify taxable subjects. Pursuant to Article X, §§ 1 and 4, § 58.1-3507(A) segregates "[m]achinery and tools ... used in a manufacturing ... business" for local property taxation only. Section 58.1-3507(B) provides that machinery and tools segregated under § 58.1-3507(A), "other than energy conservation equipment of manufacturers," are to be valued "by means of depreciated cost or a percentage or percentages of original total capitalized cost excluding capitalized interest."

Pursuant to Article X, §§ 1 and 4, § 58.1-3506(B) authorizes localities to adopt ordinances levying different tax rates on certain equipment described in § 58.1-3506(A) as follows:

7. Generating equipment purchased after December 31, 1974, for the purpose of changing the energy source of a manufacturing plant from oil or natural gas to coal, wood, wood bark, wood residue, or any other alternative energy source for use in manufacturing and any cogeneration equipment purchased to achieve more efficient use of any energy source ....

You state that an ordinance adopted by the Hopewell City Council pursuant to § 58.1-3703(A)(7) provides a reduced tax rate for "Industrial Energy Conversion Equipment." Hopewell, Va., Ordinance 90-9 (May 14, 1990) ("Hopewell Ord.").

Section 58.1-3515 provides the general rule that taxpayers shall file returns listing "taxable tangible personal property, machinery and tools and merchants' capital" they own "as of January 1 of each year." The same section also requires that all property other than merchants' capital be valued as of that date. Section 58.1-3511(A) establishes that the tax situs of such property shall be its physical location on tax day.

III. Sale of Excess Power to Public Utility Exempt

The exemption provided in § 58.1-3703(B)(4) applies to a manufacturer's wholesale sale of goods, wares and merchandise at the place of manufacture. See 1990 Att'y Gen. Ann. Rep. 220. Whether the firm's sales of excess power and capacity to the public utility qualify for exemption initially depends on whether the production and sale of electricity constitute the sale of "goods, wares and merchandise" within the meaning of § 58.1-3703(B)(4). Exemptions from local license taxes are strictly construed with all reasonable doubts resolved against the exemption. See, e.g., Solite Corp. v. King George Co., 220 Va. 661, 662-63, 261 S.E.2d 535, 536 (1980).

The phrase "goods, wares and merchandise" is not defined by statute or by the administrative guidelines promulgated by the Department of Taxation. The phrase is "[a] general and comprehensive designation," that includes products, commodities and "such chattels and goods as are ordinarily the subject of traffic and sale." 1987-1988 Att'y Gen. Ann. Rep. 560, 561 (citation omitted) (likewise defining "goods, wares and merchandise" for local license tax purposes); see also Black's Law Dictionary 848 (6th ed. 1990); Webster's New World Dictionary 581 (3d c. ed. 1988) ("goods"); id. at 848 ("merchandise"); id. at 1504 ("ware"). Words used in statutes are given their plain and ordinary meaning unless the legislature manifests some different intent. See, e.g., 1987-1988 Att'y Gen. Ann. Rep. 153, 154; id. 489, 490.
The ordinary meaning of the phrase "goods, wares and merchandise" has been held to exclude an invisible source of power such as natural gas.\(^3\) Most jurisdictions, however, treat electricity as a valuable commodity and generating electricity as a manufacturing process. See, e.g., Dept. of Rev. v. Puget Sound Power & Light, 179 Mont. 255, 587 P.2d 1282, 1290 (1982); see also Virginia Electric and Power Company v. Haden, 157 W. Va. 298, 200 S.E.2d 848 (1973), cert. denied, 416 U.S. 916 (1974) (for tax purposes, public utility is engaged in more than one business activity—supplying electricity to public and manufacturing power).\(^4\) Based on this view, the firm's sales of excess power to the public utility would qualify for exemption from local license taxation as wholesale sales of a commodity by a manufacturer at the place of manufacture where the utility's usage is metered. See Op. to Hon. C.B. Harrell Jr., Newport News Comm'r Rev. (Mar. 14, 1991) (manufacturer for local license tax purposes is one who transforms raw material into different product); see also 1990 Att'y Gen. Ann. Rep. 220 (sales at wholesale include sales for resale or sales in bulk to large institutional, commercial or industrial users). In producing electricity, a cogenerator transforms a raw material such as coal or water through a process involving the application of human skill to create a distinct product. See Utah Power & L. Co. v. Pfost, 286 U.S. 165, 179-81 (1932) (generating electricity is local manufacturing process).

It is my opinion that the cases treating the generation of electricity as the manufacture of a valuable commodity represent the better view applicable to a cogeneration firm that is not a regulated public utility providing electric utility service to the public. Unlike a public utility, which primarily provides a regulated service, a cogeneration firm that merely produces power for resale to a public utility is primarily a manufacturer that produces and sells a valuable commodity.

It is further my opinion, therefore, that the firm's sales of excess power to the public utility satisfy all the criteria for exemption from local license taxation pursuant to § 58.1-3703(B)(4).

**IV. Payments for Capacity Taxable Pursuant to § 58.1-3706(A)(4)**

The capacity payments that the firm receives for making an agreed quantity of power available to the public utility present a different situation. In merely agreeing to make power available to the utility, the firm is not selling a specific commodity that could be considered "goods, wares and merchandise" within the meaning of § 58.1-3703(B)(4). It is my opinion, therefore, that the capacity payments cannot qualify for exemption from local license taxation pursuant to § 58.1-3703(B)(4). These payments instead must be classified for local license taxation under § 58.1-3706(A)(4), which provides the rate limitation applicable to businesses and occupations not otherwise specifically listed or excepted from that section.\(^5\)

**V. Cogenerator's Equipment Assessable as Machinery and Tools**

Pursuant to § 58.1-3506(A)(7), Hopewell has adopted an ordinance providing a reduced lower tax rate for "Industrial Energy Conversion Equipment." Hopewell Ord., supra Pt. II. Under § 58.1-3506(A)(7), this term includes "[g]enerating equipment purchased . . . for the purpose of changing the energy source of a manufacturing plant from oil or natural gas to . . . any other alternative energy source for use in manufacturing and any cogeneration equipment purchased to achieve more efficient use of any energy source." Section 58.1-3507(B) excludes "energy conservation equipment of manufacturers" from the valuation method prescribed for machinery and tools generally. This method excludes capitalized interest.

The authorization for a lower tax rate now contained in § 58.1-3506(A)(7) originally was enacted in 1979. At the same time, an amendment was proposed to Article X, § 6
adding a new subsection (i) to authorize total or partial exemption of energy conversion equipment, including cogeneration equipment, used in manufacturing. Article X, § 6(i) provides:

The General Assembly may by general law allow the governing body of any county, city, or town to exempt or partially exempt from taxation any generating equipment installed after December thirty-one, nineteen hundred seventy-four, for the purpose of converting from oil or natural gas to coal or to wood, wood bark, wood residue, or to any other alternate energy source for manufacturing, and any cogeneration equipment installed since such date for use in manufacturing.\(^8\)

As originally enacted in 1979, the special classification contained in current § 58.1-3506(A)(7) applied to

"energy conversion equipment" [which] shall mean any generating equipment purchased after December thirty-one, nineteen hundred seventy-four, for the purpose of changing the energy source of a manufacturing plant from oil or natural gas to coal, wood, wood bark, wood residue, or any other alternative energy source for use in manufacturing and any co-generation equipment purchased on or after such date to achieve more efficient use of any energy source.

Ch. 351 § 58-831.01(B), 1979 Va. Acts 521, 522 (enacting former § 58-831.01, predecessor statute to § 58.1-3506).

The 1984 recodification of Title 58.1 omitted the reference to "energy conversion equipment" in combining several classifications into a single section, current § 58.1-3506(A). See 2 H. & S. Docs., The Revision of Title 58 of the Code of Virginia, H. Doc. No. 16, at 382-84 (1984 Sess.). There is no evidence of any legislative intent to expand the classification for manufacturer's energy conversion equipment to include cogeneration equipment generally. Rather, the original legislative intent, as confirmed by the contemporaneous resolution adding Article X, § 6(i), was to authorize property tax relief for manufacturing plants that in some way changed their energy source to achieve greater energy efficiency, either by changing from oil or gas to a new energy source or by adding cogeneration equipment to produce power incident to another manufacturing process. See generally 2A Norman J. Singer, Sutherland Statutory Construction § 49.01 (Sands 4th ed. 1984) (contemporaneous history is relevant in determining legislative intent). The General Assembly clearly did not envision the development of firms specializing in cogeneration that buy equipment to produce steam and electricity as an independent business activity.

Section 58.1-3506(A)(7) expressly requires that the cogeneration equipment have been "purchased to achieve more efficient use of any energy source." This special classification was adopted to enable localities to encourage the development of more efficient energy sources by large industrial manufacturers. A firm that purchases equipment exclusively for cogeneration without in any way changing its means of supplying its power needs cannot satisfy the statutory requirement that the purchase have been made for the purpose of achieving increased energy efficiency. Statutes should be construed to give effect to all their provisions and no part should be rendered void or nugatory. See, e.g., 1990 Att'y Gen. Ann. Rep. 149, 150.

Like a deduction or exemption, this special classification constitutes a tax reduction granted as a matter of legislative grace and, therefore, must be governed by principles of strict construction. See Solite Corp., 220 Va. at 662-63, 261 S.E.2d at 536. The General Assembly could, of course, decide that firms engaging exclusively in cogeneration also should receive the benefit of tax reduction. In the meantime, however, based on
the above, it is my opinion that cogeneration equipment purchased by a firm that engages exclusively in cogeneration does not qualify for the special classification provided in § 58.1-3506(A)(7).

Accordingly, it is also my opinion that equipment purchased by a firm engaged exclusively in cogeneration is assessable as machinery and tools under § 58.1-3507(A) and is not "energy conservation equipment of [a] manufacturer" excepted from the valuation prescribed for machinery and tools generally under § 58.1-3507(B). Under § 58.1-3507(B), capitalized interest must be excluded but other capitalized costs for installation, engineering and construction should be included.

VI. Cogeneration Equipment on Site but Not Operational on January 1 Assessable as Machinery and Tools

The statutes governing local property taxation contemplate that the local commissioner of the revenue should determine the taxable status and value of property based on an evaluation of the relevant facts as they exist on tax day (generally January 1) of each year. Sections 58.1-3511, 58.1-3515; see, e.g., Op. to Hon. Hunt A. Meadows III, Pittsylvania Co. Comm't Rev. (Jan. 10, 1991); 1989 Att'y Gen. Ann. Rep. 339, 342. Prior Opinions of this Office establish that the relevant facts include the ownership, location and intended use of the property in question. See, e.g., Att'y Gen. Ann. Rep.: 1987-1988 at 578, 579-80 (property owned and in place ready for use in hotel or retail business soon to be open to public is tangible personal property "employed in" or "used in" such business); 1972-1973 at 404 (cessation of manufacturing operation did not affect taxability of equipment as machinery and tools).

Based on the above, it is my opinion that equipment owned by a cogenerator that is in place and ready for use on tax day should be assessed for taxation as machinery and tools "used in a manufacturing business" for purposes of § 58.1-3507.

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1 See Puerto Rico Elec. Power Authority v. F.E.R.C., 848 F.2d 243, 244 (D.C. Cir. 1988). As popularized during the 1970s, cogeneration was an activity incidental to some independent manufacturing process such as producing paper or chemicals. More recently, firms specializing in cogeneration have developed to supply the power needs of public utilities and large industrial consumers.

2 Dept't Tax'n, Guidelines for Local Business, Professional and Occupational License Taxes (Jan. 1, 1984).


4 While not controlling for local license tax purposes, cogeneration also has been treated as the manufacture of tangible personal property for state sales tax purposes. See Ruling of Commissioner, P.D. 86-218 (Nov. 3, 1986), 2 Va. Tax Rep. (CCH) ¶ 201-344 (cogeneration firm treated as manufacturer of tangible personal property for purposes of sales tax exemption); 1983-1984 Att'y Gen. Ann. Rep. 372 (definition of manufacturer for sales tax purposes does not control in local license tax context).

5 Neither of the special rate limitations in §§ 58.1-3731 and 58.1-3716 for public service companies and wholesale merchants applies. The firm is not a public service company regulated by the State Corporation Commission pursuant to § 56-232, and the firm, in agreeing to make power available to the utility, is not acting as a merchant selling goods, wares or merchandise. See 1984-1985 Att'y Gen. Ann. Rep. 399, 400. See also Webster's New World Dictionary 848 (3d c. ed. 1988) (definition of "merchant").

6 Pursuant to Article X, § 6(l), § 58.1-3662 authorizes total or partial exemption of certain generating equipment, as well as cogeneration equipment "for use in manufacturing."
The Honorable Vincent F. Callahan Jr.
Member, House of Delegates

You ask whether a commissioner of the revenue may adopt a method to determine the assessed value of tangible personal property used in a trade or business that results in certain classes of such property being assessed at the same percentage of original cost for three successive years.

I. Facts

You state that, in 1989, a local commissioner of the revenue implemented a new valuation method that increased the percentage of cost used to determine the assessment of year-old business tangible personal property by 10% a year for two years (from 60% in 1989 to 80% in 1991). In the documents you provide, the commissioner of the revenue notes that the change was based on the use of industry guidelines, such as Marshall Swift valuation service, to value business property for assessment purposes. These industry guidelines show an average economic life for various classes of property—for example, six to ten years for computer equipment and copiers. Based on these guidelines, the commissioner of the revenue adopted a declining range of valuation percentages starting with 80% of cost for new personal property and decreasing 10% annually, to a residual value of 20%. This change in methodology has resulted, however, in the assessed value of older property being frozen at the same percentage of cost for two years. For example, property purchased in 1988 was valued at 70% of original cost on 1989 tax returns; in 1990, year-old property was assessed at 80% of original cost. Two-year-old property was assessed in 1988 at 50% of original cost. That same property in 1989 and 1990 continued to be assessed at 50%.

II. Applicable Constitutional and Statutory Provisions

Article X, § 1 of the Constitution of Virginia (1971) requires that "[a]ll taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

Article X, § 2 requires that "[a]ll assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law."

Implementing Article X, § 2, § 58.1-3503(B) of the Code of Virginia provides, in part:

Methods of valuing property may differ among the separate categories, so long as each method used is uniform within each category, is consistent with requirements of this section and may reasonably be expected to determine actual fair market value.
Section 58.1-3503 classifies tangible personal property for valuation purposes. Section 58.1-3503(A)(17) requires that "tangible personal property employed in a trade or business [that is not otherwise classified] shall be valued by means of a percentage or percentages of original cost."

III. Assessment Methodology Must Be Uniform and Reasonably Relate to Fair Market Value

Commissioners of the revenue have the duty to assess all subjects of taxation within their respective jurisdictions at fair market value. See § 58.1-3103. This statutory responsibility necessarily includes the discretion to select an appropriate valuation method, subject to the limitations prescribed by law. See 1976-1977 Att'y Gen. Ann. Rep. 34. Article X, § 1 and § 58.1-3503(B) require that the valuation method be uniformly applied to all like property within a particular class. For business property not otherwise classified, the only statutory limitation imposed on the commissioner is the requirement to use a "percentage or percentages of original cost." Section 58.1-3503(A)(17); see also 1984-1985 Att'y Gen. Ann. Rep. 371.

No constitutional or statutory provision prevents a commissioner of the revenue from changing the method of assessment of a particular class of personal property, as long as the new method meets the uniformity requirement of Article X, § 1, and can reasonably be expected to determine fair market value of the property as required by Article X, § 2 and § 58.1-3503(A)(17). The mere fact that the shift to a new method results in the value of older property being kept at the same percentage of original cost for three successive years does not violate either of these requirements, in my opinion, as long as this method of valuation applies to all like property of the same age within the jurisdiction. It is further my opinion that the assessment method you describe does not fail, as a matter of law, to produce a reasonable expectation of fair market value, as required by § 58.1-3501(A)(17). See Southern Railway v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970) (assessment is reviewable for abuse of discretion but is not exact science). A taxpayer could, of course, still challenge the assessment provided by this method, based on the condition of his specific property, as provided in § 58.1-3503(B).

1Section 58.1-3503(B) provides a limited exception authorizing consideration of the condition of specific property that the commissioner of the revenue determines is in better or worse condition than would normally be expected under normal use. See 1984-1985 Att'y Gen. Ann. Rep. 371. This limited authorization does not extend to the method of valuation for an entire class.

TAXATION: TAX EXEMPT PROPERTY.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE – EXEMPT PROPERTY.

Jewish community center considered religious association similar to YMCA for purposes of tax exemption. Focus on allocation of actual benefits and burdens of ownership, rather than on mere incidence of technical legal title, in determining proper scope of exemptions. Constitutional ownership requirement synonymous with statutory term "belonging to." Property leased to center from Jewish community foundation qualifies for exemption from local taxation.

January 30, 1991

The Honorable Bernard S. Cohen
Member, House of Delegates
You ask whether certain real property and improvements used and occupied by the Northern Virginia Jewish Community Center, Inc. qualify for exemption from local taxation under § 58.1-3606(A)(5) of the Code of Virginia.

I. Facts

The Northern Virginia Jewish Community Center, Inc. (the "Center") occupies the property at issue under a 99-year lease from the Greater Washington Jewish Community Foundation of Virginia, Inc. (the "Foundation"). The lease is renewable at the Center's option for one additional term of 99 years. The Foundation was formed for the purpose of acquiring and holding title to land to build modern facilities for the use of the Center and currently holds legal title to the property. Both the Center and the Foundation are nonprofit organizations exempt from federal income taxation under Internal Revenue Code ("I.R.C.") § 501(c)(3) (West Supp. 1990). The Center offers to the general public on a nondiscriminatory basis facilities and services similar to those offered by a Young Men's Christian Association ("YMCA"). The Center may use the property only for the purposes authorized by its charter and bylaws or approved by its board of directors.

The terms of the Center's lease with the Foundation require the Center to pay all utilities, and to maintain, repair and insure the property. The Center also is obligated to restore the premises in the event of fire or other loss and to assume primary responsibility for compliance with applicable government regulations. The recited consideration for the lease is one dollar and other good and valuable consideration. The annual rent is one dollar.

II. Applicable Constitutional and Statutory Provisions

Article X, § 6(a)(6) of the Constitution of Virginia (1971) authorizes the General Assembly to exempt from taxation

[property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly and subject to such restrictions and conditions as may be prescribed.

Pursuant to Article X, § 6(a)(6), the General Assembly has enacted § 58.1-3606(A)(5), which provides an exemption by classification for

[property belonging to and actually and exclusively occupied and used by the Young Men's Christian Associations and similar religious associations, including religious mission boards and associations, orphan or other asylums, reformatories, hospitals and nunneries, conducted not for profit but exclusively as charities (which shall include hospitals operated by nonstock corporations not organized or conducted for profit but which may charge persons able to pay in whole or in part for their care and treatment).

III. Center Is Organization Similar to YMCA

Whether property used by the Center under its renewable 99-year lease with the Foundation qualifies for exemption under § 58.1-3606(A)(5) initially depends upon whether the Center is a religious association similar to a YMCA within the meaning of the statute. Under the facts you present, the Center is a nonprofit organization supported by members of the community that offers facilities and services to the public on a nondiscriminatory basis similar to a YMCA.
Construing § 58.1-3606(A)(5) to exclude a nonprofit corporation sponsored by a non-Christian faith that operates in a manner similar to a YMCA would cast serious doubt on its constitutionality. The First Amendment to the Constitution of the United States forbids sectarian legislation distinguishing among religions. See Salkov v. Commissioner, 46 T.C. 190, 197 (1966) (federal income tax exemption could not constitutionally be limited to Christian ministers so as to exclude Jewish cantor). It is a settled rule of statutory construction that statutes must be construed to preserve their constitutionality if possible. See, e.g., 1989 Att'y Gen. Ann. Rep. 217, 218.

I am of the opinion, therefore, that the Center is a religious association similar to the YMCA for purposes of § 58.1-3606(A)(5).

IV. Renewable 99-Year Lease Arrangement and Other Facts
Presented Satisfy Ownership Requirement of Article X, § 6(a)(6)

Exemption under Article X, § 6(a)(6) also requires ownership of the property by the organization using it for qualifying purposes. See Op. to Hon. Alma Leitch, Comm'r Rev., City of Fredericksburg (Aug. 29, 1990). Mere legal title, however, does not control the determination whether property subject to a lease arrangement qualifies for tax exemption; both the terms of the lease and the constitutional and statutory provisions granting the exemption must be considered in light of the rule of strict construction mandated by Article X, § 6(f).

The term "owner" as used in Article X, § 6(a)(6) is not defined in the Constitution of Virginia. In enacting § 58.1-3606(A)(5), however, the General Assembly has interpreted the phrase "used by its owner" in Article X, § 6(a)(6) to encompass "[property belonging to and actually and exclusively occupied and used by] religious associations similar to a YMCA.

The words "belonging to" are susceptible of two meanings: absolute ownership or something less than absolute ownership, such as the absolute right of use. See Supervisors v. Medical Foundation, 204 Va. 807, 811, 134 S.E.2d 258, 261 (1964).

The "belonging to" language in § 58.1-3606(A)(5) is identical to the language of Article XIII, Sec. 183(e) of the Constitution of Virginia of 1902. In Medical Foundation, the Supreme Court of Virginia concluded that the words "belonging to" in Article XIII, Sec. 183(e) of the 1902 Constitution were susceptible of two meanings: they could be synonymous with "owned by" or could mean less than absolute and unqualified ownership. Id. at 811, 134 S.E.2d at 261. Adopting the second meaning of "belonging to," the Court held:

the words "belonging to" require only that the hospital have some interest or estate in the land it occupies and uses, not necessarily absolute ownership, as the words "owned by" would import. In this sense the real estate here in question "belongs to" the Hospital Corporation, so long as it has the exclusive right to its possession under the lease. Any other conclusion would be based upon the severest technical construction.

204 Va. at 812, 134 S.E.2d at 261-62. 2

While Article X, § 6(f) mandates a rule of strict construction, that rule does not require that the word "owner" be given the narrowest possible meaning. See Alpha Rho Zeta v. Inhab. of City of Waterville, 477 A.2d 1131, 1136 (Me. 1984). Virginia case law recognizes that the term "owner" for real estate tax assessment purposes includes "any person who has the usufruct, control or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee." City of Richmond v. McKenny, 194 Va. 427, 430, 73 S.E.2d 414, 416 (1952); 1989 Att'y Gen. Ann. Rep. 320, 321. Both life tenants and lessees have been held "owners" for real estate tax assessment purposes. See, e.g., Ceroli v. Clifton Forge, 192 Va. 118, 125-26, 63 S.E.2d 781, 785 (1951) (life tenant); Norfolk v. Perry Co., 108 Va. 28, 30-31, 61 S.E. 867, 868 (1908), aff'd, 220 U.S. 472 (1911) (lessee under renewable 99-year lease). See also § 58.1-3344(1) (listing of person as "owner" for real estate tax assessment purposes "shall be for convenience in the collection of the taxes").

The debates on the adoption of the 1971 Constitution indicate that, for purposes of construing the ownership requirement of Article X, § 6(a)(6), inquiry should focus on the allocation of actual benefits and burdens of ownership rather than on the mere incidence of technical legal title. In this regard, the debates reflect an intent to give the General Assembly broad discretion to determine the extent of ownership and use required for exemption. See Proceedings and Debates of the Virginia House of Delegates Pertaining to Amendment of the Constitution 354 (Ex. Sess. 1969) ("House Debates"). The House Debates further reflect that the phrase "used by its owner" in Article X, § 6(a)(6) resulted from a Senate amendment designed to preclude exemption where either the lessor or lessee is not an exempt organization. See id. at 635-37; Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution 160, 167 (Ex. Sess. 1969) ("Senate Debates") ; see also 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 1083 (1974) (lease between two exempt organizations may satisfy ownership and use requirements of Article X, § 6(a)(6)).

The terms of the lease in question grant the Center a right of occupancy under a 99-year lease, renewable for an additional 99-year term at the Center's option. The annual rent of one dollar is a nominal sum. The lease also imposes on the Center the duties of maintaining, repairing and insuring the property, and of restoring it in the event of loss. Both the Center and the Foundation are nonprofit religious organizations, and the Foundation's sole function is to hold legal title to the property leased by the Center. Refusing to exempt the property merely because the Foundation holds bare legal title, in my opinion, would defeat the Intention reflected in Virginia case law and the debates surrounding adoption of the 1971 Constitution to focus on the allocation of the actual benefits and burdens of ownership in determining the proper scope of tax exemptions.

Based on the above, it is my opinion that the General Assembly properly has interpreted the ownership requirement in Article X, § 6(a)(6) to be synonymous with the term "belonging to" in § 58.1-3606(A)(5). It is further my opinion that, under the lease arrangement described above, the property leased by the Foundation to the Center "belongs to" the Center, within the meaning of § 58.1-3606(A)(5), and thereby satisfies the ownership requirement of Article X, § 6(a)(6), and that the property qualifies, therefore, for exemption from local taxation by Fairfax County.

1 I.R.C. § 501(c)(3) provides an exemption for corporations "organized and operated exclusively for religious, charitable ... literary, or educational purposes."
2 The lessee hospital in Medical Foundation had the exclusive right to use and occupy the property under a 15-year lease with its parent foundation. The lease provided for a monthly rent calculated to repay loans and other costs incurred in equipping the hospital.
3 See Article X, § 6(c) (except as to property of the Commonwealth, the General Assembly by general law may restrict or condition, but not extend, any exemption).
Compare Prince William v. Thomoson Park, 197 Va. 861, 91 S.E.2d 441 (1956) (lessee under 75-year lease terminable by federal government after 39 years was not taxable as virtual owner of fee). See also Burns v. The Equitable Associates, 220 Va. 1020, 1029, 265 S.E.2d 737, 742-43 (1980) (Perry does not control construction of wills but only proper construction of tax exemptions applicable to "owner" of property). For purposes of construing tax exemptions applicable to "owners" of property, numerous cases follow the practical approach of Perry which focuses on the allocation of the actual benefits and burdens of ownership, rather than the technical incidence of title. See, e.g., Alpha Rho Zeta v. Inhab. of City of Waterville, 477 A.2d 1131 (Me. 1984); Application of County Collector, etc., 44 Ill. App. 3d 327, 357 N.E.2d 1302 (1976) (tax exemption conditioned on ownership did not require fee simple title); Mitchell Aero, Inc. v. City of Milwaukee, 42 Wis. 2d 656, 168 N.W.2d 183 (1969) (lease arrangement did not pass sufficient incidents of ownership with title to make county true owner for tax exemption purposes). See generally Annotation, Comment Note: Availability of Tax Exemption to Property Held on Lease from Exempt Owner, 54 A.L.R.3d 402 (1973).

The Senate Debates also indicate that the drafters did not understand the term "ownership" to be limited to fee simple ownership. See id. at 157 (remarks of Senators Pearson and Hutcheson).

WATERS OF THE STATE, PORTS AND HARBORS: STATE WATER CONTROL LAW.

State Water Control Board may define surface water by regulation to include wetlands. Authority to regulate wetlands in water quality management program limited to extent allowable under § 401 of federal Clean Water Act of 1977 and State Water Control Law. When granting without condition or denying § 401 water quality certification, Board must consider those water quality considerations found in § 401; when issuing conditional § 401 certifications, Board may apply § 401 water quality considerations and any other state law requirements consistent with water quality standards.

June 19, 1991

The Honorable Joseph V. Gartlan Jr.
Member, Senate of Virginia

You ask three questions about the authority of the State Water Control Board (the "State Board") to regulate wetlands in Virginia:

1. May the State Board define "state waters" or "surface water" by regulation to include wetlands?

2. May the State Board establish a comprehensive wetlands regulatory program pursuant to either § 401 of the federal Clean Water Act of 1977 (the "Clean Water Act"), 33 U.S.C.A. § 1341 (West 1986) ("§ 401") or existing state authority?

3. Does the State Board have the authority, pursuant to § 401, to certify or refuse to certify on a basis other than water quality those permits issued by federal agencies pursuant to § 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (West 1986 & Supp. 1991) ("§ 404")?

I. Applicable Statutes and Regulations
A. State Water Control Law

The State Water Control Law, §§ 62.1-44.2 through 62.1-44.34:28 of the Code of Virginia, establishes the responsibilities of the State Board. Its purpose is set forth in § 62.1-44.2:

It is the policy of the Commonwealth of Virginia and the purpose of this law to: (1) protect existing high quality state waters and restore all other state waters to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them, (2) safeguard the clean waters of the Commonwealth from pollution, (3) prevent any increase in pollution, (4) reduce existing pollution, and (5) promote water resource conservation, management and distribution, and encourage water consumption reduction in order to provide for the health, safety, and welfare of the present and future citizens of the Commonwealth.

Under § 62.1-44.5, it is unlawful for any person to discharge wastes or otherwise alter water quality except as authorized by a permit. That section provides:

Except in compliance with a certificate issued by the [State] Board, it shall be unlawful for any person to (1) discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances, or (2) otherwise alter the physical, chemical or biological properties of such state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses. [Emphasis added.]

In order to achieve these purposes, the State Board is authorized, among other things, to "issue certificates for the discharge of sewage, industrial wastes and other wastes into or adjacent to or the alteration otherwise of the physical, chemical or biological properties of state waters under prescribed conditions." Section 62.1-44.15(5). The State Board, therefore, has the power to limit water pollution, in part, by issuing certificates to allow such discharges into, or alteration of, state waters.

B. State and Federal Definitions of "Waters"

Section 62.1-44.3 defines "state waters" as "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction." (Emphasis added.)

One State Board regulatory program, which implements the State Board's water pollution control permit program under the national pollutant discharge elimination system ("NPDES"), 33 U.S.C.A. § 1342 (West 1986 & Supp. 1991), uses a definition of "surface water" that includes wetlands. While this definition does not have direct application to the § 401 state certification program, it nonetheless demonstrates the extent to which the State Board has regulated wetlands in another water quality program.

In that program, "surface water" means

(i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) all interstate waters, including interstate "wetlands";
(iii) all other waters such as inter/intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(iv) all impoundments of waters otherwise defined as surface waters under this definition;

(v) tributaries of waters identified in paragraphs (i)-(iv) of this definition;

(vi) the territorial sea; and

(vii) "Wetlands" adjacent to waters, other than waters that are themselves wetlands, identified in paragraphs (i)-(vi) of this definition.


In a definition that is virtually identical to the State Board's definition of state "surface water," both the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers (the "Corps") define "waters of the United States" to include wetlands.

The EPA definition, which relates to the administration of the NPDES program, is set forth in 40 C.F.R. § 122.2 (1990):

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;
(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the Clean Water Act] (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [Emphasis added.]

The Corps definition, relating to the § 404 permitting program, is set forth in 33 C.F.R. § 328.3 (1990):

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: 

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.
Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the Clean Water Act] (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. [Emphasis added.]

C. Water Quality Certification Program Administered by State Board

As part of its program to control pollution, the State Board, as the designated state certifying agency under the Clean Water Act, administers the water quality certification program established under § 401. Section 401 authorizes the State Board to consider the effects of certain projects requiring a federal license on water quality. Specifically, the State Board is authorized to grant or deny a water quality certification for federally licensed activities that may result in a discharge to navigable waters. Under § 401, the State Board may place conditions on a water quality certification to ensure compliance with Clean Water Act limitations and standards and with "any other appropriate requirement of State law." 33 U.S.C.A. § 1341(d). The State Board has issued a number of these § 401 water quality certifications that include wetland protection measures as a condition of certification.

The State Board acts on these water quality certifications in connection with, among other matters, water pollution permits issued by the EPA, 33 U.S.C.A. § 1342, and hydroelectric projects licensed by the Federal Energy Regulatory Commission, 18 C.F.R. § 4.38(e)(2) (1990). The most common water quality certification applications considered by the State Board, however, are those reviewed under § 404 in connection with dredge and fill permits issued by the Corps. Those permits allow the Corps to manage the discharge of dredged or fill material into navigable waters. The Clean Water Act defines "navigable waters" as "waters of the United States . . . ." 33 U.S.C.A. § 1362(7) (West 1986). As noted above, the Corps, in turn, defines "waters of the United States" by regulation to include wetlands. 33 C.F.R. § 328.3(a). In conjunction with this permit program, the State Board certifies whether dredge and fill permits, issued under § 404, comply with certain provisions of the Clean Water Act and any other appropriate requirement of state law.

In 1989, the General Assembly enacted § 62.1-44.15:5 requiring the State Board to issue a Virginia Water Protection Permit ("State Permit") to serve as the Commonwealth's § 401 certification. Section 62.1-44.15:5(A) authorizes the State Board to implement the State Permit program by adopting regulations. When issuing a State Permit, the State Board must assure that the proposed activity is consistent with the provisions of the Clean Water Act and will protect instream beneficial uses under state law. Section 62.1-44.15:5(B). "Beneficial uses" of state waters are defined in the State Board regulation establishing water quality standards to include "recreational uses, e.g., swimming and boating; and production of edible and marketable natural resources, e.g., fish and shellfish." St. Water Control Bd. Regs., Water Quality Standard VR 680-21-01.2(A) (eff. July 1, 1988) ("Water Quality Standard"); see also § 62.1-44.2. To implement the State Permit, the State Board has proposed regulations, but has not yet promulgated final regulations that establish a comprehensive management scheme for the protection of nontidal wetlands in Virginia. The proposed regulations include "wetlands" within their definition of "state waters."

II. State Board May Define Surface Water by Regulation to Include Wetlands

The definition of "state waters" in the State Water Control Law includes "all water, on the surface and under the ground." Section 62.1-44.3 (emphasis added). The State Water Control Law contains no definition, however, of "surface water." In another regulatory program, not directly related to § 401 state certification, the State Board has defined "surface water" to include wetlands. Permit Reg., supra Pt. I(B), § 1.1. The
Permit Regulation was promulgated, as authorized by 1972 amendments to the State Water Control Law, to conform to EPA's requirements for Virginia to assume responsibility for the NPDES program. 33 U.S.C.A. § 1342. EPA also requires periodic amendments to the Permit Regulation in order for Virginia to maintain its authority to administer the NPDES program. As noted above, the definition of "surface water" was included in the Permit Regulation in 1988 to conform to EPA's regulatory definition of "waters of the United States," which includes "wetlands." This same definition appears in the proposed State Permit regulations.


In this instance, the State Water Control Law defines "state waters" broadly to include "all" waters in the state, including surface water. The Corps' counterpart definition of "waters of the United States" includes wetlands and has been upheld by the Supreme Court of the United States. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). Since 1974, the State Board has had a written policy to protect wetlands. Wetlands involve "water" to some degree, and the State Board is charged with control of all the waters of the Commonwealth. Section 62.1-44.3. Since 1988, the reference to "surface water" contained in the definition of "state waters" in § 62.1-44.3 has been construed in the Permit Regulation to include wetlands. Based on the statutory construction principles and cases discussed above, that interpretation is entitled to great weight. See Lee v. Employment Commission, 1 Va. App. 82, 335 S.E.2d 104 (1985).

Based on the above, it is my opinion that the State Board has the authority to define "surface water" by regulation to include "wetlands."

III. State Board May Regulate Wetlands in State Permit Regulatory Program Only to Extent Allowed by § 401 and State Water Control Law

The language of § 62.1-44.15:5 requiring the State Board to issue the State Permit does not, on its face, provide any additional authority to the State Board regarding wetlands. Section 62.1-44.15:5 can be read, moreover, as a legislative affirmation of the State Board's previous regulatory determination that preservation of instream flows is a beneficial use of state waters. That determination was made by the State Board in 1988 when it adopted regulations establishing water quality standards. Those standards provide that "manmade alterations in stream flow shall not contravene reasonable, beneficial uses including protection of the propagation and growth of aquatic life." Water Quality Standard, supra Pt. I(C), VR 680-21-01.4; see also § 62.1-44.5. Section 62.1-44.15:5(C) requires an interagency consultation to ensure a full analysis of the effect of an activity receiving a State Permit on these instream beneficial uses.

The legislative history of § 62.1-44.15:5 supports the conclusion that it grants the State Board no additional power. In a 1989 report, the State Water Commission recommended establishment of a state water quality permit to "clarify the state legislature's emphasis on protecting a range of instream values [and] give Virginia a higher profile in the regulatory process and... bring those state agencies with jurisdiction over water use into a cooperative relationship." 4 H. & S. Docs., Report of the State Water Commission,
H.D. No. 69, at 10 (1989 Sess.). The Commission indicated, however, that the new permit "would not expand the current [§ 401 certification] procedure or create a new administrative process," and further acknowledged that the permit "may not add to the authority of the [State Board], since it may already have been delegated such authority under federal law." *Id.* (emphasis added). This report supports the conclusion that the General Assembly did not intend § 62.1-44.15:5 to provide the State Board with any broader authority than it possesses under § 401.

This conclusion is further supported by actions of the General Assembly involving proposed nontidal wetlands legislation. 5 In 1988, legislation was introduced in the House of Delegates which, if enacted, would have established a comprehensive regulatory program to protect nontidal wetlands. H.B. No. 1037 (1988 Reg. Sess.). The program was to be administered by the Departments of Forestry and Conservation and Historic Resources. That legislation passed the House but was carried over to the 1989 Session by the Senate Committee on Agriculture, Conservation and Natural Resources. The bill was not acted upon by the 1989 General Assembly. The failure of the General Assembly to enact proposed legislation granting an entity authority for a particular action can raise an inference that the General Assembly did not intend the entity to have that authority. *See Commonwealth v. Arlington County Bd.*, 217 Va. 558, 580-81, 232 S.E.2d 30, 44 (1977); *see also* 1974-1975 Att'y Gen. Ann. Rep. 77, 77-78; 2A Norman J. Singer, *Sutherland Statutory Construction* § 48.14 (Sands 4th ed. 1984). In my opinion, therefore, it would be inconsistent with the intent of the General Assembly to construe § 62.1-44.15:5 of the State Water Control Law to authorize the State Board to implement the kind of comprehensive nontidal wetlands program the General Assembly impliedly rejected when it failed to enact House Bill No. 1037.

Because the State Permit is intended to serve as the § 401 certification, it is necessarily limited in scope. Because wetlands may properly be a component of "surface water" and, therefore, constitute "state waters," it is my opinion that the State Board is entitled to grant, deny, or grant conditionally, certifications for those projects affecting Virginia wetlands that require § 401 certification. For these reasons, and based on the legislative history discussed above, however, it is further my opinion that the State Board is not empowered by § 62.1-44.15:5 to expand its regulation of wetlands beyond the scope contemplated by § 401 and the State Water Control Law, and, therefore, that the State Board may regulate wetlands in its State Permit program only to the extent allowed by those statutes.

IV. State Board Must Relate Any Grant, Denial or Conditional Grant of Certification to Authority Granted It by Statute

Section 401 allows state regulatory agencies to consider several water quality issues specified in the Clean Water Act when making the determination whether to grant or deny certification. 33 U.S.C.A. § 1341(a). As the § 401 certifying agency in Virginia, the State Board also is allowed to consider "any other appropriate requirement of State law" when conditioning a certification. 33 U.S.C.A. § 1341(d). The scope of water quality certifications under this latter provision, therefore, must be determined by examining the authority granted to the State Board by state law.

Courts in other states have addressed the proper scope of § 401 water quality certifications. In *Arnold Irrigation Dist. v. DEQ*, 79 Or. App. 136, 717 P.2d 1274 (1986), the Oregon Court of Appeals held that the Oregon Department of Environmental Quality, in deciding whether to grant or deny certification, is limited to considering sections of the Clean Water Act related to effluent limitations, water quality standards and other water protection provisions listed in § 401(a)(1) (33 U.S.C.A. § 1341(a)(1)). The Oregon court held, however, that the state agency could condition certification under § 401(d) (33 U.S.C.A. § 1341(d)) on any provision of state law relating to water quality. The court
emphasized that "an 'other appropriate requirement of State law'" in § 401(d) (33 U.S.C.A. § 1341(d)) refers only to those Oregon laws related to water quality. 79 Or. App. at 142, 717 P.2d at 1279. Courts in other states, however, have taken the opposite view, approving the imposition of conditions that reach beyond traditional water quality concerns. In my opinion, the Oregon Court of Appeals' opinion is the better view.

The water quality duties of the State Board appear in the State Water Control Law. Under Virginia law, agencies may not act beyond the authority granted them by the General Assembly. Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968). The State Board is bound, therefore, by the State Water Control Law when conditioning permits under § 401. The State Water Control Law empowers the State Board to "adopt such regulations as it deems necessary to enforce the general water quality management program of the [State] Board," § 62.1-44.15(10), and to "establish . . . standards ... and policies for any state waters consistent with the general policy set forth in [the State Water Control Law]." Section 62.1-44.15(3a) (emphasis added). The purpose of State Board's "water quality management program" and the stated policy of the Commonwealth includes protecting public uses of water, protecting propagation and growth of all aquatic life, preventing and reducing pollution of state waters, and promoting water resource conservation, management and distribution, all for the protection of the health, safety and welfare of the citizens of the Commonwealth. Section 62.1-44.2.

In response to your third question, therefore, it is my opinion that the State Board may consider the impact on surface water of a federally permitted project requiring a § 401 certification, based upon those water quality related considerations found in § 401(a)(1) (33 U.S.C.A. § 1341(a)(1)), when granting without condition, or denying, a certification. It is further my opinion that the State Board also may condition certification on "any other appropriate requirement of State law" under the State Water Control Law, consistent with its water quality management program. 33 U.S.C.A. § 1341(d). That program includes water quality, maintenance of instream flows, maintenance of recreational uses, support of propagation and growth of all aquatic life, and other uses identified by the State Water Control Law and its implementing regulations.

V. Summary

In summary, it is my opinion that the State Board is authorized to define "surface water" by regulation to include "wetlands." The State Board authority to regulate wetlands is limited, however, to those federally permitted activities that require § 401 certification. Neither § 401 nor § 62.1-44.155 authorizes establishment of a comprehensive nontidal wetlands program beyond the authority granted in § 401. When granting without condition or denying a § 401 certification, the State Board may consider only those water quality considerations found in § 401(a)(1). When issuing a conditional § 401 certification, the State Board may apply those water quality considerations found in § 401(d) and "any other appropriate requirement of State law" included in the State Water Control Law that is consistent with its water quality management program. 33 U.S.C.A. § 1342(d).

3. 40 C.F.R. § 122.2.
The General Assembly previously enacted wetland management legislation for tidal wetlands. Va. Code Ann. §§ 62.1-13.1 to 62.1-13.20. Although subject to a separate state permit, development in these wetlands also may be subject to § 404 federal permits and, therefore, § 401 state certification by the State Board.


The State Board implements several statutes in addition to the State Water Control Law, including Conservation of Water Resources (§§ 62.1-44.36 to 62.1-44.44); the Groundwater Act of 1973 (§§ 62.1-44.83 to 62.1-44.107); and Surface Water Management Areas (§§ 62.1-242 to 62.1-253), but these statutes are not part of Virginia's water quality management program.

WELFARE (SOCIAL SERVICES): ADOPTION — INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN.

Commissioner of Social Services is state official responsible for investigating and reporting suspected violations by child-placing agency of statutorily prescribed limitations on fees charged in connection with adoption; suspected violation, alone, not justification for preventing proposed interstate adoption placement approved by Virginia authorities pursuant to compact. Adequacy of agency's financial records matter committed to prosecutorial discretion of Commonwealth's attorney or other prosecuting authority.

December 3, 1991

The Honorable Robert L. Harris Sr,
Judge, Circuit Court of the City of Richmond

You ask several questions concerning the enforcement of § 63.1-220.4 of the Code of Virginia, which limits the fees that may be charged for adoption placement services. First, you ask whether any state agency is responsible for enforcing that section. Second, you ask whether a court considering adoption petitions involving placements by an out-of-state agency suspected of charging excessive fees may prevent that agency from placing children in Virginia. Finally, you ask whether certain financial information provided to your court by a particular child-placing agency licensed in another state satisfies the requirements of § 63.1-220.4. This information indicates (1) that the agency charged the prospective adoptive parents initial service and placement fees totaling $25,000, but incurred medical and childbirth-related expenses totaling only about $5,000; and (2) that the agency's tax-exempt status currently is under investigation by the Internal Revenue Service.

I. Applicable Statutes

Chapter 11 of Title 63.1, §§ 63.1-220 through 63.1-238.02 ("Virginia's adoption laws"), details the requirements and procedures generally applicable to adoptions in Virginia. Chapter 10.1 of Title 63.1, §§ 63.1-219.1 through 63.1-219.5, establishes specific rules governing interstate adoption placements. Section 63.1-219.2 codifies the Interstate Compact on the Placement of Children (the "compact"), consisting of ten articles.

Article III of the compact generally requires child-placing agencies sending children into other signatory states to comply with applicable laws of the state receiving the child. Article III(d) of the compact further obligates "appropriate public authorities" in the receiving state to make a written determination that a proposed placement does not appear contrary to the child's interests before any placement is made. These authorities
are entitled to request information needed to perform their obligations under the compact.

Under Article IV of the compact, placements made in violation of the compact are violations of the laws of both the sending and receiving states, for which the child-placing agency's license may be suspended or revoked.

Section 63.1-220.4 of Virginia's adoption laws details the fees that may be charged in connection with adoptions generally. Allowable charges include medical and other childbirth-related expenses, legal fees, transportation expenses and fees for "reasonable and customary services provided by a licensed or duly authorized child-placing agency." Section 63.1-220.4(i). All other fees and charges are prohibited. Charging or paying fees for an adoption other than those allowed by § 63.1-220.4 is a Class 5 felony.

Several sections of Virginia's adoption laws address investigation and enforcement of the fee limitation contained in § 63.1-220.4. The last sentence of § 63.1-220.4 authorizes the Commissioner of Social Services (the "Commissioner") to investigate cases in which "fees paid for legal services appear to be in excess of usual and customary fees." Section 63.1-220.3(B)(5) further requires a juvenile and domestic relations district court investigating a proposed adoption with parental consent to make a determination that § 63.1-220.4 has not been violated. Section 63.1-220.3(B)(5) specifies, however, that an apparent violation of § 63.1-220.4 shall not be grounds for rejecting a birth parent's consent and requires the court to report the alleged violation to the Commissioner for investigation and appropriate action pursuant to § 63.1-220.3(F).

Section 63.1-220.3(F) requires any court or participating agency suspecting a violation of § 63.1-220.4 to report its findings to the Commissioner for investigation and appropriate action. Section 63.1-220.3(F) also requires the Commissioner to report suspected violations to the appropriate Commonwealth's attorney and professional regulatory authorities for possible prosecution and disciplinary action.

Under § 63.1-223(B) and (D), a circuit court considering a Virginia resident's petition to adopt a child placed by an out-of-state agency must obtain an investigation and report that includes fees paid to persons or agencies that assisted in obtaining the child. Section 63.1-223(D)(vii). The last sentence of § 63.1-223(D) requires a local superintendent of public welfare or child-placing agency conducting such an investigation to report suspected violations of § 63.1-220.4 to the court and to the Commissioner.

Section 63.1-238.02 makes it the duty of every Commonwealth's attorney to prosecute violations of Virginia's adoption laws.

II. Commissioner Responsible for Investigating and Reporting Suspected Violations of § 63.1-220.4 to Appropriate Law-Enforcement Authorities

Virginia's adoption laws contemplate that the Commissioner will investigate and report suspected violations of the fee limitations imposed by § 63.1-220.4 to the appropriate law-enforcement authorities when warranted. Under §§ 63.1-220.3(F) and 63.1-223(D), courts, local superintendents of public welfare and child-placing agencies participating in or investigating a proposed adoption placement must report suspected violations of § 63.1-220.4 to the Commissioner. The Commissioner, in turn, is obligated to report suspected violations to the appropriate Commonwealth's attorney in Virginia for prosecution under § 63.1-238.02, or to the state where the violator is located for prosecution under that state's laws. See §§ 63.1-220.3(F), 63.1-219.2 art. IV. In my opinion, therefore, the Commissioner is the state official with primary responsibility for investigating and reporting suspected violations of the fee limitation imposed by § 63.1-220.4.
The General Assembly clearly has expressed the policy that the adoptive child should not be penalized for suspected violations of the fee limitations imposed by § 63.1-220.4. The statutory scheme governing interstate adoption placements in Virginia contemplates that investigations of suspected violations of § 63.1-220.4 should take place after the child is placed in the home, following a written determination by Virginia authorities that the placement is not contrary to the child's interests. See § 63.1-219.2 art. III(d). In this regard, § 63.1-220.3 specifically provides that a suspected violation of § 63.1-220.4 shall not be a ground for rejecting a birth parent's consent to an adoption, but, instead, shall be referred to the Commissioner for investigation and appropriate action.

Under the compact, violations of Virginia's fee limitations are subject to prosecution either in Virginia or in the sending state, and may result in loss of a child-placing agency's license. The compact is designed to maximize a child's opportunity for suitable placement while allowing a thorough investigation by authorities in the receiving state. See Att'y Gen. Ann. Rep.: 1984-1985 at 3; 1982-1983 at 265, 266. It is well-settled that the child's welfare is the paramount consideration in every custody and adoption proceeding. See Frye v. Spotte, 4 Va. App. 530, 359 S.E.2d 315 (1987).

Virginia statutes and administrative regulations do not define what constitutes a "reasonable and customary" fee for child-placing services. The fees customarily charged may vary from state to state and, under the compact, are available for review by authorities in the receiving state before a placement is made. See § 63.1-219.2 art. III(c). Under Article III of the compact, these authorities are responsible for determining that a proposed placement does not appear contrary to the interests of the child being placed. Once that determination has been made, neither the compact nor any other Virginia statute authorizes disrupting a placement based on a suspected violation of § 63.1-220.4. Only if the court determined that the excessive fees charged rendered the placement contrary to the interests of the child would there be a legal basis for rejecting the adoption.

Based on the above, it is my opinion that a suspected violation of § 63.1-220.4, standing alone, does not justify a court's preventing a proposed interstate adoption placement that has been approved by Virginia authorities pursuant to Article III of the compact. Courts, local officials or other child-placing agencies suspecting a violation of § 63.1-220.4 should make a report to the Commissioner who, in turn, can refer the matter to the appropriate prosecutorial and disciplinary authorities. If that is done, in the case you describe, whether the amount paid to the child-placing agency and that agency's questionable tax-exempt status indicate a violation of § 63.1-220.4 necessarily will become matters within the prosecutorial discretion of the Commonwealth's attorney or other prosecuting authority involved. See, e.g., 1981-1982 Att'y Gen. Ann. Rep. 454 (felony or misdemeanor prosecution for welfare fraud is matter of prosecutorial discretion).
payment considered supplemental compensation, not bonus for exceptional services. Board may not make one-time payments to county social services employees.

April 10, 1991

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

You ask whether the Accomack County Board of Social Services ("County Social Services Board"), using County funds previously appropriated to it by the County Board of Supervisors, may pay its employees a one-time payment of a fixed amount, which you describe as a "bonus." If so, you ask whether these payments must be approved by the Board of Supervisors and by the State Board of Social Services ("State Board").

I. Applicable Statutes

Section 15.1-7.4 of the Code of Virginia provides:

Notwithstanding any contrary provision of law, general or special, the governing body of any county, city or town may pay a monetary bonus to any of the local governments' officers and employees for exceptional services rendered. The payment of a bonus shall be authorized by ordinance.

Section 63.1-66 provides:

The local superintendent [of public welfare] and other persons employed to administer the provisions of [Title 63.1] in each county or city shall be paid such compensation by such county or city as shall be fixed by the local board [of social services] or other appointing authority within the compensation plan provided in the merit system plan. With the approval of the State Board and the local governing body the local board may provide that the local superintendent and such other employees shall be paid compensation in excess of the maximums permitted in the compensation plan. Such excess compensation shall be paid wholly from the funds of such county or city.

II. Compensation to Local Social Services Employees Must Be in Accordance with State Compensation Plan; Bonuses May Be Granted Only for Exceptional Service

A prior Opinion of this Office interpreting § 63.1-66 concludes that employees working in local social services departments are considered to be local employees for compensation purposes. 1985-1986 Att'y Gen. Ann. Rep. 342, 343. That Opinion recognizes, however, that the amount of such employees' compensation must be "fixed by the local board [of social services] or other appointing authority within the compensation plan provided in the merit system plan." Id. (quoting § 63.1-66).

The State Board has adopted the compensation plan referred to in § 63.1-66, with a series of incremental steps and a range assigned to each employee classification. 1A Va. Dep't Soc. Serv., Loc. Personnel Admin. Manual Ch. B, at 18 (1984) [hereinafter Manual]. Local boards of social services are directed by this state compensation plan to establish compensation for each employee classification within the range of incremental steps provided in the state plan. Manual, supra, at 27.

Another prior Opinion of this Office recognizes that the state compensation plan establishes minimum and maximum compensation ranges for various classifications of local social services employees, and that "salary increments, when granted, must be in the amounts specified" by that plan. 1975-1976 Att'y Gen. Ann Rep. 430, 432. While the
state compensation plan described in that Opinion differs in some respects from the one currently in effect, both contemplate that employees will be compensated by predetermined ranges and steps, and neither contemplates or makes any reference to nonrecurring payments similar to the "bonus" you describe.

I conclude, therefore, that the one-time payments proposed by the County Social Services Board are not "within" the state compensation plan as required by § 63.1-66.

Section 15.1-7.4 provides that a local governing body may, by ordinance, authorize payment of a monetary bonus to any of its officers or employees "for exceptional services rendered." By the express terms of § 15.1-7.4, such bonuses may be paid, notwithstanding any contrary provision of law. This authority for the governing body to recognize exceptional performance with a one-time payment to designated employees, if applicable, therefore, would override the restrictions of § 63.1-66. You indicate, however, that the payments contemplated by the County Social Services Board are proposed not as individual awards for, or recognition of, exceptional services, but as supplemental compensation, albeit for only one year, payable to all County social services employees. In my opinion, therefore, these proposed payments are not a "bonus . . . for exceptional services rendered" within the meaning of § 15.1-7.4.

The General Assembly may, of course, amend the law to permit bonuses for other than exceptional services. Absent such an amendment, however, it is my opinion that, based on the restrictions in both §§ 63.1-6f and 15.1-7.4 described above, the County Social Services Board may not make the proposed one-time payments to County social services employees. In view of that conclusion, it is not necessary to address your second question.

1Under regulations of the State Board, a local social services board may be approved to be a part of a comprehensive local jurisdictional compensation plan rather than to follow the state compensation plan. Manual, supra Pt. II, at 87 (1986). The County Social Services Board has not been approved to be a part of any such comprehensive local plan.

WILLS AND DECEDEETS’ ESTATES: WILLS — REQUISITES AND EXECUTION — PROBATE — ADMINISTRATION OF ESTATES — APPOINTMENT AND QUALIFICATION.

FIDUCIARIES GENERALLY: NONRESIDENT TRUSTEES, ETC.

Sufficiency of proof of validity of will admitted to probate, absent attesting witnesses, depends upon facts of each case; attestation clause strengthens will's validity. Reliance on attestation clause not sufficient when witnesses either can be called, or are unavailable, to prove due execution of will not meeting statutory requirements to be self-proving. Circuit court clerk may qualify administrator of estate after refusing to admit to probate will that is not self-proving if certain statutory prerequisites satisfied and administrator applies for position. Testator may delegate to named executor authority to appoint co-fiduciary who qualifies as co-executor of will and not administrator c. t. a. Clerk may waive surety requirement for named executor and appointed co-executor, assuming one co-executor is Virginia resident; when security waived by will, clerk may disregard such waiver and require posting of surety.

May 29, 1991

The Honorable Warren E. Barry
Clerk, Circuit Court of Fairfax County
You ask several questions concerning the probate of wills. When a will is not self-proving and the subscribing witnesses either are deceased or cannot be found, you ask whether the attestation clause of the will, by itself, is sufficient proof for the circuit court clerk to admit the will to probate. If not, you ask what evidence a clerk may accept to prove proper execution of the will. You also ask whether, if a clerk rejects a will for insufficient proof of valid execution, it is proper for the clerk to appoint a personal representative for the decedent's estate, as if the decedent had died intestate.

Your next series of questions concerns the appointment of a personal representative based on certain language in a decedent's will. The pertinent portion of the will provides:

I hereby nominate, constitute and appoint my beloved daughter ... of Billerica, Massachusetts, to be a co-executor of this my last will and testament and direct that no surety be required of my said daughter and the other co-executor that she might choose to serve with her as an executor inasmuch as my daughter is a nonresident of the State of Virginia and I direct and request that she determine who she shall choose to serve with her as a co-executor, said co-executor to be a resident of the State of Virginia.

Based on this language, you ask whether a testator may name an executor and delegate to that executor the authority to appoint a co-fiduciary. If so, you also ask whether the co-fiduciary should qualify as a co-executor or as an administrator *cum testamento annexo*, also known as an administrator with the will annexed ("administrator *c. t. a.*"). Your final question is whether the testator's waiver of surety for the named executor and the appointed co-fiduciary must be honored by the circuit court clerk, assuming at least one is a resident fiduciary, or whether the co-fiduciary actually must be named in the will for the clerk to honor the waiver of surety in § 64.1-121 of the Code of Virginia.

I. Sufficiency of Proof of Will Validity in Absence of Attesting Witnesses Is Dependent upon Facts of Each Case

Section 64.1-49 details the requirements for a valid will in the Commonwealth:

No will shall be valid unless it be in writing ... and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

The sufficiency of proof required to admit a will to probate, absent the testimony of the subscribing witnesses, necessarily is dependent upon the facts of each particular case. It is not absolutely necessary that subscribing witnesses to a will appear to offer testimony to satisfy the requirements of § 64.1-49. See *Dudleys v. Dudley*, 30 Va. (3 Leigh) 471 (1832); *Boyd et al. v. Cook ex'or &c.*, 30 Va. (3 Leigh) 33 (1831). An attestation clause, however, often will aid the circuit court clerk's determination whether a particular will qualifies for probate.

It is not necessary under [§ 64.1-49] that there should be any formal attestation, but the statute does not forbid the court from making use of an attestation clause which sets forth all the necessary formalities in aid of the presumption in favor of the validity of the will.

1 George P. Smith, Jr., *Harrison on Wills and Administration* 402 (3d ed. 1985).
The rule in Virginia is that, when witnesses can be called to prove the due execution of a will that is not self-proving, they must be called, and reliance on an attestation clause is not sufficient. When such testimony is unavailable, however, the attestation clause greatly strengthens the presumption of the will's validity. See Clarke et al. v. Dunnivant, 37 Va. (10 Leigh) 14 (1839).

"It is a well-established rule that a complete attestation clause reciting the observance of all statutory requirements raises a presumption of the due execution of a will if there is no contest as to the genuineness of the signature of the witnesses, or that of the testator, or after these signatures are proved to be genuine." Grimes v. Crouch, 175 Va. 126, 133, 7 S.E.2d 115, 117-18 (1940) (citations omitted).

Although the statutes require the will to be attested by two witnesses, its due execution may be proved by one, or if no attesting witness is procurable, by any other evidence. If all attesting witnesses be dead or out of the State it will be generally sufficient to prove that the signature of the several attesting witnesses is in their handwriting and also prove the signature of the testator. The statutes do not prescribe the mode of proof nor the number of witnesses by whom the necessary facts are to be established.

1 George P. Smith, Jr., supra, at 400-01.

In my opinion, therefore, when a will does not meet the statutory requirements to be self-proving, and the attesting witnesses are unavailable, the attestation clause alone is not sufficient for the clerk to admit the will to probate. The additional evidence the clerk will need to require necessarily will depend on the facts of each individual case, but may include such matters as the testimony of independent witnesses familiar with the signature of the testator and the attesting witnesses or other documents on which those signatures have been acknowledged and notarized.

II. Clerk May Qualify Administrator of Estate After Rejection of Will if Certain Prerequisites Satisfied

Section 64.1-118 provides for the appointment of an administrator for a decedent's estate when the decedent dies intestate and describes preferences for such appointments. If a circuit court clerk refuses to admit an instrument purporting to be a decedent's will to probate for failure to satisfy the requirements of § 64.1-49, it is my opinion that the clerk may appoint an administrator of the estate pursuant to § 64.1-118, as if the decedent died intestate. The clerk may qualify a proposed administrator, however, only if the person is entitled to become an administrator of the estate pursuant to § 64.1-118 and applies for the position. See Prudential Ins. Co. of America v. Stephens, 498 F. Supp. 155, 157 (E.D. Va. 1980) (although husband is preferred by § 64.1-118 to become administrator of wife's estate, he must make application in order to qualify). All other prerequisites for qualification must be satisfied by the person seeking to become administrator. See, e.g., § 64.1-119 (person seeking administration of estate must give bond and oath that, so far as he knows, deceased has left no will).

If an appeal is taken from an order of a clerk denying probate of an instrument, the circuit court may enter any order it deems fit for the protection of the parties or the property, pursuant to § 64.1-78, which provides for a de novo appeal from any order entered by the clerk concerning probate. This could include an order denying administration of the estate under § 64.1-118 or prohibiting distribution of estate assets until the appeal has been concluded.
III. Testator May Delegate to Named Executor Power to Appoint Co-Fiduciary

To address your questions about a named executor's authority to appoint a co-fiduciary, a testator may expressly name an executor and give the named executor the authority to appoint a co-fiduciary. It is not necessary for an executor of a will to be named expressly in the instrument; instead, he may be determined by construction of the will itself. See 1 George P. Smith, Jr., supra Pt. I, at 418. It has long been held that "a testator may delegate the power to appoint executors, and such appointment is as valid as if made by the testator himself." 8A M.J. Executors and Administrators § 8 (Repl. Vol. 1977) (footnote omitted). The language of the will you describe evidences sufficient testamentary intent for the named executor to appoint a co-fiduciary. It is my opinion, therefore, that, in the facts you present, the testator may name an executor and delegate to that executor the authority to appoint a co-fiduciary.

IV. Unnamed Co-Fiduciary Appointed by Named Executor Becomes Co-Executor

If an executor is named expressly in a will and is delegated the authority thereunder to select a co-fiduciary, the selected co-fiduciary becomes a co-executor of the will and not an administrator c.t.a. 1 George P. Smith, Jr., supra Pt. I, at 418; see also Bishop v. Bishop, 56 Conn. 208, 14 A. 808 (1888); Hartnett et al. v. Wandell, 60 N.Y. 346 (1875). This is true regardless of whether the appointed co-executor is a resident or nonresident of Virginia. See § 26-59; 1972-1973 Att'y Gen. Ann. Rep. 526.

It has long been the rule in Virginia that an estate may not be administered jointly by an executor and an administrator c.t.a. See Hofheimer v. National Bank, 154 Va. 896, 156 S.E. 581, cert. denied, 283 U.S. 585 (1931). This adds further support to the conclusion that a named executor to whom the testator has delegated the authority to name a "co-fiduciary" selects a "co-executor" when this authority is exercised. Based on the above, it is my opinion that, in the facts you present, the co-fiduciary should qualify as a co-executor and not as an administrator c.t.a.

V. Clerk May Waive Surety Requirement of Co-Executor Not Expressly Named in Will

Section 64.1-121 provides that, when a testator waives the security of an executor "nominated" in the will, the circuit court clerk need not require such security. Nothing in § 64.1-121 requires that the executor be expressly named in the will in order to benefit from the testator's waiver of security. As discussed above, an executor of a will does not need to be "named" expressly in the will to qualify. Indeed, "the method of . . . nomination may be prescribed without express nomination in the will." 1 George P. Smith, Jr., supra Pt. I, at 419.

I am of the opinion, therefore, that a circuit court clerk may waive the surety requirement for both the executor expressly named in the will and the co-executor chosen by the named executor to carry out jointly the mandate of the will, assuming that at least one of the co-executors is a Virginia resident. 1

Even though the will may waive the surety required of an executor, the clerk may disregard such waiver and require that surety be posted by any or all executors. Section 64.1-121 expressly authorizes circuit court clerks to require security "in an amount deemed sufficient," even though security is waived by the will. See 1970-1971 Att'y Gen. Ann. Rep. 461.

1Section 26-59(B) provides that certain designated nonresidents may qualify as executor under a will without the qualification of a resident co-executor. In such cases, however, bond with surety is mandatory, unless a resident executor qualifies as personal representative with the nonresident.
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Commissioner determines taxable status and value of property based on evaluation of relevant facts existing on tax day (January 1) of each year; relevant facts include ownership, location and intended use of property.

Commissioner determines whether person engaged in business within taxing jurisdiction for purposes of imposing business license tax.

Commissioner determines whether person's home constitutes definite place of business or office for purposes of imposing business license tax.

Commissioner determines whether taxpayer engaged in "manufacturing" for purposes of local license tax exemption.

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- No statutory authority for sheriff to deputize employees of private corporation to act as correctional officers in correctional facility built in Virginia for confinement of District of Columbia prisoners
- Popularly elected, independent local constitutional officers not subject to control and jurisdiction of local governing body of county or city served; enjoy considerable independence in performance of duties
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