OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
FROM
JANUARY 1, 1994 TO DECEMBER 31, 1994


COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
RICHMOND
1994
THE 1994 REPORT OF THE ATTORNEY GENERAL

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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 § 2.1-128 of the Code of Virginia.

**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, 1994, to December 31, 1994. Opinions begin on the page on which the headnote first appears.
LETTER OF TRANSMITTAL

May 1, 1995

The Honorable George F. Allen
Governor of Virginia

My dear Governor Allen:

I am pleased to present to you the Report of the Attorney General for the calendar year January 1, 1994, through December 31, 1994, the first year of this Administration. The report contains the official opinions rendered during 1994 in order to provide for uniform construction of the law in the Commonwealth. I also have included a listing of significant cases pending or completed during this same time period.

As part of my pledge to make the Office of the Attorney General more responsive to the legal needs of the Commonwealth and her citizens, I have, since January 15, reorganized the structure of the Office to reflect an increased emphasis on criminal law and public safety. At the same time, this reorganization also was designed to make the delivery of state legal services more efficient and effective.

During my review of the Office, undertaken during the transition period, I interviewed all of the attorneys within the Office to gain personal knowledge of their abilities and day-to-day activities. After evaluating each attorney's qualifications, I made appointments to positions within the Office which, I believe, significantly improve the quality of legal representation for the Commonwealth, and give greater control of the Commonwealth's legal matters to the Office of the Attorney General.

In reorganizing the structure of the Office, I established divisions devoted solely to criminal and civil litigation; consolidated the general counsel functions of the Office in a government operations division; placed legal concerns dealing with education, health and social services in another division; and put responsibility for intergovernmental affairs and legal opinions in a separate division.

Criminal Law Division

The highest responsibility of government is to provide for the safety of its citizens. When I entered office, I found that there was no division solely responsible for handling criminal justice and public safety issues. Accordingly, I have created the Division of Criminal Law and have provided increased resources to make public safety a primary objective of this Office. This new Division consists of the Criminal Litigation Section, Corrections Litigation Section, Medicaid Fraud and Abuse Control Unit, and a strengthened Investigation and Enforcement Section.

Attorneys from the Criminal Law Division also worked closely with members of the General Assembly who sponsored portions of the anticrime proposals for this Administration. In 1994, the General Assembly acted favorably on many of the Administration's
proposals for sweeping reform of the criminal justice system. The new laws included abolition of parole, bifurcated jury sentencing, life imprisonment for a third felony conviction, creation of a sexual offender registry, lowering to 14 the age for trying a juvenile as an adult on a felony charge, making it easier to prosecute stalking cases, making it a felony for an adult to entice a juvenile to commit a crime, and establishing a truth-in-sentencing commission.

The Criminal Law Division handles all post-conviction litigation filed by state prisoners. This year, the Office defended 865 petitions for writs of habeas corpus filed in state and federal courts, and represented the Commonwealth in 112 criminal appeals in the Supreme Court of Virginia and 490 criminal appeals in the Court of Appeals of Virginia. My staff also defends on appeal and collateral attack the convictions of persons under sentence of death in Virginia, who now number 55.

In addition to providing day-to-day legal advice to the Department of Corrections, Criminal Law Division attorneys represented Corrections personnel in 1,240 federal lawsuits filed by prisoners who alleged that conditions of their confinement violated their civil rights. These cases included major litigation involving the constitutionality of federal statutes, the appropriate application of Virginia’s parole procedures, and whether prison officials may ban pornographic magazines from Virginia’s prisons.

The Criminal Law Division also has continued to work closely with federal and local law enforcement agencies, to provide a more expansive coordinated investigative and prosecutorial effort. The steady increase in drug traffic in the past several years has added serious new burdens in the field of law enforcement. This Office is committed to working with all levels of law enforcement to carry that burden, and to continuing to institute new legislation to strike back at drug dealers. We also have taken a more aggressive approach toward assisting regulatory agencies, such as the ABC Board and the Board of Medicine, as they seek license revocations against problem licensees. Finally, we are working with the State Police, state agencies and Commonwealth’s attorneys to ensure that state employees caught stealing from the State or taking illegal advantage of their positions are vigorously prosecuted.

This Division also provides general legal representation to those agencies that report to the Governor’s Secretary of Public Safety.

Health, Education and Social Services Division

The Division of Health, Education and Social Services represents those agencies that report to the Governor’s Secretaries of Health and Human Resources, and Education.

As of December 31, 1994, the Division of Health, Education and Social Services was handling 349 active cases. This figure represents only those cases pending on that date and does not reflect the number closed or settled during the course of the year. These cases involve the full range of possible civil litigation—constitutional issues, personal injury, property damage, contract disputes, injunctive relief, mandamus and various
other actions. The cases concern issues that, in monetary value, range from hundreds to millions of dollars.

I reversed the policy of the previous Attorney General, and entered into the case on your behalf and on behalf of the Commonwealth before the United States Court of Appeals for the Fourth Circuit in support of Virginia Military Institute. The goal of the defense in this case was to preserve the unique intellectual and leadership training that Virginia Military Institute offers young men, and to create that same unique opportunity for young women through the Virginia Women's Institute of Leadership at Mary Baldwin College. The Court of Appeals ruled in favor of the Commonwealth.

The Division filed a friend-of-the-court brief with the Supreme Court of the United States on your behalf and on behalf of the Commonwealth's citizens, supporting the First Amendment right to a freedom of speech challenge by *Wide Awake*, a student-run magazine that was denied funding by the University of Virginia. This case is of vital importance to the people of Virginia, because it concerns whether government may discriminate against certain organizations based on their viewpoint. The case involved the University of Virginia and the student-run publication *Wide Awake*, which sought to address the issues of the day from a religious standpoint. The University, through fees that all students are required to pay, provides funding to a wide variety of student organizations and publications. When *Wide Awake* sought to publish its views, the University, through its Student Council, denied funding. The University took the position that the Constitution not only allows, but also requires discrimination against the publication because it expressed a religious point of view.

Some concern was expressed that this Office filed a friend-of-the-court brief on behalf of the student publication, while permitting the Office's local counsel to continue to represent the University of Virginia. The resources of the Office are committed to the Bill of Rights and the representation of the citizens of Virginia. Virginia law recognizes that, from time to time, this Office may represent competing interests. For that reason, this Administration was able to allow the Office's local counsel to continue to represent the University of Virginia so that its point of view also could be put forward fairly. A constitutional scholar also was selected by the University and appointed by this Administration to assist the Office's local counsel. Both the constitutional scholar and the Office's local counsel acted independently to provide the University with the best representation possible. This procedure allowed our Office to provide a level playing field in the presentation of all ideas equally.

The Division also was instrumental in obtaining from the United States Department of Education over $50 million allocated for the special education children of the Commonwealth. We successfully sought an order from the United States Court of Appeals for the Fourth Circuit requiring payment of these funds to Virginia.

The attorneys assigned to the Mental Health and Health Services Section provide representation to the Departments of Mental Health, Mental Retardation and Substance
Abuse Services; Health; Health Professions; Rehabilitative Services; Visually Handi-
capped; Aging; and to the Governor's Employment and Training Department. During the
past year, attorneys in the Section have actively defended three facilities under investiga-
tion by the United States Department of Justice under the Civil Rights of Institutionalized
Persons Act. The Section also has defended a challenge from the United States Depart-
ment of Education alleging that the Southwestern Virginia Training Center violated § 504
of the Rehabilitation Act as a result of an employment policy requiring that direct care
staff be able to lift over 15 pounds as an essential function of the job. The Section also
successfully defended an action for unnecessary billable hours for private attorneys' fees
in the Court of Appeals and the Supreme Court brought against the Commonwealth in
\textit{Greenwald Cassell Associates v. Guffey}.

The Education Section provides legal services to Virginia's 15 senior institutions,
23 community colleges, the State Council of Higher Education, the Virginia Department
of Education, and the many other education-related agencies and museums. In addition
to providing exemplary litigation defense, which has saved the Commonwealth's tax-
payers substantial dollars, the Section successfully handled numerous and diverse prob-
lems in the areas of procurement, personnel, real estate, and investments, in addition to
handling the daily issues arising out of the operation of major health care complexes,
highly sophisticated technical/scientific research projects, campus police services, athletic
programs, management of significant trust funds, and even international agreements with
institutions of higher learning in other countries. We provided noteworthy leadership in
developing guidelines that will respect important religious liberties in our public schools.
The proposed guidelines currently are circulating for public comment to ensure the broad-
est opportunity for public participation in such an important policy development.

The Medicaid and Social Services Section provides legal support to the Department
of Social Services and the Department of Medical Assistance Services. This Office has
demonstrated its commitment to personal responsibility by ensuring that parents support
their children. The result of our efforts has been an increase in the establishment of both
card support obligations and paternity and collection of support. The efforts will be
enhanced by legislation that gives the circuit courts of the Commonwealth authority to
require surrender of professional and drivers' licenses from delinquent noncustodial
parents.

In addition, we provide legal assistance to Child Protective Services and have been
instrumental in ensuring that founded child abuse determinations are upheld by the circuit
courts. The efforts of our attorneys in maintaining the integrity and confidentiality of
adoption records is also significant.

In addition to the Department of Social Services, we provide support to the Depart-
ment of Medical Assistance Services on numerous issues. We have played a vital role in
requiring health care providers to reimburse the Commonwealth for disallowed costs and
expenses, and have initiated efforts to ensure that only qualified individuals receive
Medicaid benefits. This Office has played an active role in advising Medical Assistance Services to develop alternative health care initiatives, which will result in dramatic savings to the Commonwealth’s taxpayers.

Civil Litigation Division

Another important aim of the reorganization of the Office of the Attorney General was to strengthen representation of the Commonwealth in civil litigation. Within this Division are sections devoted to the following practice areas: antitrust enforcement, consumer protection, utility and insurance regulation, real estate and construction litigation, debt collection, tort defense, and employment litigation. Of the thousands of cases handled by the Civil Litigation Division, several warrant mention.

In April 1994, I presented proposals to you that led to settlement legislation enacted in a special session of the General Assembly, resolving claims of 147,853 federal civil service and military retirees. My civil litigation staff had defended successfully the case of Harper v. Commonwealth, an action brought by retired federal employees alleging that the Commonwealth unconstitutionally taxed their retirement income while not charging the same tax to retired employees of the Commonwealth. The Commonwealth’s potential liability was approximately $468 million in tax refunds plus $235 million in accrued interest. Recognizing the risks on appeal, I recommended to the General Assembly a plan by which the Department of Taxation would make individual settlement offers to retirees who desired to settle their claims of tax overpayment. With your leadership, we were able to craft a settlement with members of the General Assembly and representatives of the federal retirees. The vast majority of the retirees now have agreed to settle for approximately 76 percent of the excess taxes paid, exclusive of any interest.

In my role as consumer counsel for all Virginians, I examined Trigon Blue Cross-Blue Shield of Virginia’s practice of negotiating significant discounts from hospitals, calculating subscriber copayments on the basis of the higher retail charge. Attorneys from this Office worked with both Trigon and the State Corporation Commission’s Bureau of Insurance to make certain that Trigon’s settlement with the Bureau included refunds to subscribers of self-funded group plans, such as the State Key Advantage Plan, and not just those fully insured individuals who came within the Bureau’s jurisdiction. This Office has yet to close the books on this practice by Trigon, nor will we until we are completely satisfied.

Also in fulfillment of my statutory duty as consumer counsel, attorneys in the Insurance and Utility Section participated vigorously in a groundbreaking telecommunications case tried in 1994. In this case, where the State Corporation Commission considered alternative forms of regulation over telephone carriers providing basic exchange services, I advocated a variety of safeguards for the protection of consumers and competitors as competition evolves to replace traditional forms of regulation.
I also achieved a settlement of a consumer protection case brought against Commonwealth College, obtaining $375,000 from this proprietary school and its parent corporation. These monies were used to make restitution to students who were misled by the school’s practices, and to repay lenders that made educational loans to students enrolled there.

Attorneys and support staff in the Trial Section and the Employment Law Section continued to carry heavy litigation caseloads as they regularly defended actions filed against client agencies. The Trial Section defended 301 new workers’ compensation claims in 1994 and represented the Commonwealth in 27 trials and in 18 appeals decided by the Supreme Court of Virginia. The Employment Law Section defended state employers in 143 new grievances filed in 1994, and appeared in ten trials and eight appeals in defense of claims primarily alleging discrimination based on age, race, gender or national origin.

The Real Estate and Construction Litigation Section handled both “vertical” construction (buildings) and “horizontal” construction (roads and bridges) cases in 1994. These included cases filed on behalf of or against the Commonwealth. This Section also provided day-to-day advice to the Virginia Department of Transportation on construction matters and claims, including 22 formal claims filed by contractors and handled through the agency’s administrative process.

Cases in which the Commonwealth was a defendant included Kenbridge Construction Company v. UVA and Branch Construction Company v. Virginia Tech. In these cases, although plaintiffs sought damages totaling $3,565,000, they were resolved for a total of $1,373,786. The Commonwealth acted as plaintiff in vertical construction cases, including Jamestown-Yorktown Foundation v. Cottrell Engineering, Virginia Tech v. Smithey & Boynton and multiple cases involving design errors and omissions known as the “VVKR cases.” The amount sought by the Commonwealth in these cases totaled $3,923,786. The total amount which has either been paid or awarded to the Commonwealth is $2,417,786. Thus, during 1994, this Section either recovered or was awarded 62 percent of the total amount it claimed. In one noteworthy case—Fair Woods Homeowners Association v. VDOT—the plaintiff filed an action in the United States District Court to stop construction of an interchange adjacent to its subdivision located at Route 50 and the Fairfax County Parkway. The Section successfully moved to dissolve a restraining order initially entered by the court. This allowed road construction to continue, saving the Commonwealth thousands of dollars put at risk by delays.

Recovery of delinquent accounts owed to the Commonwealth continued to receive the highest priority within this Division. During 1994, the Division of Debt Collection pursued and collected on behalf of the Commonwealth $9,594,798 in delinquent accounts owed to agency clients such as the Medical College of Virginia Hospitals, the Department of Medical Assistance Services and the Department of Transportation. In addition, I joined in a national settlement of Delaware v. New York, a case of original jurisdiction
in the Supreme Court of the United States, involving unclaimed dividends, interest and other distributions made by issuers of securities. In the settlement, Virginia's share of $4.7 million was increased to $5 million in recognition of the extra efforts of my staff in achieving this result. Installments of $500,000 will be paid to the Literary Fund each year from 1995 to 2005.

**Government Operations Division**

The Government Operations Division represents those agencies that report to the Governor's Secretaries of Administration, Commerce, Finance, Natural Resources and Transportation.

Among the many significant responsibilities of this Division is the selection and management of private attorneys who provide for the Commonwealth and her citizens legal services that are impracticable or uneconomical for me to provide through my Office. These services include bond counsel for public financing, eminent domain counsel for highway construction, defense counsel for cases insured by the Division of Risk Management, and many other areas requiring specialized expertise.

In the past, it has been clear to me that political and patronage considerations have played a role in these outside counsel selections. I abolished the patronage system in favor of appointment of outside counsel solely on the basis of merit. I opened the selection process and sent more than 2,000 letters to attorneys, legal organizations and leaders in the legal community describing the opportunities for service to the Commonwealth available to outside counsel. From the literally hundreds of responses I received, I have chosen a very distinguished group of attorneys to appoint to provide these vital services. I have chosen attorneys affiliated with both major political parties, as well as many attorneys whose political party affiliation, if any, is unknown to me. I have made a special effort to recruit well-qualified minority and women attorneys as well.

A detailed review system is being devised, for the first time, that will track the performance of all outside attorneys so as to provide the most cost-efficient and effective representation.

During my first year in office, I have devoted substantial attention to the defense of Virginia's constitutional prerogatives against increasingly aggressive encroachments by the federal government bureaucracy and, in particular, the United States Environmental Protection Agency. As you know, I share your firm and unwavering commitment to protection of Virginia's abundant natural resources. I also am committed to the view that the states and the federal government should cooperate freely in environmental matters, and that federal regulatory programs may not be forced on the states on pain of coercive sanctions.

In the past year, attorneys from the Government Operations Division, in addition to the major initiatives outlined above, have advised and represented state agencies in
numerous matters involving economic development, public finance, transportation, public administration, and regulation of businesses and professions.

Local and Intergovernmental Affairs

A particular concern to this Administration was the manner of addressing legislation vital to the citizens of the Commonwealth. Therefore, I formed the Local and Intergovernmental Affairs Division to provide the highest quality legal services to the General Assembly in its consideration of the many pieces of legislation introduced at each session. Not only is this Division formulating legislation I feel is extremely important to Virginia's citizens, but it also is monitoring all legislation presented before the General Assembly. In addition, the Division assists attorneys from the other Divisions of this Office in providing information and legal comment before committees of the General Assembly considering legislation.

I have created the position of Counsel to the Attorney General, who reports directly to me on matters involving legal and legislative policy. Among the duties of the Counsel is the coordination of all legislative activities of the Office. Counsel also assists the Deputy Attorney General for the Local and Intergovernmental Affairs Division with the tasks of policy analysis, provision of legal and policy advice, and representation of the Office on various commissions.

One of the important statutory responsibilities of the Office of the Attorney General is the research of legal issues and the preparation of official opinions. It is essential that the Office provide the highest quality response to requests for legal advice. To meet that need, I have strengthened and reorganized the process by creating a new Opinions and Local Government Section within the Division of Local and Intergovernmental Affairs. The Section reviews all opinions prepared by the Office, researches and coordinates the study of complex legal issues, and contributes to the orderly conduct of state and local affairs by providing a uniform interpretation of the law.

Conclusion

This letter gives a very brief overview of the efforts of the Office of the Attorney General in the first year of this Administration to provide effective, efficient legal services to the institutions of the Commonwealth's government and to her public officers and citizens.

Lawsuits and the adversarial nature of associated legal challenges negatively affect the timely delivery of government services to the citizens of the Commonwealth. It is my desire, therefore, to try to prevent as many legal controversies as possible and to offer the resources of the Office of the Attorney General to state and local government officials in support of this effort.

I believe that Virginia has been blessed with public servants of the highest integrity and honesty. Our efforts to assist these officials will include helping them to become
better acquainted with the requirements and the ever evolving complexity of the law, which will allow the Commonwealth to continue to be well-served by the efforts of all her public officials.

While no one document could cover all the duties, responsibilities and accomplishments of the Office, this review serves as a guide to our continuing efforts to meet our mandate as the Department of Law for the Commonwealth of Virginia.

With kindest regards, I am

Very truly yours,

James S. Gilmore, III
Attorney General
## PERSONNEL OF THE OFFICE

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<thead>
<tr>
<th>Name</th>
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<tr>
<td>James S. Gilmore III</td>
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1This list includes all persons employed on a full-time basis in the Office of the Attorney General at any time during 1994.
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<td>Edmund Randolph</td>
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<td>Charles Whittlesey (military appointee)</td>
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<td>Samuel W. Williams</td>
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<tr>
<td>John Garland Pollard</td>
<td>1914-1918</td>
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<tr>
<td>J.D. Hank Jr.</td>
<td>1918-1918</td>
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<tr>
<td>John R. Saunders</td>
<td>1918-1934</td>
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</table>

The Honorable J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of the Honorable John Garland Pollard and served until February 1, 1918.
Abram P. Staples\textsuperscript{2} ........................................... 1934-1947
Harvey B. Apperson\textsuperscript{3} ........................................... 1947-1948
J. Lindsay Almond Jr. \textsuperscript{4} ........................................... 1948-1957
Kenneth C. Patty\textsuperscript{5} ........................................... 1957-1958
A.S. Harrison Jr. ................................................................. 1958-1961
Frederick T. Gray\textsuperscript{6} ........................................... 1961-1962
Robert Y. Button ................................................................. 1962-1970
Andrew P. Miller ................................................................. 1970-1977
Anthony F. Troy\textsuperscript{7} ........................................... 1977-1978
Gerald L. Baliles ................................................................. 1982-1985
William G. Broaddus\textsuperscript{8} ........................................... 1985-1986
Mary Sue Terry ................................................................. 1986-1993

\textsuperscript{2}The Honorable Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of the Honorable John R. Saunders and served until October 6, 1947.

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

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

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

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

\textsuperscript{7}The Honorable Anthony F. Troy was elected Attorney General by the General Assembly on January 26, 1977, to fill the unexpired term of the Honorable Andrew P. Miller upon his resignation on January 17, 1977, and served until January 14, 1978.

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


Black v. Eagle. From Rockbridge Cir. Ct. Amicus urging that land properly acquired and used by state agency is not waste and unappropriated land. Aff'd and remanded.


Burket v. Commonwealth. From Virginia Beach Cir. Ct. Appeal of capital murder conviction and death sentence. Aff’d.

Cardwell v. Commonwealth. From Henrico Cir. Ct. Appeal of capital murder conviction and death sentence. Aff’d.


Commonwealth v. Woodward. From Va. Ct. App. Appeal of workers' compensation claim concluding inmate was injured while working on road crew for state department as state employee. Rev'd and dismissed.


Fairfax Co. Park Auth. v. Commonwealth Transp. Comm'r. From Fairfax Cir. Ct. Appeal of decision that in valuing park property subject to deed restriction for condemnation purposes, restriction must be considered. Rev'd and remanded.


Headley v. Fleming. From Nottoway Cir. Ct. Petition for writ of mandamus to have warden prohibit employee from serving as notary. Dismissed.

In re Beckman. From Fairfax Cir. Ct. Petition for writ of prohibition rescinding lower court order quashing defendant’s request for witness subpoenas. Dismissed.

In re Ford. From Fairfax Cir. Ct. Petition for writ of prohibition rescinding lower court order quashing defendant’s request for witness subpoenas. Dismissed.

In re Kettles. From Fairfax Cir. Ct. Petition for writ of prohibition rescinding lower court order quashing defendant’s request for witness subpoenas. Dismissed.

In re Lux. From Spotsylvania Cir. Ct. Petition for writ of mandamus to have judge sign plaintiff’s Statement of Facts for appeal. Dismissed.

In re Old Dominion Jockey Club. From Loudoun Cir. Ct. Petition for writ of prohibition to have court enter order prohibiting clerk from accepting petition requesting second referendum on pari-mutuel wagering. Denied.

In re Pisner. From Fairfax Cir. Ct. Petition for writ of mandamus to have trial judges sign Statements of Facts. Dismissed.

In re Richardson. From Richmond Cir. Ct. Petition for writ of prohibition preventing court from asserting jurisdiction in petition to remove councilman from elected position. Denied.

In re Sentara Hampton Gen. Hosp. From Hampton Cir. Ct. Petition for writs of prohibition and mandamus prohibiting court from holding hospital in contempt and compelling court to enter order suspending contempt order. Dismissed.


Johnson v. Commonwealth. From Chesapeake Cir. Ct. Appeal of convictions for burglary while armed with deadly weapon and use of firearm in commission of robbery. Aff’d.


Lynch v Commonwealth Transp. Comm'r. From Fairfax Cir. Ct. Appeal of decision in condemnation case declaring certain evidence inadmissible because it was speculative and dealt with frustration of development plans rather than highest and best use of property. Rev'd and remanded.


Oliver v. Langer. From Richmond Cir. Ct. Appeal of dismissal of tort action suit against public defender for failure to provide effective assistance of counsel during criminal trial. Appeal dismissed.


Power v. Kendrick. From Arlington Cir. Ct. Petition for writ of mandamus to have court declare whether medical malpractice review panel has authority to dismiss plaintiff's cause of action. Aff'd.
Ramdass v. Commonwealth. From U.S. Sup. Ct. (on remand). Reconsideration of ruling that defendant was not entitled to instruct jury about his parole eligibility, in light of recent U.S. Supreme Court holding in Simmons v. South Carolina that defendants have right to inform jury about their parole eligibility in certain cases. Aff’d.


Scott v. Commonwealth. From Richmond Cir. Ct. Appeal of order sustaining demurrer in case involving constitutional challenge to public school funding formula. Aff’d.


Soullant v. Fauquier Co. From Fauquier Cir. Ct. Petition for writ of mandamus commanding court to hear petitioner’s grievance against zoning board. Dismissed.

Southwest Va. Training Ctr. v. Kyle. From Carroll Cir. Ct. Appeal of decision reinstating state employee/grievant in same position despite panel finding that employee had engaged in sexual harassment. Appeal denied.


Swann v. Commonwealth. From Danville Cir. Ct. Appeal of capital murder conviction and death sentence. Aff’d.

Terry v. Wilder. From Richmond Cir. Ct. Appeal of decision holding Governor lacked authority to terminate Attorney General’s representation of state agency. Rev’d and dismissed.


Virginia Retire. Sys. v. Little. From Richmond Cir. Ct. Appeal of trial court decision that retirement system and its board chairman violated Virginia Freedom of Information Act, arising from award of attorney’s fee. Aff’d.


Williams v. Commonwealth. From Cumberland Cir. Ct. Appeal of capital murder convictions and death sentences. Aff’d.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

BiChemicals v. Department of Tax’n. From Richmond Cir. Ct. Petition for appeal of case denying sales and use tax exemption for certain chemicals purchased by pharmaceutical manufacturer.

Carr v. Department of Tax’n. From Newport News Cir. Ct. Appeal of case denying sales and use tax exemption for publications.


Garraghty v. Williams. From Nottoway Cir. Ct. Appeal of dismissal of suit alleging infliction of emotional distress when defendant brought sexual harassment charge against plaintiff.


Giesecke v. Department of Tax'n. From Fairfax Cir. Ct. Appeal of case denying refund of taxes collected as result of denial of credit for unincorporated business tax paid to District of Columbia.

Gill v. Parsons. From Henrico Cir. Ct. Pro se inmate emergency petition for writ of mandamus commanding judge to issue writ of habeas corpus.


In re Billings. From Amherst Cir. Ct. Petition for writ of prohibition preventing judge from sitting on any cases involving petitioner.


In re Robertson. From Fairfax Cir. Ct. Petitions for writs of mandamus and prohibition vacating, and prohibiting enforcement of, court orders stemming from action for slander and libel.

Jefferson v. Commonwealth. From Chesapeake Cir. Ct. Interlocutory appeal of case denying motion to dismiss prosecution on double jeopardy grounds.


Kilgore v. Pethtel. From Wise Cir. Ct. Landowner’s inverse condemnation appeal arguing cause of action did not accrue for purposes of statute of limitations until landowner had knowledge of damage.

Largent’s Great Falls Stables v. Mickle. From Fairfax Cir. Ct. Petition for writ of mandamus or certiorari to have court quash motion to dismiss appeal and correct record on appeal.

Lewis v. Commonwealth. From Va. Ct. App. Appeal of defendant’s sentence received for convictions of cruelty to animals and operating kennel without license.


Point of Rocks Dev. Corp. v. Commonwealth Transp. Comm'r. From Chesterfield Cir. Ct. Appeal of decision holding that Point of Rocks failed to prove its damages as to cost of replacement dirt that court determined was converted by defendant.


Taylor v. Richmond Cir. Ct. From Richmond Cir. Ct. Pro se inmate petition for writ of mandamus to have court provide transcript of 1992 sentencing hearing.
West v. Commonwealth. From Fairfax Cir. Ct. Interlocutory appeal of case denying motion to dismiss prosecution on double jeopardy grounds.

Yeatts v. Murray. From Pittsylvania Cir. Ct. Appeal from denial of habeas corpus relief in capital murder case.

CASES IN THE SUPREME COURT OF THE UNITED STATES


AVIATION: MUNICIPAL AND COUNTY AIRPORTS AND OTHER AIR NAVIGATION FACILITIES.

Alleghany-Bath-Clifton Forge-Covington Joint Airport Authority may convey fee simple title in Ingalls Field property, real and personal, to Bath County without Alleghany County and cities of Clifton Forge and Covington having any equitable interest remaining in Ingalls Field or its property.

December 27, 1994

The Honorable R. Creigh Deeds
Member, House of Delegates

You ask whether the Alleghany-Bath-Clifton Forge-Covington Joint Airport Authority ("Joint Airport Authority" or "Authority") may convey fee simple title in the Alleghany-Bath-Clifton Forge-Covington Joint Airport ("Ingalls Field") to Bath County without Alleghany County and the cities of Clifton Forge and Covington having any equitable interest remaining in Ingalls Field.

I. Facts

One of the documents you provide reflects that on March 16, 1960, Alleghany and Bath Counties and the cities of Clifton Forge and Covington ("Localities") entered into a Joint Airport Agreement ("Agreement") to provide for the establishment and operation of Ingalls Field. Agr. sec. 4. The Agreement creates a Joint Airport Committee ("Committee") to be the governing board operating Ingalls Field. Id. sec. 2. Under the terms of the Agreement, the Committee acquired fee simple title to certain land in the name of the Localities equally and jointly to establish, construct and operate Ingalls Field. Id. sec. 5(a). In addition, the Agreement permits the Localities to withdraw from the Committee, with the proviso that any obligation of any of the withdrawing Localities shall remain outstanding until such time as it is discharged. Id. sec. 7.

On June 15, 1978, the Localities entered into an Agreement of Amendment ("Amendment") to the Agreement. The name of the governing body of Ingalls Field was changed from the Committee to the Joint Airport Authority. Amend. sec. I. Under the terms of the Amendment, the Joint Airport Authority is authorized to acquire land for Ingalls Field on behalf of the Localities. Id. sec. II. The Amendment also authorizes the Authority to exercise any other rights, powers and duties conferred on political subdivisions by Article 1, Chapter 3 of Title 5.1 of the Code of Virginia. Id. sec. III(3). Additionally, the Authority may apply for and receive federal grant payments in accordance with the Federal Airport Act. Id. sec. III(4). The Amendment also commits the Localities to vest in the Authority fee simple title
to all personal and real property held jointly in the name of the Localities that is used by, and under the control of, the Authority. Id. sec. IV.

By deed dated October 2, 1978, the Localities conveyed to the Joint Airport Authority the real estate and all personal property held by the Localities that is used by and under the control of the former Committee. Deed at 1. At the same time, the Authority assumed all obligations that the Localities had undertaken with the Federal Aviation Administration before 1978 relating to certain grants of federal funds for airport purposes.

Since 1978, the Joint Airport Authority has obtained five grants from the Federal Aviation Administration. In each instance, the chairman of the Authority has signed the grants, committing the Authority to use the grant money properly and to repay the grants if the airport ceases to operate.

II. Applicable Statutes

Article 1, Chapter 3 of Title 5.1, §§ 5.1-31 through 5.1-41.1, provides generally for the acquisition of land for the establishment and operation of municipal and county airports.

Section 5.1-31 provides:

All cities, incorporated towns and counties of the Commonwealth may acquire ... whatever land may be reasonably necessary for the purpose of establishing ... and operating airports for the use of airplanes[.]

The first sentence of § 5.1-35 provides:

All powers, rights, and authority granted to counties, cities, and towns under this article may be exercised and enjoyed jointly by any two or more of such political subdivisions within or without the territorial limits of either or any of them, or if one or more of such political subdivisions is a county, then within such county or one of such counties, and the political subdivisions so acting jointly may enter into such agreements with each other as may be necessary or proper for the exercise and enjoyment of the joint powers hereby granted, and for joint action in carrying out the general purposes of this article.

Section 5.1-36 provides:

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

III. Authority May Convey Title to Bath County Without Remaining Three Localities Having Any Equitable Interest In Either Ingalls Field or Its Property

Section 5.1-36 leaves the structure and the authority of the entity created pursuant to § 5.1-35 to the Localities that constitute the Joint Airport Authority. Section 5.1-36 also provides that the entity have the same but no greater powers than those granted to each of the participating political subdivisions in § 5.1-31.

The Amendment provides that the Localities vest fee simple title to all personal property and real estate held jointly in the name of said Localities in the Joint Airport Authority. Amend. sec. IV. In the deed dated October 2, 1978, the Localities conveyed fee simple title in the Ingalls Field property, real and personal, to the Authority. Deed at 1. The deed states that “[s]aid property herein conveyed ... shall be held and disposed of on behalf of the [Localities] as provided for by Article 1, Chapter 3, Title 5.1.” Id. at 2. There is no evident retention of any ownership rights or equitable interest by the individual jurisdictions.

In the Assumption Agreement dated October 2, 1978, the Localities make it clear that the Joint Airport Authority is to assume the obligations of the Localities to the Federal Aviation Administration undertaken to receive federal aid grants “as though the Authority were the party in privity with the Federal Aviation Administration under said instruments.” Assumption Agr. at 2. Since 1978, the Authority has obtained five grants from the Federal Aviation Administration. In each instance, the chairman of the Authority has signed the grants, committing the Authority to use the grant money properly and to repay the grants if the airport ceases to operate.
Based on the clear language of the documents you have provided, it is apparent that the Localities divested themselves of any interest in Ingalls Field or its property. Such divestiture is consistent with the provisions of § 5.1-36.

I am, therefore, of the opinion that the Joint Airport Authority, having been conveyed the Ingalls Field property to "hold and dispose of ... on behalf of" the Localities, has the authority to convey title in all of the property to Bath County without the other three Localities having any remaining equitable interest in Ingalls Field and its property. Section 5.1-36; see also Amend. sec. III(3).

These documents upon which I have relied in this opinion are: (1) Joint Airport Agreement of 3/16/60, between Alleghany and Bath Counties and the cities of Clifton Forge and Covington [hereinafter Localities]; (2) Deed of 8/22/60, between Virginia Hot Springs, Incorporated and Localities (recorded in Clerk's Off., Bath Co. Cir. Ct., Deed Book 69, at 106); (3) Agreement of Amendment of 6/15/78, between Localities for governing establishment and operation of Ingalls Field; (4) Deed of 10/2/78, between Localities and Joint Airport Authority (recorded in Clerk's Off., Bath Co. Cir. Ct., Deed Book 96, at 818); and (5) Assumption Agreement of 10/2/78, between Localities and Joint Airport Authority.

This additional fact has been obtained from the Commonwealth's Department of Aviation.

CIVIL REMEDIES AND PROCEDURE: CIVIL ACTIONS; COMMENCEMENT, PLEADINGS, AND MOTIONS - ACTIONS.

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

COURTS OF RECORD: CIRCUIT COURTS.

General district court may impose sanctions on creditor's attorney for filing motion for judgment and supporting affidavit stating amount debtor owes that, while correct at time pleadings signed, attorney knew to be incorrect at time of filing. Sanction compensating adverse party for expenses or attorney's fees incurred is civil matter appealable to circuit court. Circuit court may conduct de novo hearing to determine whether to impose sanction.

April 27, 1994

The Honorable S. Lee Morris
Judge, Portsmouth General District Court

You ask what action a general district court may take when, pursuant to § 16.1-88 of the Code of Virginia, a litigant or his attorney files a motion for
judgment and supporting affidavit stating an amount owed that is correct at the time
the pleading is signed, but that no longer is correct at the time of filing.

If a general district court is authorized by § 8.01-271.1 to impose a sanction
on the creditor or his attorney in the situation you describe, you ask whether that
sanction is civil or criminal in nature, whether such a sanction imposed by a general
district court on its own initiative may be appealed to the circuit court, and if such
a sanction may be appealed, whether the circuit court must hear evidence and con-
sider the sanction de novo.

I. Applicable Statutes

The first sentence of § 8.01-28 states:

In any action at law on a note or contract, express or implied, for the
payment of money ... if (i) the plaintiff files with his motion for judg-
ment or civil warrant an affidavit made by himself or his agent, stating
therein to the best of the affiant’s belief the amount of the plaintiff’s
claim, that such amount is justly due, and the time from which plaintiff
claims interest, and (ii) a copy of the affidavit together with a copy of
any account filed with the motion for judgment or warrant ... is served
on the defendant as provided in § 8.01-296 at the time a copy of the
motion for judgment or warrant is so served, the plaintiff shall be enti-
tled to a judgment on the affidavit and statement of account without
further evidence unless the defendant either appears and pleads under
oath or files with the court before the return date an affidavit or
responsive pleading denying that the plaintiff is entitled to recover from
the defendant on the claim.

Section 8.01-271.1 states:

Every pleading, written motion, and other paper of a party represented
by an attorney shall be signed by at least one attorney of record in his
individual name ....

The signature of an attorney or party constitutes a certificate by him
that (i) he has read the pleading, motion, or other paper, (ii) to the best
of his knowledge, information and belief, formed after reasonable
inquiry, it is well grounded in fact ... and (iii) it is not interposed for
any improper purpose ....

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

The first sentence of § 16.1-88 states:

If a civil action in a general district court is upon a contract, express or implied, for the payment of money ... an affidavit and a copy of the account if there be one ... may be made and served on the defendant in accordance with § 8.01-296 with the warrant or motion for judgment as provided in § 8.01-28 for actions at law, whereupon the provisions of § 8.01-28 shall be applicable to the further proceedings therein.

Section 17-123 establishes the jurisdiction of circuit courts, which shall have appellate jurisdiction of all cases, civil and criminal, in which an appeal, writ of error or supersedeas may, as provided by law, be taken to or allowed by such courts, or the judges thereof, from or to the judgment or proceedings of any inferior tribunal. They shall also have jurisdiction of all other matters, civil and criminal, made cognizable therein by law and when a motion to recover money is allowed in such tribunals, they may hear and determine the same, although it be to recover less than $100.

II. Facts

You describe a hypothetical situation to illustrate your question. A creditor executes and gives to his attorney an affidavit that conforms to §§ 16.1-88 and 8.01-28 by stating the sum owed to the creditor by a debtor. The affidavit is correct when signed. The attorney then prepares and signs (but does not file) a motion for judgment claiming the amount stated in the affidavit. The allegations of the motion for judgment are also true when the pleading is signed by the attorney.

Before the creditor’s attorney files the motion for judgment, the debtor makes a substantial payment to the creditor, a fact which the creditor communicates to his attorney. Nevertheless, the creditor’s attorney commences suit by filing the motion for judgment and supporting affidavit, although they no longer correctly reflect the amount “justly due.” Section 8.01-28(i).
III. Monetary Sanctions May Be Imposed for Filing Erroneous Motion for Judgment and Supporting Affidavit

Section 16.1-88 refers only to making and serving the affidavit on the debtor. By its terms, however, that section must be read in conjunction with § 8.01-28, which expressly requires that the plaintiff’s affidavit must show the amount “justly due” at the time of filing. Section 8.01-28(i). Thus, a creditor or creditor’s attorney who files a civil warrant or motion for judgment and accompanying affidavit that claims an amount greater than what the creditor or attorney knows the defendant justly owes has not complied with § 8.01-28.

Section 8.01-28, however, does not state any remedy for that noncompliance. Section 8.01-271.1 provides that remedy, by authorizing the court to impose a sanction for pleadings that a party or an attorney knows are not well grounded in fact. Although § 8.01-271.1 refers to certifying the factual basis for pleadings, written motions, or other papers by signing the paper, cases applying that section to papers filed with the court (as opposed to, for example, discovery between parties) use that signature requirement interchangeably with the term “filing.”

[Section] 8.01-271.1 ... provides authority for a court to order sanctions, including reasonable attorneys’ fees, against parties and attorneys who file pleadings or make motions “for any improper purpose ....”


These cases illustrate that, while a signature on a court paper certifies that the paper complies with § 8.01-271.1, sanctions may be imposed under that section, either for filing a noncomplying pleading with the court or for serving an inappropriate pleading or discovery request on an opposing party. The General Assembly’s choice of the language requiring a paper to be “signed” rather than “filed” reflects the intent that § 8.01-271.1 cover more than just those papers that are filed with the court. At the same time, as a prior opinion of the Attorney General indicates, the signature requirement prevents imposition of sanctions under the statute for mere inaction on the part of a litigant or his attorney. *See 1990 Op. Va. Att’y Gen. 24, 25* (“Section 8.01-271.1 imposes sanctions only for statements affirmatively made—either by signed pleading or oral motion—and not for inaction.”).
Based on the above, it is my opinion that the attorney in your hypothetical situation has violated both §§ 8.01-28 and 8.01-271.1, and that sanctions under § 8.01-271.1 may be imposed on him for the filing of a motion for judgment and supporting affidavit that he knew to be incorrect when filed.¹

IV. Sanction Imposed Under § 8.01-271.1 Is Civil Matter

Independent Appealable de Novo to Circuit Court

Section 8.01-271.1 is in the title of the Code addressing matters of civil procedure. Moreover, a sanction imposed under that section is not a fine or civil penalty payable to the Commonwealth, but a payment to the adverse party in the nature of compensation for expenses or attorney’s fees incurred. Accordingly, it is my opinion that a sanction under § 8.01-271.1 is a civil matter.

Section 17-123 gives circuit courts appellate jurisdiction over not only all cases, civil and criminal, in which an appeal may be taken from inferior tribunals, but also over “all other matters, civil and criminal, made cognizable” in those inferior tribunals, and specifically authorizes the circuit courts to hear and determine motions to recover money allowed in inferior tribunals, even when the amount is less than $100. Accordingly, the appellate jurisdiction of circuit courts is not subject to the same $100 minimum amount as the original jurisdiction of such courts. In my opinion, therefore, § 17-123 authorizes a circuit court to hear an appeal of a general district court order imposing a sanction under § 8.01-271.1, even when the sanction imposed is less than $100.

Because the general district court is a court not of record, and because § 17-123 provides that circuit courts “may hear and determine” any matter cognizable in an inferior tribunal, it is further my opinion that a circuit court considering the appeal of a sanction imposed by a general district court may conduct a de novo hearing and make its own determination about whether the sanction should be imposed.

¹Another prior opinion of the Attorney General states that a party represented by counsel also may be sanctioned for a violation of § 8.01-271.1. See 1989 Op. Va. Att’y Gen. 22, 23. In your hypothetical situation, the plaintiff promptly communicated the fact of the defendant’s payment to the plaintiff’s attorney. The appropriateness of a sanction against the plaintiff himself in that situation would depend, in part, on whether, at the time of the debtor’s payment, the plaintiff knew that his attorney had not yet filed the affidavit and the motion for judgment with the court.
CIVIL REMEDIES AND PROCEDURE: GENERAL PROVISIONS AS TO CIVIL CASES.

COURTS NOT OF RECORD: DISTRICT COURTS.

CONSTITUTION OF VIRGINIA: JUDICIARY.

COUNTIES, CITIES AND TOWNS: GENERAL - GENERAL PROVISIONS; CERTAIN POWERS.

MOTOR VEHICLES: LICENSURE OF DRIVERS.

Decision whether to prosecute misdemeanor violations of state law left to discretion of Commonwealth’s attorney; Norfolk city attorney has same discretionary authority over prosecution of misdemeanor city ordinance violations. General district court judge not authorized to override such statutory authority by adopting rule to require either Commonwealth’s attorney or city attorney, or one of their assistants, to appear daily in court to review and prosecute citizen-initiated misdemeanor complaints.

October 3, 1994

The Honorable Charles R. Cloud
Judge, Norfolk General District Court

You have sent to my Office a proposed “decision” in which you recite various concerns about the prosecution of misdemeanor cases in your court, particularly in those cases when the misdemeanor warrant has been issued by a magistrate in response to a complaint from a private citizen. This document you have asked me to review addresses numerous subjects, including what you perceive to be inadequate or improper performance by the Commonwealth’s attorney’s office and city attorney’s office with regard to these misdemeanor prosecutions, most of which are not appropriate subjects to be addressed in an opinion of the Attorney General.1 2 Limiting this response to the only issue presented by your proposed decision on which I properly can render an opinion, I will address whether, as a general district court judge in Norfolk, you have the authority to establish procedures requiring either the Commonwealth’s attorney or the city attorney to assign lawyers from their respective staffs to appear daily in your court to screen citizen-initiated misdemeanor cases and determine whether to participate in prosecuting each such case, and, at your direction, to articulate the reasons for making those determinations.

I. Applicable Constitutional and Statutory Provisions

Article VI, § 5 of the Constitution of Virginia (1971) states:
The Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedures to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.

Section 8.01-3 of the Code of Virginia addresses the rule-making authority of the Supreme Court of Virginia. The last sentence of § 8.01-3(D) states:

In the case of any variance between a rule and an enactment of the General Assembly such variance shall be construed so as to give effect to such enactment.

Section 15.1-8.1(B) provides, in part:

The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duty and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging felony and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $500 or more, or both such confinement and fine.

Section 16.1-69.32 authorizes the Supreme Court to formulate rules of practice and procedure for general district courts, and states:

Such rules ... shall be the only rules of practice and procedure in all the district courts in the Commonwealth ....

Section 46.2-385 gives judges express authority to compel Commonwealth’s attorneys or city attorneys to appear and prosecute certain specific traffic offenses reportable to the Department of Motor Vehicles under § 46.2-382.

Section 53 of the charter for the city of Norfolk provides that the city attorney “shall be the prosecuting attorney for the prosecution of the violation of city ordinances.” Ch. 34, 1918 Va. Acts 31, 55.
II. District Court Is Not Authorized to Impose Rule Requiring
Commonwealth’s Attorney or Assistant to Appear
Daily in Court and Screen Misdemeanors for Prosecution

Prior opinions of the Attorney General conclude that § 15.1-8.1(B) leaves the
decision whether to prosecute misdemeanors entirely to the discretion of the
1987-1988 at 176, 179; see also 1981-1982 Op. Va. Att’y Gen. 78. As one of these
opinions notes, the decision of the Commonwealth’s attorney not to appear in such
cases may be based on staffing considerations or other factors that do not necessarily
supra.

The Supreme Court of Virginia has held that courts of general jurisdiction
may adopt rules of practice, but that such rules “must not contravene the Constitu-
tion or statutes, or affect substantive law.” Raiford v. Raiford, 193 Va. 221, 224,
68 S.E.2d 888, 890 (1952). In Raiford, the Court upheld the Norfolk law and chan-
cery court’s adoption of a rule requiring reference of divorce cases to commissioners
in chancery. In Virginia, the courts of general jurisdiction are the circuit courts, or
their predecessor courts of record that were designated by other names, including the
law and chancery courts that formerly existed in Norfolk and some other cities. See
§ 17-116.1. Thus, Raiford does not really address whether district courts have simi-
lar rule-making authority.

Section 16.1-69.32 strongly implies that district courts do not have such
authority, by stating that the district court rules promulgated by the Supreme Court
are “the only rules of practice and procedure in all the district courts.” Even assum-
ing that general district courts retain some residual, inherent rule-making authority,
any rule made under that authority would have to be consistent with constitutional
and statutory requirements. VA. CONST. art. VI, § 5; § 8.01-3(D); Dorn v. Dorn,
222 Va. 288, 291, 279 S.E.2d 393, 394-95 (1981) (Supreme Court Rule allowing
trial court to modify or vacate judgment within 21 days of entry “and no longer”
could not limit authority granted trial court by statute to correct clerical error in
judgment at any time); Raiford v. Raiford, 193 Va. at 224, 68 S.E.2d at 890.

Section 46.2-385 gives judges express authority to compel Commonwealth’s
attorneys or city attorneys to appear and prosecute certain specific traffic offenses.
Under well-accepted principles of statutory construction, when a statute creates a
specific grant of authority, that power exists only to the extent plainly granted by the
statute. 1991 Op. Va. Att’y Gen. 91, 93 (juvenile court judge may not order tem-
porary detention of juveniles in any circumstances except those expressly provided
in statute). The mention of one thing in a statute implies the exclusion of another.
presence of this specific authority in § 46.2-385 to compel the presence of the Commonwealth’s attorney for misdemeanor prosecutions in limited instances strongly implies that courts do not have the authority to do so more generally.\(^5\) It is my opinion, therefore, that a general district court does not have the authority to override the statutory discretion conferred by § 15.1-8.1(B) on the Commonwealth’s attorney for its jurisdiction by adopting a rule to require the Commonwealth’s attorney or one of his assistants to appear in that court daily to review and prosecute citizen-initiated misdemeanor complaints.

III. Norfolk City Attorney Exercises Discretionary Authority of Commonwealth’s Attorney in Prosecution of City Ordinance Violations

Section 53 of the Norfolk charter, significantly, does not say that the city attorney “shall prosecute” every city ordinance violation; it merely provides that he shall “be the prosecuting attorney” for that purpose. 1918 Va. Acts, supra Pt. 1, at 55. There is nothing in that charter provision to indicate that the General Assembly intended the city attorney to have any less discretion over the prosecution of city ordinance violations than the Commonwealth’s attorney would have in comparable cases.\(^6\) In a 1975 case, the Supreme Court of Virginia treated the Norfolk city attorney as having the same degree of prosecutorial discretion with regard to a city ordinance violation that the Commonwealth’s attorney would have for a comparable violation of state law. See Hensley v. City of Norfolk, 216 Va. 369, 373, 218 S.E.2d 735, 739 (1975) (in case involving violation of Norfolk criminal ordinance “prosecutor,” who was city attorney, had discretion to decide under which of several applicable statutes defendant would be charged).

In my opinion, therefore, in Norfolk’s charter, the General Assembly has given the Norfolk city attorney the same discretionary authority over prosecution of misdemeanor city ordinance violations that § 15.1-8.1(B) confers on the Commonwealth’s attorney over comparable misdemeanor violations of state law. Accordingly, for the reasons discussed in Part II above, it is my opinion that a general district court judge does not have the authority to adopt a rule requiring the city attorney or a member of his staff to appear in that court daily to review and prosecute citizen-initiated misdemeanor charges.

\(^1\)Abuses of prosecutorial discretion are matters covered by the Virginia Code of Professional Responsibility developed by the Virginia State Bar and adopted as Part 6, § II of the Rules of Supreme Court of Virginia. See id. Canon 8, DR8-102 (“Special Responsibilities of a Prosecutor or Government Lawyer”). Historically, Attorneys General have declined to render opinions on questions of legal ethics that require application or interpretation of the Code of Professional Responsibility, because that is a matter reserved by the Supreme Court Rules to the State Bar itself. See id. Pt. 6, § IV, paras. 10, 13 (detailing procedures for issuance of legal ethics opinions and
for disciplining attorneys); see also 1990 Op. Va. Att’y Gen. 18, 21 n.2 (Attorney General traditionally does not issue opinions on questions of legal ethics).

Moreover, the Office of the Attorney General does not supervise either Commonwealth’s attorneys or city attorneys. Commonwealth’s attorneys are independently elected constitutional officers responsible directly to the voters of their localities. They may be removed from office only by the procedures detailed in §§ 24.2-230 through 24.2-238 of the Code of Virginia for removal of an elected official. City attorneys, as appointed officers, are accountable to, and may only be removed by, the person or authority appointing them. See § 24.2-230. Norfolk’s city attorney is appointed by the city council, and may be removed only by that body. Accordingly, neither a general district court judge nor the Attorney General has any statutory jurisdiction to evaluate the performance of either of these officials, or to direct the manner in which they perform their official duties.

I have received no similar expressions of concern from any of the five other judges in the Norfolk General District Court, or from any of Norfolk’s four juvenile court judges or nine circuit court judges. Even if it were appropriate for the Attorney General to comment on the performance of a Commonwealth’s attorney or city attorney, I would be reluctant to do so on the basis of personal observations of only one of the nineteen judicial officers before whom those officials and their staff attorneys regularly appear.

The Supreme Court was careful to note that this rule of practice was not adopted by the Norfolk court in isolation, but had been similarly adopted by the courts in several other judicial circuits following a recommendation by the annual meeting of the Virginia State Bar. Raiford v. Raiford, 193 Va. 224-25, 68 S.E.2d at 890-91.

Whatever rule-making authority any court may have, that authority presumably would not rest with a single judge acting independently, but would have to be exercised by the several judges of that court acting in concert, or by the chief judge, under some statute giving him administrative authority over the court’s operations.

Section 16.1-232 formerly gave juvenile courts the authority to require Commonwealth’s attorneys to appear and prosecute particular cases or classes of cases in those courts. A 1991 amendment to that section, however, now leaves that decision to the Commonwealth’s attorneys’ discretion. See Ch. 262, 1991 Va. Acts Reg. Sess. 365. This change is a further legislative recognition of the growing burden of felony prosecutions and the need for prosecutors to give priority to those cases in the assignment of staff.

Under § 15.1-901, notwithstanding any charter provision to the contrary, penalties for violations of municipal ordinances may not exceed the penalty provided by law for violation of Class I misdemeanors, nor may they exceed the penalties prescribed for like offenses under state law.

COMMERCIAL CODE—SECURED TRANSACTIONS: FILING.

Proper filing of continuation statement extends effectiveness of Uniform Commercial Code financing statement for five-year period beginning on fifth anniversary of date of original financing statement filing. Same conclusion applies to subsequent continuation statements.

March 4, 1994
You ask whether the five-year extension of a Uniform Commercial Code financing statement created by filing a continuation statement under § 8.9-403 of the Code of Virginia begins on the date the continuation statement is filed, or on the fifth anniversary of filing the original financing statement.

I. Applicable Statutes

Section 8.9-403, a part of the Uniform Commercial Code ("UCC"), details the procedures for filing financing statements to perfect security interests in personal property. Section 8.9-403(2) makes an original financing statement effective for five years from the date it is filed. The effectiveness of a financing statement may be extended by filing a continuation statement before the original statement lapses. Section 8.9-403(3) provides, in part:

Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. [Emphasis added.]

II. Effective Date of Continuation Statement Is Fifth Anniversary of Original Financing Statement

There is no reported Virginia court decision or prior opinion of the Attorney General that addresses your question. Court decisions of two nearby states, however, have commented on the effective period for UCC continuation statements. The Supreme Court of Appeals of West Virginia has noted that "(t)he effective period of an initial financing statement may be extended for successive five-year periods by timely filing continuation statements." Daniel v. Stevens, 183 W. Va. 95, 98 n.4, 394 S.E.2d 79, 82 n.4 (1990) (citing W. VA. CODE § 46-9-403(3) (1974)) (emphasis added). Similarly, the Supreme Court of Pennsylvania has said that "the effectiveness of the original financing statement is continued for an additional five-year period." Heights v. Citizens National Bank, 463 Pa. 48, 56, 342 A.2d 738, 741 (1975) (citing 12A PA. STAT. ANN. § 9-403(3)) (emphasis added).

The terms "successive" and "additional" do not appear in the relevant part of § 8.9-403(3) or the corresponding West Virginia or Pennsylvania statutes. By using the terms "successive" or "additional" in describing their statutes, however, these other courts clearly have concluded that, when added to the original five-year term, the continuation statement extends the security through the tenth full year. This can
occur only if the continuation statement becomes effective on the fifth anniversary of the effective date of the original financing statement.

One leading commentary on the UCC states:

Upon a proper filing of a continuation statement, the duration of the original financing statement is continued for five years after the last moment that the original financing statement was effective. Thus, if the original financing statement was effective for five years and the continuation statement was filed six months before that effectiveness would lapse, the total period of perfection would be ten years (not nine and one-half years), whereupon it would lapse unless another continuation statement was filed prior to such lapse.


Based on the above, it is my opinion that a continuation statement filed under § 8.9-403(3) extends the effectiveness of a financing statement for a five-year period beginning on the fifth anniversary of the date the original financing statement was filed.¹

¹Under the language in § 8.9-403(3) cited above, the same conclusion applies to subsequent continuation statements. A subsequent continuation statement extends the security interest for a five-year period beginning on the date the prior continuation statement lapses.

CONSTITUTION OF VIRGINIA: EDUCATION.

ADMINISTRATION OF GOVERNMENT GENERALLY: ADMINISTRATIVE DEPARTMENTS GENERALLY — GOVERNOR.

APPROPRIATION ACT.

EDUCATION: BOARD OF EDUCATION — STANDARDS OF QUALITY — SCHOOL PROPERTY — LITERARY FUND — SPECIAL EDUCATION — PROGRAMS, COURSES OF INSTRUCTION, ETC. — TEACHERS, OFFICERS AND EMPLOYEES — SUPERINTENDENT OF PUBLIC INSTRUCTION.

Board of Education serves as Virginia's “state educational agency” for purposes of recently adopted federal Goals 2000: Educate America Act. Statutory limitations on Board's authority to unilaterally apply for and expend grants and to communicate with
federal government about Act; Board may take those actions in coordination with rules and regulations promulgated by, and at policy direction of, Governor, and subject to appropriation act.

June 20, 1994

Mr. James P. Jones
President, Board of Education

You ask whether the Board of Education is Virginia’s “state education agency” for purposes of the recently adopted federal Goals 2000: Educate America Act.

I. Applicable Constitutional and Statutory Provisions

A. Federal Goals 2000: Educate America Act

Approved on March 31, 1994, the Goals 2000: Educate America Act, 20 U.S.C.A. ch. 68 (Supp. Pamph. No. 2 1994) (the “Act”), seeks to provide a comprehensive framework for promoting safe schools and national education reforms by the year 2000. The Act authorizes federal funding for various programs including grants under Title II of the Act and allotments to states under Title III of the Act. See 20 U.S.C.A. §§ 5849, 5850, 5871, 5883, 5884(b). A state’s application for allotments and grants under the Act must be made by its respective “state educational agency” (“SEA”). See 20 U.S.C.A. §§ 5850, 5885, 5891(e)(4), 5893(a). The SEA has primary responsibility for administering the Act, including developing and implementing “a State improvement plan for the improvement of elementary and secondary education in the State.” 20 U.S.C.A. § 5886(a). This state plan must be “developed by a broad-based State panel in cooperation with the [SEA] and the Governor.” Section 5886(b)(1).1 The plan must contain proposed strategies for meeting national education goals, including, among other matters, strategies for improving teaching skills and learning opportunities, for improving governance, accountability and management of the state’s education system, and for assisting local educational agencies in reducing drop-out rates. See § 5886(d)-(i).

Before submitting the proposed state improvement plan to the federal Secretary of Education for approval and funding, the SEA is responsible for ensuring that all state approvals necessary for implementation are obtained. See § 5886(b)(8). The SEA is also responsible for periodic review of the plan and reporting to the Secretary of Education, including reporting “the progress of local educational agencies in meeting local goals and plans and increasing student learning.” 20 U.S.C.A. § 5892(a)(3); see also § 5886(o)-(p). The SEA also must review and approve applications for subgrants sought by local school divisions. See 20 U.S.C.A. § 5889.
In defining an SEA, § 5802(a)(6) of the Act incorporates the definition in “section 2891 of this title.” That definition states: “‘State educational agency’ means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools.” 20 U.S.C.A. § 2891(23) (West 1990).

B. State Constitutional and Statutory Provisions

Article VIII, § 1 of the Constitution of Virginia (1971) places ultimate authority and responsibility for Virginia’s public school system in the General Assembly of Virginia. Article VIII, § 4 states that “[t]he general supervision of the public school system shall be vested in a Board of Education.” Article VIII, § 2 further states, in part, that “[s]tandards 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.”

Article VIII, § 5(b) also establishes the Board of Education as the agency responsible for annually reporting to the Governor “concerning the condition and needs of public education in the Commonwealth.” Section 5(e) provides: “Subject to the ultimate authority of the General Assembly, the Board [of Education] shall have primary responsibility and authority for effectuating the educational policy set forth in this Article ....”

Section 2.1-3 of the Code of Virginia provides:

Any department, agency, bureau or institution of this Commonwealth may accept grants of funds made by the United States government, or any department or agency thereof, to be applied to purposes within the functions of such state department, agency, bureau or institution, and may administer and expend such funds for the purposes for which they are granted.

With respect to official communications on behalf of the Commonwealth to the federal government, § 2.1-38.2 provides:

The Governor may promulgate rules and regulations for coordination of official communications on behalf of the Commonwealth by any officer, agency or employee of the Commonwealth with the government of the United States, and other and foreign states. Subject to the ultimate authority of the General Assembly to prescribe the policies of the Commonwealth and within the framework of policy established by the General Assembly, all such communications shall be at the policy direction of the Governor; provided, however, that communications by the General Assembly or the Supreme Court of Virginia with
the legislature or the judiciary, respectively, of the United States, or other and foreign states shall be at the discretion of the General Assembly and the Supreme Court of Virginia. Actions taken under § 2.1-3 shall be subject to the provisions of this section.

The general appropriation act for the 1994–1996 biennium contains the following provisions:

§ 4-1.05 APPROPRIATION INCREASES

* * *

b. UNAPPROPRIATED NONGENERAL FUNDS:

* * *

3. Gifts, Grants and Other Nongeneral Funds:

a) Subject to §§ 4-1.02.a., 4-1.03.b., 4-1.04.b.1. and the conditions stated in this section, the Director of the Department of Planning and Budget is hereby authorized to increase the appropriations to any state agency by the amount of the proceeds of donations, gifts, grants or other nongeneral funds paid into the state treasury in excess of such appropriations. Such appropriations shall be increased only when the expenditure of funds is required to:

* * *

6) participate in a federal or sponsored program[.]

* * *

§ 4-2.01 NONGENERAL FUND REVENUES

a. SOLICITATION AND ACCEPTANCE OF DONATIONS, GIFTS, GRANTS, AND CONTRACTS:

1. No state agency shall solicit or accept any donation, gift, grant, or contract without the written approval of the Governor except as provided below.

2. The Governor may issue policies in writing for approval procedures which:
a) allow state agencies on the authority of the agency head to solicit and accept nongeneral funds within the amounts appropriated to the agency for such funds;

b) allow state agencies to solicit and accept nongeneral funds in excess of appropriated amounts for such nongeneral funds[.]

* * *

§ 4-11.00 CONFLICT WITH OTHER LAWS

This act shall prevail over all other laws of the Commonwealth which may be in conflict therewith until July 1, 1996, at which time this act shall expire.


II. Board of Education Serves as SEA for Purposes of Act; Grant Applications Are Subject to Governor’s Approval

The Act itself does not specify the state officer or agency that will constitute the SEA. By incorporating the earlier definition from a 1965 federal statute, the Act responsibly defers to each state’s law and policy to determine the “officer or agency primarily responsible for the State supervision of public elementary and secondary schools.” 20 U.S.C. § 2891(23).

In Virginia, there is shared responsibility for the administration and supervision of the public school system. Article VIII, § 1 places ultimate responsibility for public education in the General Assembly; however, the Board of Education, the State Superintendent of Public Instruction, local school division superintendents and local school boards have substantial constitutional and statutory responsibilities and powers regarding Virginia’s public schools. Article VIII, §§ 2, 4, 5; see generally Title 22.1. Article VIII, § 4 designates the Board of Education as the state agency responsible for “general supervision” of the public schools.3

Based on that constitutional designation, it is apparent that the Board of Education is the appropriate entity to serve as Virginia’s SEA under the Act. Under § 2.1-38.2, however, any communications between the Board of Education and the federal government with respect to the Act must be coordinated under the rules and regulations promulgated by the Governor for such communications, and are subject to the policy direction of the Governor.3 Although § 2.1-3 reflects the Board general authority to accept federal grants, that section is expressly limited by § 2.1-38.2. Moreover, the appropriation act, which by its own terms overrides other statutes,
prohibits any agency from soliciting or accepting any grant without the Governor's written approval, except as the Governor may have permitted in written policies and procedures. See §§ 4-2.01(a)(1)-(2), 4-11.00, 1994 Va. Acts, supra, at 2365-66, 2391. The appropriation act further requires that the Director of Planning and Budget authorize an increased appropriation for education, to permit the Board of Education to expend any previously unappropriated federal funds received under the Act. See §§ 4-1.05(b)(3)(a)(6), 1994 Va. Acts, supra, at 2363.

In my opinion, therefore, because of the statutory limitations on the authority of the Board of Education to apply for and expend grants and otherwise to communicate with the federal government, as a matter of state law, that Board may not take those actions unilaterally, even though they are assigned to the SEA under the Act. The Board may, however, take those actions, acting as the SEA, in coordination with the Governor, and subject to his authority under § 2.1-38.2 and the appropriation act.

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1The panel must include the Governor and the chief state school officer (in Virginia, the State Superintendent of Public Instruction) or their designees, chairpersons of the state board of education and appropriate authorizing committees of the state legislature, teachers, principals and administrators, etc. The Governor and chief state school officer appoint half the members of the panel and jointly select its chair. See 20 U.S.C.A. § 5886(b)(1)-(2).

2In addition to its general statewide supervisory responsibility, the Board of Education is also statutorily responsible for enforcing the legally prescribed educational “standards of quality” in all school divisions (§ 22.1-253.13:8); for the accreditation of public elementary, middle and high schools (§ 22.1-19); for setting minimum standards governing construction of public school facilities (§ 22.1-138); for administration of the Literary Fund (§ 22.1-146); for establishment of standards and supervision of the special education program (§ 22.1-214); for approval of vocational education projects (§ 22.1-231); for approval of textbooks (§ 22.1-238); for prescribing requirements for licensure of teachers (§ 22.1-298); and for establishing the teacher grievance procedure (§ 22.1-308).

3The General Assembly, however, retains final authority to determine the Commonwealth’s participation in federal programs. See, e.g., § 22.1-227 (designating Board of Education as responsible entity to carry out provisions of federal Vocational Education Act of 1963, as amended); § 22.1-24 (designating State Superintendent of Public Instruction as the SEA responsible for administering federal National School Lunch Act).

4The Board of Education may delegate authority to the State Superintendent of Public Instruction to administer the ongoing responsibility imposed by the Act, including obtaining all necessary approvals required by state law. Section 22.1-23(4). But see 1991 Op. Va. Att’y Gen. 154, 155 (Board of Education may not however delegate its state constitutional responsibility for standards of quality program).

5This opinion is limited only to the respective roles of the Board of Education and the Governor under the Act in question. It should not be viewed as controlling for every federal program. The federal statutory language and the impact of federal policy on important state interests may vary for each federal program.
Tuition voucher program that generally benefits all students, including those attending sectarian schools, might withstand federal constitutional challenge if (1) program has clear secular purpose, (2) has principal or primary effect that neither advances nor inhibits religion, and (3) avoids excessive entanglement with religion. Virginia's Constitution imposes stricter provisions requiring separation of church and state than first amendment concerning state government relationship to religion. In formulating policies that aid private education, General Assembly must be cognizant of responsibility to public school system and of obligation to provide quality public education program in manner consistent with equal protection clause of federal constitution's 14th amendment. Virginia Constitution does not prohibit tuition grants to further education of nonsectarian private school students; does prohibit state aid to sectarian private school students through tuition grants or vouchers.

January 10, 1994

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

You ask whether there are federal or state constitutional barriers to a statewide "voucher" program that would direct financial assistance to parents subsidizing the cost of educating their children in private sectarian and nonsectarian schools in Virginia. You ask further whether any such constitutional barriers would apply if the voucher program was funded exclusively through local appropriations.

I. Applicable Constitutional Provisions

A. Federal Constitution

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."

Section 1 of the Fourteenth Amendment further provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws."

B. Virginia Constitution

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.

Article VIII, § 1 requires that “[t]he General Assembly shall provide for a system of free public elementary and secondary schools ... throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.”

Article VIII, § 10 provides:

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; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; ... third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district.
The first sentence of Article VIII, § 11 states:

The General Assembly may provide for loans to, 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. Federal Constitution Would Not Prohibit Properly Designed Voucher Program Aiding All Students, Including Those in Sectarian Schools

The formulation of educational policies and determination of the appropriate means of state support for education largely are matters of state sovereignty, circumscribed only by the individual liberties protected in the federal Bill of Rights and applicable state constitutional and statutory standards. A legislative decision to include assistance to students attending sectarian schools in any voucher plan would implicate both the federal constitutional prohibition against laws respecting establishment of religion and state constitutional restrictions against state aid to religious organizations, but it is not clear that the result would be the same under both constitutions.

The establishment clause of the First Amendment to the Constitution of the United States generally requires that governmental action affecting religious organizations (1) have a clear secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) avoid excessive entanglement with religion. **Lemon v. Kurtzman**, 403 U.S. 602, 612-13 (1971). Applying these three “**Lemon** criteria,” the Supreme Court of the United States generally has upheld governmental grant programs that benefit religion only indirectly and incidentally, in pursuit of legitimate nonsectarian policies, and that avoid undue governmental entanglement in religious affairs. For example, in **Mueller v. Allen**, infra note 3, the Supreme Court of the United States upheld a state statute that allowed state income taxpayers to deduct expenses for tuition, textbooks and transportation incurred in sending their children either to public schools or to private nonsectarian or sectarian schools. Importantly, these tax deductions were available to all parents, not just those who attended private nonsectarian or sectarian schools. **Id.** at 395-402. The Court also decided that the state’s involvement in this program through governmental audits of claimed deductions, and the resulting disallowance of deductions for textbooks used to teach religious doctrines, did not constitute “excessive entanglement” with religion. **Id.** at 403.

You have not detailed any specific proposal for a voucher program, and the decision of the federal courts undoubtedly would depend on such specific details.
Existing United States Supreme Court decisions suggest, however, that a tuition voucher program that generally benefits all students, including those attending sectarian schools, might withstand a federal constitutional challenge if it were tailored to fit the Lemon criteria and thus be consistent with the establishment clause of the First Amendment. A federal court finding that such a program is constitutional, however, does not dictate that the same result will hold when the program is examined in light of stricter state constitutional provisions requiring separation of church and state.

III. Virginia Constitution Creates Stricter Separation of Church and State than Establishment Clause of First Amendment

A “higher wall” of church/state separation has long been recognized in Virginia: “No State has more jealously guarded and preserved the questions of religious belief and religious worship as questions between each individual [person] and his Maker than Virginia.” Jones v. Commonwealth, 185 Va. 335, 343, 38 S.E.2d 444, 448 (1946). “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, infra note 7, at 303. The historic prominence of Virginia in the solidification of this nation’s separation between church and state was saluted by Justice Hugo Black in Everson, infra note 1:

No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights’ provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

330 U.S. at 11.

IV. Virginia Constitution Does Not Prohibit Aid to Students in Nonsectarian Private Schools

This stricter separation of church and state under Virginia law is reflected in the decision of the Supreme Court of Virginia in *Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955). In that case, the General Assembly had appropriated funds for tuition grants to the parents or guardians of war orphans attending private sectarian or nonsectarian schools. The Court held that this scheme violated §§ 16, 58, 67 and 141 of the Constitution of Virginia (1902), as in effect in 1955.¹

The decision in *Almond v. Day* was based on two grounds. The Court first held that former § 141 prohibited an appropriation of public funds to both sectarian and nonsectarian private schools, regardless of whether the appropriation was made directly to the institutions or to the parents of children attending the institutions. The Court further held that, to the extent these tuition grants were authorized for children attending sectarian schools, the appropriation also violated the basic state law guarantee of “complete separation of Church and State in civil affairs” in former §§ 16, 58 and 67 of the Constitution. 197 Va. at 429, 89 S.E.2d at 858. The Court concluded that constitutional amendments would be needed before public funds could be used, even to support students attending nonsectarian private schools. 197 Va. at 431, 89 S.E.2d at 859.

The constitutional provisions considered by the Court in *Almond v. Day* currently are contained in Articles I, IV and VIII of the Constitution of Virginia. Former §§ 16 and 58 are combined into § 16 of Article I, and former § 67 is presently § 16 of Article IV. These present sections do not differ in substance from former §§ 16, 58 or 67, as in effect at the time of the *Almond v. Day* decision. Former § 141, however, is now § 10 of Article VIII.

Following a constitutional convention held in March 1956 for the sole purpose of proposing amendments to former § 141, that section was amended to include the present language in Article VIII, § 10, authorizing the appropriation of funds for educating Virginia students in nonsectarian private schools. No further changes were made in the language of former § 141 when it was adopted as § 10 of Article VIII of the 1971 Constitution.

The 1956 amendment to former § 141 negated that part of the decision in *Almond v. Day* that held unconstitutional tuition grants in aid of education of Virginia students in nonsectarian private schools. As a result, current Article VIII, § 10 expressly authorizes state and local aid¹⁰ for the education of Virginia students in
nonsectarian private schools. Accordingly, it is my opinion that the Constitution of Virginia does not prohibit tuition grants in furtherance of the education of Virginia students in such nonsectarian private schools.

In formulating policies in aid of private education, the General Assembly must, however, be cognizant of its responsibility to the public school system and its obligation to provide a quality public education program. See Art. VIII, §§ 1-2. Moreover, the program must be adopted and implemented in a manner consistent with the equal protection clause of the Fourteenth Amendment to the United States Constitution. Arbitrary classifications and invidious discrimination in purpose or effect will render any program constitutionally suspect. This issue is especially sensitive, because the 1956 amendment to former § 141 initially was adopted, at least partially if not primarily, in response to United States Supreme Court desegregation rulings. See Preface, JOURNAL OF THE CONSTITUTIONAL CONVENTION TO REVISE AND AMEND SEC. 141 OF THE CONSTITUTION OF VIRGINIA (1956). In fact, much of the debate at the 1969 Extra Session centered on whether § 141, as amended in 1956, was unconstitutional under federal court rulings relating to the closing of the public schools in Prince Edward County and the providing of tuition grants to enable children to attend private schools. See, e.g., PROCEEDINGS AND DEBATES OF THE HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 288-303 (Ex. Sess. 1969); see also Griffin v. School Board, 377 U.S. 218 (1964) (district court has power to enjoin county from paying tuition grants or giving tax exemptions for attending private schools, as long as public schools remain closed). Moreover, school divisions currently operating under federal desegregation decrees might be required to seek federal court approval if the voucher program, as implemented in those localities, would impact pupil enrollment or other court-ordered criteria. See Board of Ed. of Oklahoma City v. Dowell, 498 U.S. 237 (1991) (previously segregated school districts must eliminate, to extent practicable, lingering vestiges of its prior segregation); see also Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 1981) (prohibiting discrimination on basis of race, color or national origin in “any program or activity receiving Federal financial assistance”).

V. Virginia Constitution Does Prohibit State and Local Aid to Students Attending Sectarian Schools

The Almond Court expressly declined to apply the reasoning of federal case law that might have upheld indirect support of sectarian schools through “vouchers” or tuition grants under the “child benefit” theory formulated by the United States Supreme Court beginning in Everson. See infra note 1. Instead, the Almond Court held that, even though the tuition voucher payments authorized by the General Assembly would be distributed to parents directly, they impermissibly would afford “direct and substantial” aid to religion. “[T]he parent or guardian to whom the tuition fees are paid is merely the conduit or channel through whom the aid from the
State to the school is transmitted. Such natural and reasonable effect of the appropriation is proof of its invalidity." 197 Va. at 428, 89 S.E.2d at 857.

Although the 1956 amendment to former § 141 that followed Almond negated that decision's result concerning state aid to students in nonsectarian private schools, that amendment did not affect the decision's impact on state aid to sectarian private school students, because the added language expressly mentioned only the nonsectarian school students. Under accepted rules of statutory construction, the mention of one thing implies the exclusion of another. See Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982).

The 1969 Commission on Constitutional Revision discussed further amending former § 141 so that “aid might go to children in sectarian private schools on equal terms with those in [other] private schools.” REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 271 (Jan. 1, 1969). Ultimately, however, the Commission rejected that approach and recommended leaving § 141 as it then stood. Id. at 272. Amendments to make that change were first adopted, then ultimately rejected during the 1969 and 1970 General Assembly debates on the constitutional revision. See 2 A.E. DICK HOWARD, infra note 7, at 953-54. Professor Howard states that the reason for this was the fear that the provision was so controversial, it might result in the defeat of the entire constitutional revision. Howard comments: “After all the furor—probably no other single section occupied so much of the 1969 debates—section 10 appears in the Constitution exactly as it did when it was section 141.” Id. at 954.

This constitutional history makes it abundantly clear that the framers of the 1971 Constitution intended that Article VIII, § 10, read together with Article I, § 16 and Article IV, § 16, continues to prohibit state aid to students in sectarian private schools through tuition grants or vouchers. Accordingly, it is my opinion that such aid to sectarian school students would be unconstitutional without an amendment to Article VIII, § 10 similar to the ones proposed and rejected during the 1969 and 1970 debates.


2In applying the Lemon criteria to educational activities, the Supreme Court of the United States has not required absolute separation between church and state. See, e.g., Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226 (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 both indirect and insubstantial); Committee for Public
Education v. Nyquist, 413 U.S. 756, 781-82 (1973) [hereinafter Nyquist] (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 clearly “‘marked off from the religious function’” of the schools (quoting Everson, supra note 1, 330 U.S. at 18)); Board of Education v. Allen, 392 U.S. 236 (1968) (permitting loans of public textbooks to children in public and private schools, including sectarian schools). The Court, nevertheless, has invalidated state programs created for the specific purpose of aiding religion in public schools. See, e.g., Wallace v. Jaffree, supra note 1, 472 U.S. at 56-61 (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 unduly entangled government in religion).

1See, e.g., Mueller v. Allen, 463 U.S. 388 (1983) (permitting state tax deductions for tuition, textbooks and transportation costs for parents with children attending private schools, including sectarian schools); Everson, supra note 1 (upholding general transportation programs for all students when state has not directly contributed money for sectarian schools and state program is designed to promote safety, irrespective of whether “beneficiary” attends sectarian or nonsectarian schools).

4Previously, in Nyquist, supra note 2, the Supreme Court had invalidated a state statute providing parents of nonpublic school children with tuition reimbursement if their income was less than $5,000, or with a tax deduction for tuition if their income fell between $5,000 and $25,000. 413 U.S. at 764-66. On the specific facts presented, the Court determined that the “primary” effect of the tuition reimbursement scheme was “unmistakably to provide desired financial support for nonpublic, sectarian institutions,” by providing a financial incentive for parents to send their children to sectarian schools and ensured their financial ability to do so. Id. at 783. The Court also struck the tax deduction in Nyquist, reasoning that it, too, rewarded parents for sending their children to nonpublic schools. Id. at 791. The Court noted that the tax deduction was like a tax credit, since it yielded a fixed amount of tax “forgiveness” in exchange for benefiting religious enterprise, which the state desired to encourage. Id. at 789.

Decisions since Mueller, supra note 3, however, show the trend of upholding general or “neutral” grant programs animated by legitimate secular reasons with only incidental and indirect support of religion. See, e.g., Zobrest v. Catalina Foothills School Dist., 509 U.S. , 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993) (upholding provision of interpreter services to deaf student attending sectarian school because services were part of general program distributing benefits neutrally to parents and children without regard to nature of school); Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481 (1986) (upholding, as aid to individuals rather than as significant aid to religious education, state rehabilitation aid payments to blind student to reimburse expenses while attending seminary).

A voucher program would, for example, probably be invalidated if the legislative record reflected religious motives, rather than legitimate secular reasons (such as expanding parental choices and educational opportunities for all students). And, even assuming a legitimate secular purpose for such a program, it could be unconstitutional if the program, in actual practice, primarily benefited the sectarian schools or entangled government in religious dogma and practice. Such issues are manifestly dependent on specific facts beyond the purview of this opinion. “The test is inescapably one of degree.” Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

6In Witters, supra note 4, while upholding the provision of tuition assistance for a seminary student as consistent with the federal establishment clause, the United States Supreme Court aptly recognized that the Washington state constitution, nonetheless, may be more restrictive. On remand to the Washington Supreme Court, that state supreme court determined that its state constitution

7The Virginia Bill of Rights’ provision establishing freedom of religion formed the basis of the First Amendment provision. “[I]t was ‘the high honor of Virginia that she was thus the first state in the history of the world to pronounce the decree of absolute divorce between Church and State, and to lay as the chief cornerstone of her fabric of government this precious stone of religious liberty ....’” 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 291 (1974) (citations omitted).

Current Article I, § 16 of the Virginia Constitution, was part of the original Virginia Declaration of Rights, adopted June 12, 1776, fifteen and one half years before Virginia’s ratification of the First Amendment to the United States Constitution on December 15, 1791. *Virginia Declaration of Rights, 5 THE FOUNDERS’ CONST. 3* (Philip B. Kurland & Ralph Lerner eds., 1987) (citing 1 *Papers of George Mason, 1725-1792*, 287-89 (Robert A. Rutland ed., 1970)); see also U.S.C.A. CONST. AMEND. 1 to 3, at 6 (Historical Notes) (West 1987). Following congressional submission of the federal Bill of Rights for state ratification in 1789, nine states quickly approved the proposed amendment, but Virginia’s ratification was delayed for a year and a half, partly on the argument that the provision for religious freedom was “too weak.” See 1 A.E. DICK HOWARD, supra note 7, at 293.

Professor Howard observes: “In the running controversy over aid to parochial schools, [Article I] section 16 is a key factor, along with Article VIII, section 10. It is such provisions in Virginia’s Constitution that make the restrictions on aid which even in indirect ways might aid religion tighter in Virginia than they are in the interpretations of the First Amendment of the Federal Constitution.” *Id.* at 552.

8I assume, for purposes of this opinion, that the “vouchers” you describe would be similar in concept to those considered by the Court in *Almond v. Day*. In that case, the General Assembly had authorized the reimbursement of up to $400 per year per child for tuition, institutional fees, board, room, books and supplies, upon a determination by the Superintendent of Public Instruction that the child was eligible for the benefits and that the expenses submitted by the child’s parent were accurate. 197 Va. at 422-23, 89 S.E.2d at 853-54. The Superintendent would then approve a voucher authorizing the payment to the parent or guardian and would submit the voucher to the State Comptroller for payment. *See* Ch. 708, Item 210, 1954 Va. Acts 935, 970.

9Any voucher program implemented in a local school system would, of course, first require enabling legislation from the General Assembly.

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COUNTIES, CITIES AND TOWNS: COUNTIES GENERALLY — POWERS OF CITIES AND TOWNS — GENERAL.

Under general police powers, county may adopt ordinance to regulate operation of shooting range, unless specifically prohibited by state statute, and as long as none of obligations ordinance imposes infringes on any constitutional right.

January 14, 1994
The Honorable Harvey B. Morgan  
Member, House of Delegates

You note that York County has adopted an ordinance regulating the operation of shooting ranges and ask whether the county has the necessary authority under state law to adopt such an ordinance.

I. Applicable Statutes and Ordinance

A. Virginia Statutes

Section 15.1-510 of the *Code of Virginia* provides that “[a]ny county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of [its] inhabitants ... not inconsistent with the general laws of this Commonwealth.” Section 15.1-839 makes a comparable grant of general “police powers” to cities and towns.

With certain exceptions not relevant to your question, § 15.1-522 states that “boards of supervisors of counties are ... vested with the same powers and authority as the councils of cities and towns by virtue of the [Virginia] Constitution ... or the acts of the General Assembly passed in pursuance thereof ....”

The first paragraph of § 15.1-29.15 provides:

From and after January 1, 1987, no county, city or town shall adopt any ordinance to govern the purchase, possession, transfer, ownership, carrying or transporting of firearms, ammunition, or components or combination thereof other than those expressly authorized by statute.

B. County Ordinance

The ordinance about which you inquire is § 16-38 of the York County Code, adopted September 2, 1993, and effective November 2, 1993. It provides:

(a) No sports shooting range or combination of ranges shall be used at any time unless a range safety officer, as designated by the owner or operator of such range, is present on the range. Such officers shall have the duty and responsibility of enforcing the owner or operator’s rules and regulations for the safe use of such range.

(b) A log shall be maintained on the premises of every sports shooting range of the name of the range safety officer present on the range, and the hours during which the safety officer was present. The range safety
officer shall ensure that every person who uses a range is identified in a log to be kept for such purpose, the manufacturer, model, and caliber firearm used by each such person, and the time during which the firearm was used. Such logs shall be maintained for a period of at least two months after the latest entry therein, and be made available for review during reasonable hours at the request of law enforcement officers or the County Administrator.

(c) For purposes of this section, a “sports shooting range” shall mean each outdoor area designed and designated for the use of rifles, shot guns, pistols, silhouettes, skeet, trap, blackpowder, or any other similar sports shooting.

II. County Has Authority Under General Police Powers to Regulate Shooting Ranges Unless Prohibited by State Statute or Preempted by State Regulation

Virginia adheres to the Dillon Rule of strict construction, construing local governments to have only those powers expressly granted by state law, and those powers necessarily implied by such express grants of authority. Nevertheless, state court decisions and prior opinions of the Attorney General applying § 15.1-510 or § 15.1-839 have concluded that the general police powers conferred on counties by those sections are broad enough to sustain local regulation of a wide range of activities and subjects. See, e.g., Alford v. Newport News, 220 Va. 584, 260 S.E.2d 241 (1979) (city may regulate smoking in public places under general police powers); Wayside Restaurant v. Virginia Beach, 215 Va. 231, 208 S.E.2d 551 (1974) (approving ordinance regulating topless dancing); Kisley v. City of Falls Church, 121 Va. 693, 187 S.E.2d 168, appeal dismissed, 409 U.S. 907 (1972) (approving ordinance regulating operation of massage salons); King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1954) (county ordinance prohibiting keeping of vicious dog is within county’s police powers); see also Op. Va. Att’y Gen.: 1992 at 59, 61 (broad grant of police powers under § 15.1-839 provides authority for municipal regulation of burglar alarm installation and access to police department); 1987-1988 at 143 (county regulation of smoking is reasonable exercise of § 15.1-510 police powers); id. at 146 (county may regulate homes for aged to extent state law does not do so).

In a 1988 decision, the Supreme Court of Virginia specifically addressed whether the general grant of police powers to localities was broad enough to authorize local ordinances regulating firearms. See Stallings v. Wall, 235 Va. 313, 367 S.E.2d 496 (1988). The Court concluded that the power conferred on Virginia Beach by § 15.1-839 was sufficient to authorize the city’s adoption of an ordinance that required a person desiring to acquire a handgun from a licensed firearms dealer first to obtain a permit from the chief of police.1 Id. In Stallings, the Court made it clear that it considered the grant of city and town police powers in § 15.1-839 to be
the equivalent of those given counties under former § 15-8 (currently § 15.1-510). *Id.* at 317-18, 367 S.E.2d at 498-99; *see also* § 15.1-522 (generally equating county powers with those of cities and towns).

In my opinion, if a county’s police powers under § 15.1-510 are broad enough to authorize its regulation of the sale of firearms, those powers clearly must also be broad enough to authorize county regulation of the operation of a shooting range. Therefore, such a county ordinance will be valid, unless specifically prohibited by state statute.

III. County Ordinance Not Prohibited by § 15.1-29.15 and Is Reasonable Means of Exercising Police Power

Following the Supreme Court’s decision in *Stallings v. Wall*, the General Assembly adopted § 15.1-29.15 to curtail, in part, after January 1, 1987, the broad scope of authority the Court had found localities to have over firearms. By its express terms, however, § 15.1-29.15 prohibits only those local ordinances governing “the purchase, possession, transfer, ownership, carrying or transporting of firearms, ammunition or components or combination thereof.” The York County ordinance about which you inquire governs none of these things. In fact, it imposes no obligation on the individual owner of any firearm. Instead, it regulates the operation of a facility, a shooting range, and imposes obligations on the operator of such a facility to have a designated range safety officer present on the range and to maintain a log identifying the safety officer, the times he or she has been present on the range, and the identity of each user of the range, and relevant information about the weapons used. In my opinion, nothing in § 15.1-29.15 prohibits any of these regulations, and I am aware of no other state statute that would do so.

A locality exercising its police powers is allowed to use its discretion in selecting the means to do so, as long as the mechanism it chooses is reasonable and does not unduly restrict any constitutional rights. *See Tidewater Homebuilders v. City of Va. Beach*, 241 Va. 114, 119, 400 S.E.2d 523, 526 (1991). In my opinion, the York County ordinance is a reasonable means of regulating the safe and lawful operation of a type of facility that involves some inherent threat to the public safety and welfare.2 None of the obligations the ordinance imposes appears to infringe on any constitutional right. Accordingly, it is my opinion that the ordinance is a valid exercise of the county’s police powers under § 15.1-510.

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I am advised by the State Police that the information the county ordinance requires to be kept in a log would be useful to law enforcement officials in some criminal investigations.

COUNTIES, CITIES AND TOWNS: COUNTY EXECUTIVE AND COUNTY MANAGER - EFFECTIVE CHANGE - COUNTY MANAGER FORM — GOVERNMENTAL CHARTERS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS).

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

If Hanover County voters approve adoption of county manager form of government in referendum to be conducted concurrently with November 8, 1994, general election, elective constitutional offices of treasurer and commissioner of revenue will be abolished on January 1, 1996, following November 1995 election of new board of county supervisors. County need not conduct additional referendum to abolish two offices by seeking charter or other special act from General Assembly. Change in form of government that will occur at conclusion of incumbent officers' terms does not conflict with constitutional mandate that term of person holding office at time of election not be reduced. County’s holding of such referendum and, if approved, its implementation eliminating two elective offices must be submitted to U.S. Department of Justice for preclearance under § 5 of federal Voting Rights Act.

June 13, 1994

The Honorable Lois B. Chenault
Commissioner of the Revenue for Hanover County

You note that the board of supervisors for Hanover County has petitioned its circuit court to order a referendum under § 15.1-583 of the Code of Virginia, in which the voters of the county will determine whether the county’s form of government should be changed from the traditional form to the county manager form. You ask whether, if the voters of the county approve adoption of the county manager form of government, the offices of treasurer and commissioner of the revenue will be automatically abolished as elective constitutional offices, or whether, to abolish those offices, the county must conduct an additional referendum pursuant to § 24.2-685.
I. Applicable Constitutional and Statutory Provisions

A. Constitution

Article VII, § 4 of the Constitution of Virginia (1971) establishes in each county and city the constitutional offices of treasurer, commissioner of the revenue, sheriff, Commonwealth's attorney and circuit court clerk. The third paragraph of § 4, however, states, in part:

The General Assembly may provide for county or city officers or methods of their selection, including permission for two or more units of government to share the officers required by this section, without regard to the provisions of this section, either (1) by general law to become effective in any county or city when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon in each such county or city, or (2) by special act upon the request, made after such an election, of each county or city affected. No such law shall reduce the term of any person holding an office at the time the election is held.

B. Local Government Statutes

Chapter 13 of Title 15.1, §§ 15.1-582 through 15.1-668, creates two optional forms of county government, the county executive and county manager forms. Article 1 of Chapter 13, §§ 15.1-582 through 15.1-587, details the procedures by which counties may adopt either of those two forms. Those procedures include the holding of a referendum, initiated by a petition of ten percent of the qualified voters of the county or by resolution of the board of supervisors. See § 15.1-583. Under §§ 15.1-585 and 15.1-586, when the voters of a county approve the change to either optional form, a new board of county supervisors is elected at the next succeeding November general election to take office on the first day of January thereafter, at which time the newly adopted form of government will take effect. Section 15.1-587 states:

All other county and district officers of such county shall continue to hold office until their successors are elected or appointed and shall have qualified; but the term of office of any person who holds an office abolished by the form of organization and government adopted shall terminate as soon as his powers and duties shall have been transferred to some other officer or employee, or done away with.

Article 3 of Chapter 13, §§ 15.1-622 through 15.1-660, details the powers and organization of the optional county manager form of government. Under § 15.1-640,
the financial affairs of a county operating under that form, including the assessment and collection of taxes and management of all county funds and accounts, are the responsibility of an appointed director of finance. The director of finance exercises all powers conferred and performs all duties imposed by general law on treasurers and commissioners of the revenue. Section 15.1-640(C), (E).

Chapter 17 of Title 15.1, §§ 15.1-833 through 15.1-836.3, deals with the granting of local charters. Section 15.1-836.1 states:

Notwithstanding any provision of law to the contrary, the statutes found within this chapter shall not be used as authorization for the ordering of, or the holding of, any election or referendum the results of which would cause or result in the abolition of any office set forth in § 4 of Article VII of the Constitution of Virginia unless and until the abolition of any such office or offices has first been provided for by a general law or special act on such question alone and approved in a referendum.

Section 15.1-836.1:1 provides:

No bill to enact or amend a charter which has the effect of abolishing any office set forth in Article VII, Section 4 of the Constitution shall be considered unless a referendum, elsewhere authorized by law, has been conducted in accordance with the provisions of § 24.1-165.1 [now recodified as § 24.2-685], and a majority of the qualified voters voting thereon have approved the request for the enactment or amendment of the charter.

C. Election Statutes

The first sentence of § 24.2-217 states:

The qualified voters of each county shall elect a sheriff, an attorney for the Commonwealth, a treasurer, and a commissioner of the revenue at the general election in November 1995, and every four years thereafter unless a county has adopted an optional form of government which provides that the office be abolished or a county's charter so provides.

Under § 24.2-218, the next election of county supervisors also will occur at the November 1995 general election.

Section 24.2-685 (formerly § 24.1-165.1) states:
A. The provisions of this section shall be applicable to the holding of any referendum, elsewhere authorized by law, on the abolition of any constitutional office conducted prior to a request for a special act of the General Assembly to abolish such office.

B. Notwithstanding any other provision of general law or any special act, no referendum subject to the provisions of this section shall be held unless:

1. Petitions are filed with the circuit court of the county or city requesting that a referendum be held to authorize a request for a special act on the abolition of the named office;

2. The petitions are signed by qualified voters of the county or city equal in number to twenty percent of the total vote cast in the county or city for presidential electors in the last preceding presidential election; and

3. The petitions are filed with the court within ninety days of the first signature on the petitions, and the petitions show the date each signature was affixed.

* * *

E. No special act authorizing the abolition of any such office shall be considered by the General Assembly without court certification that a referendum has been conducted pursuant to this section and that a majority of the qualified voters voting thereon have approved the request for a special act.

II. If Approved in November 1994 Referendum, Change to County Manager Form of Government Will Abolish Offices of Treasurer and Commissioner Without Further Referendum

Prior opinions of the Attorney General applying Article VII, § 4 indicate that the General Assembly may provide for the elimination of a local elected constitutional office in either of two ways, by a general law that will become effective following a referendum of the locality’s qualified voters, or by a charter bill or other special act adopted following such a referendum in the locality to which the charter or special act applies. Op. Va. Att’y Gen.: 1989 at 49, 51-53; 1976-1977 at 44; 1973-1974 at 98.2 Section 24.2-217 reflects these two possibilities by requiring the election of constitutional officers every four years, “unless a county has adopted an
optional form of government which provides that the office be abolished or a ... charter so provides."

The 1973 opinion cited above concludes that Chapter 13 of Title 15.1 is a general statute, permissible under Article VII, § 4, that results in the abolition of the offices of treasurer and commissioner of the revenue upon approval by the voters of a change in a county’s form of government in a referendum. 1973-1974 Op. Va. Att’y Gen., supra, at 100. That opinion further cites a 1973 case in the Supreme Court of Virginia contending that abolition of constitutional offices through such a change in form of government violated Article VII, § 4. The 1973 Attorney General’s opinion indicates that the Court rejected that argument. See id., at 99 (citing Hubbard v. Mahan, 214 Va. lxxi (1973), dismissing petition for writ of mandamus).

Although Article VII, § 4 also allows the General Assembly to abolish a locality’s constitutional offices by amending its charter, §§ 15.1-836.1 and 15.1-836.1:1 establish some conditions that must be met before the legislature will proceed by that method. Section 15.1-836.1 requires that the constitutionally necessary referendum on such a charter amendment may not occur until the General Assembly first authorizes a referendum on that question alone, and § 15.1-836.1:1 requires that referendum to be conducted in the manner set forth in § 24.2-685.

By its own plain language, however, § 24.2-685 applies only to the holding of any referendum “conducted prior to a request for a special act of the General Assembly to abolish such office.” Hanover County is not proposing to abolish the offices of commissioner of the revenue and treasurer by seeking a charter or other special act from the General Assembly. Instead, it proposes to use the alternate method authorized by Article VII, § 4 to abolish those offices, namely by holding a referendum on a change in the county’s form of government, authorized by general law.

In my opinion, therefore, the separate referendum requirements of § 24.2-685 and §§ 15.1-836.1 and 15.1-836.1:1 do not apply to the action Hanover County proposes, and the scheduled referendum on the change to the county manager form of government, which will be conducted pursuant to § 15.1-583, is the only referendum that will be required. If the county’s voters approve the change in form of government in that referendum, the offices of treasurer and commissioner of the revenue will be abolished effective January 1, 1996.3

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3These prior opinions emphasize that under Article VII, § 4, the abolition of any such constitutional office may not become effective during the present incumbent’s term. The county treasurer’s
and your current terms end December 31, 1995, concurrently with the expiration of the terms of all current members of the board of supervisors. See §§ 24.2-217, 24.2-218. If the voters of Hanover County approve the change to the county manager form of government in the referendum that will be held on November 8, 1994, that change will become effective on January 1, 1996, following the November 1995 election of a new board of county supervisors. See § 15.1-586. Accordingly, the change in form of government will not conflict with Article VII, § 4, because, if it is adopted, it will occur upon the conclusion of the affected officers’ current terms.

3 Under § 5 of the federal Voting Rights Act of 1965, as amended, all changes in voting practices and procedures in Virginia and its localities must be precleared by the United States Department of Justice before they may be implemented. 42 U.S.C.A. § 1973c (West 1981). The Justice Department regulation implementing that statutory requirement lists examples of changes that must be submitted for preclearance. See 28 C.F.R. § 51.13 (1993). Among the examples listed is “[a]ny change in the term of an elective office or an elected official or in the offices that are elective,” and “[a]ny change effecting the necessity of or methods for offering issues and propositions for approval by referendum.” Id. § 51.13(i), (j). Accordingly, the holding of Hanover County’s referendum on the change in form of government and, if approved, its implementation eliminating two elective offices must be submitted for § 5 preclearance. See 1989 Op. Va. Att’y Gen. 49, 53.

COUNTIES, CITIES AND TOWNS: GENERAL.

CRIMINAL PROCEDURE: TRIAL AND ITS INCIDENTS.

Local governing body has discretion to reimburse legal fees and expenses incurred in defense of local officer or employee on criminal charge arising out of performance of official duties. Entry of order of nolle prosequi effectively dismisses pending criminal indictment or warrant so that governing body may exercise discretion to reimburse officer or employee. Governing body may elect not to do so when nolle prosequi has been entered for technical reasons and it appears new charge may be brought.

January 5, 1994

The Honorable Clarence E. Phillips
Member, House of Delegates

You ask whether § 15.1-19.2:1 of the Code of Virginia allows a locality to pay legal fees incurred by an officer or employee of the locality in defense of a criminal charge arising out of the officer’s or employee’s performance of official duties, when the charge has been disposed of by entry of a nolle prosequi.

I. Applicable Statutes

Section 15.1-19.2:1 provides:
If any officer or employee of any county, city or town shall be investigated, arrested or indicted or otherwise prosecuted on any criminal charge arising out of any act committed in the discharge of his official duties, and no charges are brought, or the charge is subsequently dismissed, or upon trial he is found not guilty, the governing body of the county, city or town may reimburse the officer or employee for reasonable legal fees and expenses incurred by him in defense of the investigation or charge, the reimbursement to be paid from the treasury of the county, city or town.

Section 19.2-265.3 permits a nolle prosequi to be entered “in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown.”

II. For Purposes of § 15.1-19.2:1, Entry of Nolle Prosequi Constitutes Dismissal of Criminal Charge

If a local government officer or employee is the subject of criminal proceedings connected with his or her official duties, § 15.1-19.2:1 authorizes the governing body to reimburse for legal expenses only if no charge is brought, the charge is “dismissed,” or the officer or employee is “found not guilty.” While the decision of the investigating or prosecuting authority on whether to bring criminal charges or to dismiss criminal charges may be based on various facts or circumstances, the language in § 15.1-19.2:1 authorizing reimbursement by the governing body when criminal charges are not brought or later are dismissed does not limit the inclusiveness of those phrases. Rather, the decision on providing reimbursement is placed within the discretion of the local governing body.

An order of nolle prosequi is a formal entry on the record that the prosecuting attorney will not further prosecute the case. See BLACK’S LAW DICTIONARY 1048 (6th ed. 1990). A nolle prosequi does not constitute a finding of not guilty, and if entered before jeopardy attaches, does not prevent further prosecution for the offense. See Cantrell v. Commonwealth, 7 Va. App. 269, 281, 373 S.E.2d 328, 333 (1988). It does, however, operate to discharge the accused from liability on the indictment for which the nolle prosequi is entered, and to require the Commonwealth to obtain a new indictment to prosecute the accused further for the same offense. See Miller v. Commonwealth, 217 Va. 929, 935, 234 S.E.2d 269, 273 (1977); see also Lowery v. Commonwealth, 205 Va. 575, 577-78, 138 S.E.2d 300, 302 (1964) (when criminal charge under warrant is disposed of by nolle prosequi, prosecution under that particular warrant is barred). Thus, for purposes of the particular charge pending, a nolle prosequi has the same effect as a dismissal.
It is my opinion that, because the entry of an order of *nolle prosequi* has the effect of dismissing the pending criminal indictment or warrant, a *nolle prosequi* may be considered the subsequent dismissal of that criminal charge for purposes of § 15.1-19.2:1. A local governing body, therefore, in its discretion, may reimburse an officer or employee for legal fees and expenses incurred in defense of a criminal charge arising out of his or her official duties, if the charge has resulted in a *nolle prosequi*. If it appears that the *nolle prosequi* has been entered for technical reasons and that a new charge will be brought, the governing body may, of course, elect not to reimburse the officer or employee for expenses incurred on the original charge.

COUNTIES, CITIES AND TOWNS: GOVERNMENT OF CITIES AND TOWNS — GENERAL.

Failure of General Assembly to grant specific statutory authority to local governments and other political subdivisions to permit charitable contributions by payroll deduction does not indicate legislative opposition. Virginia localities have necessarily implied power to regulate employee payroll deductions. Exercise of such implied power must be reasonable and consistent with legislative intent; may not unduly burden citizens' constitutional rights. Political subdivisions' regulation of charitable organizations' access to workplace or to payroll deduction system must survive First Amendment scrutiny. By permitting some charitable solicitations and charitable payroll deductions, governmental entity creates limited public forum. Locality's restrictions on speech and method of selecting charitable organizations that will solicit donations in limited public forum must not be based on content, and will survive constitutional challenge only if such restrictions serve compelling governmental interest and are narrowly drawn to achieve that end.

February 28, 1994

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether a political subdivision may allow one group of nonprofit charitable organizations to solicit contributions from the political subdivision's employees in the workplace, while denying other charitable organizations access to the same workplace or to the payroll deduction mechanism.

I. Applicable Statutes

No provision of the *Code of Virginia* directly addresses the authority of a political subdivision to permit its employees to make charitable contributions by pay-
roll deduction, or to regulate charitable organizations’ access to the workplace to solicit such contributions.

II. Subject to Federal Constitutional Limitations, Permitting Solicitation of Charitable Donations from Government Employees in Workplace is Matter of Employers’ Discretion

Because there is no specific statute addressing public employee payroll deductions for charitable contributions, the initial question presented by your inquiry is whether, under the Dillon Rule, local governments and other political subdivisions are prohibited from doing so altogether. Under the Dillon Rule, of course, localities and other political subdivisions have only those powers expressly granted to them by statute, and those necessarily implied from their expressly granted powers. See Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).


While it is true that there is no section in Title 15.1 expressly authorizing local governments to allow charitable contributions by payroll deduction, it is equally true that there is no such section expressly authorizing them to permit any other form of voluntary payroll deduction for insurance or other fringe benefits, employee parking, savings bonds, or any of the many other items that employers, both public and private, commonly permit to be deducted from their employees’ paychecks. Title 15.1 is also silent on many other aspects of the employer/employee relationship in local government. In fact, at least for counties, there is no general statute authorizing them to hire employees at all. Instead, that power is necessarily implied from the many statutes authorizing counties to perform other functions that could not be performed without employees, or from sections such as § 15.1-7.1 (requiring governing body of every county, city and town with more than 15 employees to have grievance procedure, personnel system, and classification and pay plan). Section 15.1-7.1 clearly contemplates an ongoing employer/employee relationship in local government, with the local government, as employer, exercising many of the same prerogatives as a private employer.

The Code is likewise devoid of legislative authority for voluntary payroll deductions of any sort by state employees. Nevertheless, by executive action, the Commonwealth long ago permitted its employees to contribute to United Way-type organizations in this manner, and in more recent years has authorized the annual
Combined Virginia Campaign, which makes possible employee donations to a very broad range of charitable organizations. Exec. Order No. 6 (Apr. 16, 1990). Two prior opinions of this Office recognize the authority of the General Assembly to legislate rules for state employee payroll deductions, but, in the absence of such legislation, conclude that the State Comptroller, the administrative official responsible for payroll preparation, may determine what voluntary deductions will be allowed.5

The General Assembly obviously could adopt legislation defining or restricting the authority of local governments and other political subdivisions to permit charitable contributions by payroll deduction. The Supreme Court has observed, however, that “it would be unrealistic, inefficient, and unnecessary to require the General Assembly to define every aspect of each mechanism available” to a local government to carry out the powers granted to it. Tidewater Homebuilders v. City of Va. Beach, 241 Va. 114, 119, 400 S.E.2d 523, 526 (1991). In my opinion, the General Assembly’s failure to grant specific statutory authority in this instance does not indicate legislative opposition to local authority for that purpose. Instead, it reflects a legislative assumption that such authority is inherent in the employer/employee relationship, and thus is a necessarily implied power that localities and other political subdivisions already possess.

When a locality exercises such an implied power, that exercise must be reasonable and consistent with the legislative intent and may not unduly burden citizens’ constitutional rights. Tidewater Homebuilders, 241 Va. at 119, 400 S.E.2d at 526. Political subdivisions permitting their employees to make charitable contributions through payroll deductions thus must observe the constitutional limitations discussed below.

III. Charitable Solicitations Protected by First Amendment

The Supreme Court of the United States has held that charitable appeals for funds “involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.” Schaumburg v. Citizens for Better Environ., 444 U.S. 620, 632 (1980). Restrictions on the solicitation of charitable contributions thus are analyzed under the standards applicable in First Amendment cases.

IV. First Amendment Does Not Require Political Subdivision to Permit Charitable Solicitations in Workplace

The fact that charitable solicitations are protected by the First Amendment does not mean that governments must allow the unfettered exercise of this form of
speech in the workplace. Determining the constitutionality of any limitation on the use of government facilities for free expression requires an analysis of both the nature of the facilities and the nature of the restriction. This analysis begins by determining whether the government facility at issue constitutes a public forum for the expression of ideas. See Perry Ed. Assn. v. Perry Local Educators’ Assn., 460 U.S. 37 (1983) [hereinafter Perry Ed. Assn.].

V. First Amendment Analysis Depends on Whether Facility Is Public Forum

For purposes of First Amendment analysis, a public forum may consist of facilities traditionally open to the public for the expression of ideas, such as public streets and parks, or facilities that, while not historically deemed a public forum, have been made a public forum by opening them for use by the public as a place for expressive activity. See Perry Ed. Assn., 460 U.S. at 45-46. If government facilities constitute a “public forum” open to the public for expressive activity, the government’s ability to deny access to them for expressive purposes is severely limited by the First Amendment. See United States v. Grace, 461 U.S. 171, 177 (1983).


VI. Whether Property Constitutes Public Forum Depends on Facts; Forum Can Be Created for Limited Purposes

Determining whether a particular government facility constitutes a public or nonpublic forum is a highly fact-specific inquiry, based on, among other factors, the location, purpose and nature of the facility. The United States Supreme Court held in Perry Education Association that a school’s permitting access to teachers’ mailboxes by the exclusive labor organization representing the teachers did not make the mailboxes a “public forum” for other labor organizations. 460 U.S. at 51-53. In a case involving facts similar to those presented by your question, the Court of Appeals for the District of Columbia considered First Amendment and equal protection challenges from a group of charities that had been denied access to payroll deductions under the Combined Federal Campaign. See Nat. Black United Fund, Inc. v. Devine, 667 F.2d 173, 178-79 (D.C. Cir. 1981) [hereinafter Nat. Black
United Fund]. That court concluded that it was unnecessary to determine whether the Combined Federal Campaign constituted a public forum, because, by permitting access to the federal workplace for the solicitation of donations by the Combined Federal Campaign, the government had incurred a constitutional obligation to similar organizations seeking to engage in the same form of communication. \textit{Id}. In such a situation, the court held that the First Amendment requires the government to observe total impartiality with respect to viewpoints being expressed. \textit{Id}. at 179. Another way of describing this distinction is to say that, by opening the door to some charitable solicitations and charitable payroll deductions, a governmental entity creates a limited public forum for those purposes.\(^6\)

While the issue is not free from doubt, a Virginia political subdivision that permits use of its workplaces and payroll system for solicitation of employee charitable contributions probably makes those facilities a limited public forum. If so, the constitutional limitations discussed below would apply to any effort by the locality to restrict the charitable groups that may have access to that limited public forum.

VII. Validity of Restrictions on Speech in Limited Public Forum Begins with Analysis of Whether Restrictions Are Content-Based

In analyzing the validity of restrictions on speech in a limited public forum, the first question is whether the limitations are based on the content of the speech or are content-neutral, merely regulating the time, place and manner of the expression.

Even when a government has established a public forum only on a limited basis, it may not restrict access to that forum on the basis of the content of the speech unless it can show that such restriction is necessary to serve a compelling state interest and that the restriction is narrowly drawn to achieve that end.\(^7\) If restrictions are content-neutral, however, and serve merely to regulate the time, place or manner of speech, they will survive challenge if they are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.

VIII. Whether Regulation Is Content-Based Depends on Facts

Like the analysis to determine whether a particular facility constitutes a public forum, the analysis of whether a restriction is content-based is highly fact-specific. For example, if a locality has allowed access to a combined charitable organization representing a broad general group of various charities with various goals and purposes, its denial of access to an individual charitable organization, especially if that organization could have joined the combined group, might not constitute content-based discrimination. But if the locality has chosen among distinct individual charitable organizations that represent different interests, granting some and denying others
access to the workplace, that selection process probably would be content-based discrimination.

IX. Content-Based Restrictions on Speech Must Serve Compelling State Interest and Be Narrowly Drawn

If a political subdivision’s method of selecting the charitable organization that it will allow to solicit donations is content-based, that method will survive constitutional challenge only if it serves a compelling governmental interest and is narrowly drawn to achieve that end. Few restrictions on speech satisfy this strict standard of review. See Carey v. Brown, 447 U.S. 455, 464-67 (1980) (protection of residential privacy and labor interests were not sufficiently compelling to justify allowing labor picketing at place of employment but forbidding it in residential neighborhoods).

Federal courts will scrutinize carefully any government action that grants some and denies others access to a forum for public expression, if that action distinguishes on the basis of the view expressed. See Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 536 (1980) (government cannot prohibit dissemination of information on basis that it addresses controversial issues of public policy); Carey v. Brown, 447 U.S. at 461-62 (government regulations discriminating among speech-related activities are carefully scrutinized).

X. Time, Place and Manner Restrictions on Speech Must Further Important Government Goal and May Not Substantially Burden Free Speech

If, however, a political subdivision’s denial of access to its workplaces and payroll system is not based on content but merely regulates the time, place and manner of charitable solicitations, it will be analyzed under a looser standard. Regulations on time, place and manner of solicitation will be upheld if they further an important government goal and do not substantially burden free speech. See Nat. Black United Fund, supra Pt. VI, 667 F.2d at 179; see also Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding antinoise regulation prohibiting demonstrations near schools during school hours); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding licensing requirements for parades on city streets).

The extent to which a regulation impairs the ability of a particular group to convey its message to its desired audience often controls the level of justification required to uphold that regulation. A primary factor to consider is whether the group has alternative means of exercising the speech. See Perry Ed. Assn., supra Pt. IV, 460 U.S. at 53 (union had access to teachers by alternative means of bulletin board, meeting facilities and regular mail); Nat. Black United Fund, 667 F.2d at 180 (fund could have had access to same audience and participated in same solicitation by becoming affiliated with United Way). Thus, the answer to your question also
depends on whether a complaining charity has been offered these alternate means of access.

A government has a clear interest in limiting the disruption in the workplace that would occur if every charitable organization were allowed to conduct an individual solicitation. If a political subdivision's restrictions on access to its workplace are not content-based and do not substantially impair charities' ability otherwise to solicit funds, a decision to restrict charitable solicitations in that workplace to one annual campaign, by an organization or group representing a broad spectrum of charitable programs of general interest and benefit, probably will survive constitutional challenge.9

In summary, there are numerous factors to be considered in determining whether a political subdivision may grant one charitable organization access to its workplace and payroll system and deny access to another. The answer to the question you present will depend on the particular facts and circumstances in each case, but the analysis discussed above should guide local officials in making those decisions.

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9Section 15.1-7.3 authorizes local governing bodies to adopt group life accident and health insurance programs for their employees and to pay the entire cost or share the cost with the employee, but does not say that the employee's share may be collected by payroll deduction.

1I am advised by the Virginia Municipal League that an inquiry to eight of its largest member jurisdictions reveals that all eight allow payroll deductions for contributions to local United Way campaigns or similar groups of charitable organizations.

2Cities and towns have such power under § 15.1-797, and in some cases through their charters. A few counties have charters; these may also make specific reference to the hiring of employees.

4Local governments do not, of course, enjoy all of the same prerogatives as private employers. The Supreme Court has made it clear, for example, that localities do not have the necessarily implied power to enter into collective bargaining agreements with their employees. See Commonwealth v. Arlington County Bd., 217 Va. at 558, 232 S.E.2d at 30. In reaching that conclusion, however, the Court relied not only on the absence of express statutory authority, but also on a series of General Assembly resolutions declaring public employees' collective bargaining to be against the public policy of the Commonwealth, and a pattern of rejection of such collective bargaining legislation over a number of years. There is, of course, no comparable legislative rejection of local authority to permit charitable contributions by payroll deduction.

5See Op. Va. Att'y Gen.: 1992 at 126, 126-27; 1985-1986 at 215, 215-16. These opinions both concern payroll deductions for dues to employee organizations. They conclude that the Comptroller has authority over such deductions in the absence of any contrary policy expressed by the General Assembly. Because the General Assembly similarly has been silent concerning authority over charitable deductions, the rationale of these opinions applies equally to such charitable deductions. A federal district court has also recognized that a Virginia locality has the same discretionary authority over voluntary payroll deductions. See Local 995, Intern. Ass'n, etc. v. City of Richmond, 415 F. Supp. 325 (E.D. Va. 1976) [hereinafter Local 995].
Creation of a limited public forum for one purpose does not constitutionally obligate a government to open that forum for other purposes. In *Local 995*, *infra* note 5, the United States District Court held that Richmond was not constitutionally obligated to permit payroll deductions for union dues, even though it allowed other voluntary payroll deductions for other purposes. In so ruling, the district court relied on the decision of the Supreme Court of the United States in *City of Charlotte v. Firefighters*, 426 U.S. 283 (1976). There, Charlotte had denied union dues checkoff, although it allowed several other voluntary payroll deductions, including those for United Way contributions. *Id.* at 287 & n.3. The Supreme Court rejected the union’s argument that this violated the equal protection clause of the Fourteenth Amendment. *Id.* at 288. In the Richmond case, the union asserted that the city’s denial of payroll deduction for dues also violated its First Amendment rights. The district court rejected this argument, stating that “the First Amendment imposes no duty on the [public employer] to provide services or engage in policies that will affirmatively assist a union to carry out its function and purpose.” *Local 995*, 415 F. Supp. at 326.

If it were determined that the workplace and payroll system did not constitute a public forum, the government’s limitation of access would survive challenge if it were “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Perry Ed. Assn.*, *supra* Pt. IV, 460 U.S. at 46. Selective access under such circumstances is not necessarily invalid. *Id.* at 47. The Supreme Court stated in *Perry Education Association*: “Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.... The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.” 460 U.S. at 49.

Even if a political subdivision has created a limited public forum by allowing some charitable solicitations in its workplaces, so that it then must allow other charities access to this forum, it is not necessarily obligated to assume the additional burden of payroll withholding of contributions. *See Op. Va. Att’y Gen.: 1992* at 126, 128 (withholding practices of government must meet only relatively relaxed standard of reasonableness to survive constitutional challenge); 1985-1986 at 215, 215 (no provision of Virginia law requires an employer to withhold any amounts from employee’s pay for purposes not mandated by statute); 1975-1976 at 420 (employer not required to make payroll deductions for voluntary employee contributions to political action fund).

Both the Combined Virginia Campaign, authorized by Executive Order No. Six (Apr. 16, 1990), and the Combined Federal Campaign, discussed in *National Black United Fund* and authorized by federal Executive Order No. 10,927, offer access to numerous local, national and international charities and permit employees to designate their contributions to one or more of these charities. Such programs not only provide a forum for charities representing a variety of speech interests, but also substantially reduce the disruption in the workplace that would be caused by multiple uncoordinated fund drives.

**COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.**

**CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY.**

**MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY.**
Juvenile courts retain exclusive jurisdiction over cases charging juveniles with possession of tobacco and over cases charging juveniles with violations of seat belt and child restraint statutes.

March 4, 1994

The Honorable John F. Ewell
Judge, Warren County General District Court

You ask whether general district courts or juvenile and domestic relations district courts ("juvenile courts") should hear cases charging juveniles with possession of tobacco, in violation of § 18.2-371.2(B) of the Code of Virginia. You also ask which courts should hear charges against juveniles for violating the seat belt and child restraint statutes, §§ 46.2-1094 and 46.2-1095. If any of these cases should be heard in general district courts, you ask additional questions concerning the authority of those courts to appoint counsel or guardians ad litem for juvenile defendants in such cases.

I. Applicable Statutes

Section 18.2-371.2 provides, in part:

B. No person less than eighteen years of age shall purchase or possess any tobacco product including but not limited to cigarettes and cigars....

C. A violation of subsection A or B by an individual ... shall be punishable by a civil penalty not to exceed $50 for a first violation and a civil penalty of $100 for any subsequent violation. Any attorney for the Commonwealth of the county or city in which an alleged violation occurred may bring an action to recover the civil penalty, which shall be paid into the state treasury. Any law-enforcement officer may issue a summons for a violation of subsection A or B.

Section 46.2-1094(A) states that "[e]ach person at least sixteen years of age and occupying the front seat of a motor vehicle equipped ... with a safety belt system ... shall wear the appropriate safety belt system at all times while the motor vehicle is in motion on any public highway." A driver transporting a child between four and sixteen years of age in the front seat of a motor vehicle must cause the child to wear the safety belt. Section 46.2-1094(B). Violations of these seat belt requirements may be punished by a civil penalty of twenty-five dollars and may be charged on the uniform traffic summons. Section 46.2-1094(D), (F).
Section 46.2-1095 requires the use of approved automobile child restraint devices. Parents, legal guardians and regular drivers of children under the age of four must ensure that the children are secured in such devices. *Id.* A violation of § 46.2-1095 is punishable by a civil penalty of fifty dollars. Section 46.2-1098.

Section 16.1-241 details the jurisdiction of juvenile courts, and provides that such courts have

exclusive original jurisdiction ... over all cases, matters and proceedings involving:

A. The ... disposition of a child:

1. Who is alleged to be abused, neglected, in need of services, in need of supervision, a status offender, or delinquent;

* * *

6. Who is charged with a traffic infraction as defined in § 46.2-100.

[Emphasis added.]

Section 16.1-228 defines a “status offense” as “an act prohibited by law which would not be an offense if committed by an adult.”

II. Juvenile Courts Have Jurisdiction over Juveniles Charged with Violations of § 18.2-371.2(B)

Before 1991, § 18.2-371.2 made it illegal for persons under sixteen years of age to possess tobacco products. Ch. 406, 1986 Va. Acts (Reg. Sess.) 687, 687-88. That offense was punishable by a fine of not more than twenty-five dollars. *Id.* at 688. Courts hearing cases under this section were permitted to defer a finding of guilt and to place the accused on probation, after which the charge could be dismissed. *Id.*

In 1991, § 18.2-371.2 was rewritten to extend its coverage to any person under age eighteen. Ch. 558, 1991 Va. Acts (Reg. Sess.) 989. Although the statute remains within Title 18.2, the 1991 amendments substituted a civil penalty for the former criminal fine, and deleted any reference to a finding of guilt. See 1991 Va. Acts, *supra*. Section 18.2-371.2(C) specifies that the civil penalty is to be recovered by the Commonwealth’s attorney, however, and that any law-enforcement officer may issue a summons for a violation of this section.¹
The General Assembly did not specify in § 18.2-371.2 that courts have jurisdiction to enforce that section, but there is nothing in § 18.2-371.2 to suggest a legislative intent to exclude such cases from the juvenile courts’ jurisdiction. Under § 16.1-241(A)(1), juvenile courts have exclusive original jurisdiction over all cases involving the disposition of children alleged to be status offenders. The act that § 18.2-371.2 prohibits for children under eighteen is an act that is not an offense if committed by an adult. It is, therefore, a status offense, as defined by § 16.1-228. Accordingly, it is my opinion that juvenile courts retain exclusive jurisdiction of cases charging juveniles with violations of § 18.2-371.2. ²

III. Juvenile Courts Have Jurisdiction over Charges Against Juveniles for Violations of § 46.2-1094 or § 46.2-1095

A 1983 opinion of the Attorney General answers your question about which court has jurisdiction over a charge against a driver under eighteen for violating the child restraint law, now § 46.2-1095. See 1982–1983 Op. Va. Att’y Gen. 346 (applying former § 46.1-314.2, now recodified as § 46.2-1095). That opinion concludes that violations of the child restraint law should be heard by the same courts that would hear any other traffic violations. See id. at 347. Under § 16.1-241(A)(6), juvenile courts have exclusive jurisdiction over juveniles charged with traffic violations. Thus, the 1983 opinion concludes that juvenile courts have exclusive jurisdiction over a violation of § 46.2-1095 when the driver charged with the violation is a minor. ³

The reasoning of that prior opinion applies to violations of the safety belt law. Although the General Assembly did not specify in § 46.2-1095 which courts should hear such cases, it provided that violations of that statute may be charged on the uniform traffic summons. See § 46.2-1094(F). In my opinion, violations of § 46.2-1094 should be heard by the same courts that would consider other traffic violations. When a juvenile is charged with violating § 46.2-1094, therefore, that charge also should be heard in the appropriate juvenile court. ⁴

¹Cf. 1990 Op. Va. Att’y Gen. 109 (concluding that absence of language in Virginia Indoor Clean Air Act authorizing enforcement by public agency or law-enforcement official makes violation of that Act civil matter enforceable by private citizens). Unlike the Virginia Indoor Clean Air Act, which is codified in Chapter 8.1 of Title 15.1, § 18.2-371.2 remains in Title 18.2, which deals with “Crimes and Offenses Generally.”

²The fact that § 18.2-371.2 authorizes issuance of a summons to a juvenile violating that section does not indicate a legislative intent that such violations be tried in general district courts. Ordinarily juvenile court cases must be initiated by petition. See § 16.1-260(A). The General Assembly has provided, however, that certain juvenile offenses may be charged by a summons instead of a petition: traffic, bicycle, pedestrian, hitchhiking and surfing offenses, game and fish law violations, and curfew and animal control violations. See § 16.1-260(F)(1). The General Assembly’s failure to include tobacco law violations in this listing of juvenile offenses chargeable by summons does
not alter the juvenile court's jurisdiction under § 16.1-241. A summons charging a juvenile with a violation of § 18.2-371.2(B) thus should be made returnable to the appropriate juvenile court.

The 1983 opinion reached this conclusion, notwithstanding the fact that the child restraint and seat belt laws impose civil instead of criminal penalties. See §§ 46.2-1094(D), 46.2-1098.

Because all of the cases about which you inquire are within the jurisdiction of the juvenile courts, it is not necessary to address your additional questions about the authority of general district courts to appoint guardians ad litem.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

DOMESTIC RELATIONS: DIVORCE, AFFIRMATION AND ANNULMENT.

RULES OF SUPREME COURT OF VIRGINIA: EQUITY PRACTICE AND PROCEDURE — COMMENCEMENT OF SUITS IN EQUITY - THE BILL OF COMPLAINT.

Juvenile court acting on custody petition filed by parent or relative, or circuit court in divorce and custody case, may transfer custody of child to local board of public welfare or social services, if court makes specific statutory findings of abuse or neglect, that child is in need of services or supervision, is status offender or delinquent, or when petition requests relief from child's care and custody. Board, to be properly before court, must have received reasonable notice of, and opportunity to be heard on, pending custody issue, unless emergency exists, and board may be required to accept child for up to 14 days without having received prior notice or opportunity for hearing. In such cases, local board need not file custody petition; petition filed by parent or relative gives court jurisdiction over child's custody.

June 21, 1994

The Honorable Terry G. Kilgore
Member, House of Delegates

You ask whether circuit courts and juvenile and domestic relations district courts ("juvenile court(s)") have the authority in a pending case to include the local board of welfare or social services ("local board") as a third party, and award custody of a child to the local board even though the board has not filed a custody petition. In two hypothetical cases you describe, a circuit court in a divorce and custody case, or the juvenile court in a custody dispute between two parents or other relatives, determines after hearing the evidence that neither parent or petitioning relative is appropriate to have custody of the child, and the court wishes to place the child in the temporary custody of the local board.
I. Applicable Statutes

Section 16.1-241(A)(3) of the Code of Virginia confers exclusive original jurisdiction on juvenile courts in all cases, matters and proceedings involving “custody, visitation, support, control or disposition of a child” “[w]hose custody, visitation or support is a subject of controversy or requires determination.” That section also makes jurisdiction in such cases concurrent with, and not exclusive of, the equity jurisdiction of circuit courts, except as provided in § 16.1-244. The last paragraph of § 16.1-241(A) provides:

The authority of the juvenile court to adjudicate matters involving the custody, visitation, support, control or disposition of a child shall not be limited to the consideration of petitions filed by a mother, father or legal guardian but shall include petitions filed at any time by any party with a legitimate interest therein. A party with a legitimate interest shall be broadly construed and shall include, but not be limited to, grandparents, stepparents, former stepparents, blood relatives and family members. The authority of the juvenile court to consider a petition involving the custody of a child shall not be proscribed or limited where the child has previously been awarded to the custody of a local board of social services.

Section 16.1-244(A) provides that another court may exercise jurisdiction concurrent with that of the juvenile court over the custody of a child when the custody issue is incidental to the determination of a cause pending in the other court. Under that section, when a suit for divorce raising the matter of custody in the pleadings has been filed in a circuit court, and a hearing is set within twenty-one days of the filing, the juvenile court is divested of jurisdiction unless the parties agree otherwise.

Section 16.1-260(A) states that “[a]ll matters alleged to be within the jurisdiction of the [juvenile] court shall be commenced by the filing of a petition ....”

Article 9, Chapter 11 of Title 16.1, §§ 16.1-278 through 16.1-290, sets forth several dispositional alternatives when the custody of a child is at issue. Section 16.1-278.2 provides, in part:

If a child is found to be (i) abused or neglected, (ii) at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in his care, or (iii) abandoned by his parent or other custodian, or without parental care and guardianship because of his parent’s absence or physical or mental incapacity, the juvenile court or the circuit court may make any
of the following orders of disposition to protect the welfare of the child:

* * *

4. After a finding that there is no less drastic alternative, transfer legal custody, subject to the provisions of § 16.1-281, to any of the following:

* * *

c. The local board of public welfare or social services of the county or city in which the court has jurisdiction or, at the discretion of the court, to the local board of the county or city in which the child has residence if other than the county or city in which the court has jurisdiction. The local board shall accept the child for care and custody, provided that it has been given reasonable notice of the pendency of the case and an opportunity to be heard. However, in an emergency in the county or city in which the court has jurisdiction, the local board may be required to accept a child for a period not to exceed fourteen days without prior notice or an opportunity to be heard if the judge entering the placement order describes the emergency and the need for such temporary placement in the order. Nothing in this section shall prohibit the commitment of a child to any local board of public welfare or social services in the Commonwealth when the local board consents to the commitment....

Any order authorizing removal from the home and transferring legal custody of a child to a local board of public welfare or social services as provided in this section shall be entered only upon a finding by the court that reasonable efforts have been made to prevent removal and that continued placement in the home would be contrary to the welfare of the child, and the order shall so state.

Subsequent sections similarly authorize a juvenile court or a circuit court to transfer legal custody to the local board when a parent or other custodian seeks to be relieved of the care and custody of any child (§ 16.1-278.3), or when the court finds a child to be in need of services (§ 16.1-278.4), in need of supervision (§ 16.1-278.5), a status offender (§ 16.1-278.6), or delinquent (§ 16.1-278.8).

Section 16.1-278.15 also authorizes a juvenile court to “make any order of disposition to protect the welfare of the child and family as may be made by the
circuit court" (§ 16.1-278.15(A)), and "may award custody upon petition to any party with a legitimate interest therein" (§ 16.1-278.15(B)).

Section 20-107.2 provides, in part:

Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the custody, visitation and support of the minor children of the parties .... In any case involving the custody or visitation of a child, the court may award custody or visitation to any party with a legitimate interest therein, including but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term "legitimate interest" shall be construed broadly to accommodate the best interests of the child.

II. In Proper Case, Circuit Court or Juvenile Court May Transfer Legal Custody of Child to Local Board Without Board's Filing Petition

Under § 16.1-260(A), all matters alleged to be within the jurisdiction of a juvenile court must be initiated by filing a petition. Similarly, all divorce matters must be commenced by filing a bill of complaint. A circuit court divests a juvenile court of jurisdiction if divorce pleadings raise an issue about custody, guardianship, visitation or support of children and the case has been set for hearing within twenty-one days. Section 16.1-244(A). When a parent or relative files a petition for child custody in a juvenile court, that court acquires subject matter jurisdiction over custody of the child. See §§ 16.1-241(A)(3), 16.1-278.15. Similarly, when the issue of custody is raised in a divorce proceeding in a circuit court, that court may award custody to any "party with a legitimate interest," if that person has filed a motion to intervene, "or is otherwise properly before the court." Section 20-107.2. Unlike the situation in a 1988 decision of the Court of Appeals of Virginia, in which no underlying petition for custody had ever been filed with the court, in each of the hypothetical situations you describe, the issue of custody has been raised in the pleadings and thus is properly before the court.

Sections 16.1-278.2(4)(c), 16.1-278.3, 16.1-278.4(5)(c), 16.1-278.5(B)(1), 16.1-278.6 and 16.1-278.8(13)(c) all permit either a circuit court or a juvenile court to award custody to the local board, if the board is properly before the court. When the local board has been given reasonable notice of the pendency of a case, and an opportunity to be heard on the custody issue, the local board would be properly before the court. The local board may also consent to the commitment of the child,
thereby voluntarily submitting to the court’s jurisdiction. In my opinion, the court then may proceed to determine the custody without any requirement for the local board to file a petition for custody.

When awarding custody to the local board, a court must make the specific findings required under § 16.1-278.2 (child is abused or neglected), § 16.1-278.3 (parents or other custodians have petitioned to be relieved of custody), § 16.1-278.4 (child in need of services), § 16.1-278.5 (child in need of supervision), § 16.1-278.6 (child is status offender), or § 16.1-278.8 (child is delinquent). In the case of a child found to be abused or neglected, the court also must find that there is no less drastic alternative, and, in each of the above situations, must find that reasonable efforts have been made to prevent removal and that continued placement in the home would be contrary to the welfare of the child. Section 16.1-278.2(4)(c).

Based on the above, it is my opinion that either a circuit court or a juvenile court, when acting on a custody petition filed by a parent or relative, may transfer custody of a child to the local board if the court makes the specific findings required by statutes that respectively apply when the child is abused or neglected, is in need of services or supervision, or is a status offender or delinquent, or when a parent or other custodian has asked to be relieved of the care and custody of the child. Before transferring custody, the court must give the local board reasonable notice and an opportunity to be heard, unless there is an emergency, in which case the local board may be required to accept a child for up to fourteen days without the board receiving prior notice or an opportunity for a hearing. In such cases, the local board does not have to file a custody petition, because the petition filed by the parent or relative has given the court subject matter jurisdiction over the child’s custody.

1VA. SUP. CT. R. 2:2.
2At its 1994 Session, the General Assembly amended § 20-107.2 to delete the language in that section authorizing courts in divorce cases to award custody or visitation to persons other than the divorcing parties, but added, among others, new §§ 20-124.1 and 20-124.2, effective July 1, 1994. Ch. 769, 1994 Va. Acts Reg. Sess. 1170, 1172-74. New § 20-124.1 defines a “person with a legitimate interest” broadly. Id. at 1173. Section 20-124.2(B) recognizes the “primacy of the parent-child relationship,” and requires a “showing by clear and convincing evidence that the best interest of the child would be served” by awarding custody “to any other person with a legitimate interest.” Id. The amendments thus do not change the legal analysis of the question you present.
3See Rader v. Montgomery County, 5 Va. App. 523, 365 S.E.2d 234 (1988). In Rader, the Court of Appeals reversed an award of custody to a county department of social services, holding that the circuit court lacked jurisdiction to terminate residual parental rights, because no petition seeking custody had been filed by the department or by anyone else. Your hypothetical situations are distinguishable because, in both of them, a parent or relative has filed a petition invoking the jurisdiction of the court over the custody issue.
4“[T]he local board may be required to accept a child for a period not to exceed fourteen days without prior notice or an opportunity to be heard if the judge entering the placement order
CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY - TRESPASS TO REALTY.

Hotel guest’s legal right to occupy room expires when he overstays agreed-upon term of occupancy. Guest who refuses to vacate room, upon termination of occupancy and after receiving notice from hotel’s management to do so, presumably has committed willful trespass, for which he may be prosecuted.

May 6, 1994

The Honorable Glenn R. Croshaw
Member, House of Delegates

You ask whether a hotel guest who overstays the term for which he initially reserved a room, and refuses to vacate after being notified to do so by the hotel’s management, may be prosecuted for criminal trespass under § 18.2-119 of the Code of Virginia.

I. Applicable Statute

Section 18.2-119 provides that any person shall be guilty of a Class 1 misdemeanor if he

without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons ... on such lands, structures, premises or portion or area thereof at a place or places where it or they may be reasonably seen ....

II. Hotel Guest Who Stays Beyond Agreed Term and Fails to Vacate After Notice Violates § 18.2-119

A person who exceeds the authority or permission under which he lawfully entered property is liable for trespass. McClannan v. Chaplain, 136 Va. 1, 11, 116 S.E. 495, 497 (1923). A prior opinion of the Attorney General concludes that a shopping center owner may revoke the privilege previously given to the public to

describes the emergency and the need for such temporary placement in the order.” Section 16.1-278.2(4)(c).
park while doing business in the shopping center, when that privilege has been abused by individuals congregating in or repeatedly driving through the center's parking lot. See 1987-1988 Op. Va. Att'y Gen. 446, 447-48. Moreover, that opinion implies that, once a person is notified either to leave or not to enter business premises, he may be charged with trespassing under § 18.2-119 for failure to comply. See id. at 447.

Based on the above, it is my opinion that a hotel guest who overstays his previously agreed-upon term of occupancy, and refuses to leave after notice to do so, has committed a trespass.

Section 18.2-119 has been construed, however, to make criminal only a “willful trespass.” Reed v. Commonwealth, 6 Va. App. 65, 70, 366 S.E.2d 274, 278 (1988).¹ A conviction for criminal trespass cannot be sustained if an individual acts under “a sincere, although perhaps mistaken, good faith belief that [he] has some legal right to be on the property.” 6 Va. App. at 71, 366 S.E.2d at 278. Obviously, a hotel guest occupies his room initially under a legal right, but that right expires when he stays beyond the agreed term. If that guest fails to vacate the hotel room after receiving actual notice from the hotel’s management that he must do so, any good-faith belief that he is entitled to remain will in most, if not all, cases be extinguished. Accordingly, a continued occupancy thereafter would constitute a willful trespass, in violation of § 18.2-119, for which the violator may be prosecuted.

¹The defendant in Reed had been given permission to live at a construction site as a security guard; the company became disgruntled, however, when he began to play music and operate concessions for the construction workers. After he refused the company’s request to cease those activities, he was charged with trespassing. Finding that the defendant did not possess the requisite criminal intent, the Court of Appeals reversed and dismissed his conviction. 6 Va. App. at 72, 366 S.E.2d at 279.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY - TRESPASS TO REALTY — CRIMES AGAINST THE PERSON - EXTORTION AND OTHER THREATS — CRIMES INVOLVING HEALTH AND SAFETY - DRUGS - OTHER ILLEGAL WEAPONS.

Statute criminalizing certain trespasses on school property should not be extended to make mere unauthorized presence on school bus criminal offense, unless General Assembly specifically expresses intent to do so.

August 17, 1994
You ask specifically whether § 18.2-128(B) of the Code of Virginia, which makes it a criminal offense in certain circumstances to trespass on school property, applies to unauthorized entry to, or presence on, a school bus.

I. Applicable Statutes

Section 18.2-128(B) states:

It shall be unlawful for any person, whether or not a student, to enter upon or remain upon any school property in violation of (i) any direction to vacate the property by a person authorized to give such direction or (ii) any posted notice which contains such information, posted at a place where it reasonably may be seen. Each time such person enters upon or remains on the posted premises or after such direction that person refuses to vacate school property, it shall constitute a separate offense.

Section 18.2-60(B) states:

If any person orally makes a threat to any employee of any elementary, middle or secondary school, while on a school bus, on school property or at a school-sponsored activity, to kill or to do bodily injury to such person, he shall be guilty of a Class 1 misdemeanor. [Emphasis added.]

Section 18.2-255.2(A) states:

It shall be unlawful for any person to manufacture, sell or distribute or possess with intent to sell, give or distribute any controlled substance, imitation controlled substance or marijuana at any time while (i) upon the property, including buildings and grounds, of any public or private elementary, secondary, or post secondary school, or any public or private two-year or four-year institution of higher education; (ii) upon public property or on any property open to public use within 1,000 feet of such school property; (iii) on any school bus as defined in § 46.2-100 .... [Emphasis added.]

The first paragraph of § 18.2-308.1 states:

If any person has in his possession any (i) stun weapon or taser as defined in this section or (ii) weapon, other than a firearm, designated
as subsection A of § 18.2-308 upon (i) the property of any public, private or parochial elementary, middle or high school, including buildings and grounds, (ii) that portion of any property open to the public used for school-sponsored functions or extracurricular activities while such functions or activities are taking place, or (iii) any school bus owned or operated by any such school, he shall be guilty of a Class 1 misdemeanor. If any person has in his possession any firearm designed or intended to propel a missile of any kind while such person is upon ... (iii) any school bus owned or operated by any such school, he shall be guilty of a Class 6 felony. [Emphasis added.]

II. School Trespassing Statute Not Clearly Applicable to Unauthorized Person on School Bus

The Supreme Court of Virginia has held that a mere trespass upon real or personal property ... is not always a crime at common law; but it is a crime at common law if it amounts to a breach of the peace, or if it tends to or threatens a breach of the peace. 

*Miller v. Harless*, 153 Va. 228, 244, 149 S.E. 619, 624 (1929). Unauthorized presence on school property does not, in every instance, amount to a breach of the peace. Section 18.2-128(B), therefore, criminalizes certain trespasses on school property, regardless of whether those offenses would have been crimes at common law.

Under accepted principles of statutory construction, the common law is not altered or changed by statute unless the legislative intent is plainly manifested, and statutes in derogation of the common law must be strictly construed and not enlarged in their operation by construction beyond their express terms. *Hyman v. Glover*, 232 Va. 140, 143, 348 S.E.2d 269, 271 (1986). Accordingly, § 18.2-128(B) should not be extended to cover unauthorized presence on a school bus unless the General Assembly has clearly expressed the intent to do so. This rule of strict construction also applies to § 18.2-128(B) because it is a penal statute; any doubt about its meaning in a particular case would have to be resolved against the Commonwealth and in favor of the defendant. *Graybeal v. Commonwealth*, 228 Va. 736, 324 S.E.2d 698 (1985); *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992).

As noted above, there are at least three other statutes creating criminal offenses on school property in which the General Assembly has expressly criminalized the offense when it occurs on a school bus. See §§ 18.2-60(B), 18.2-255.2(A), 18.2-308.1. The absence of such a specific reference to school buses in § 18.2-128(B) thus creates an ambiguity about whether the legislature intended that
section to apply to trespasses on school buses. Under the rules of statutory construc-
tion discussed above, that ambiguity must be resolved in favor of any potential
defendant. If the General Assembly wants § 18.2-128(B) to apply on school buses,
it can, of course, add language to that section similar to that found in the other three
statutes. In the absence of such language, however, it is my opinion that
§ 18.2-128(B) does not make mere unauthorized presence on a school bus a criminal
offense.1

1Under the Supreme Court’s holding in Miller v. Harless, supra Part II, a civil trespass on per-
sonal property such as a school bus, if coupled with a breach of the peace, would be a crime at
common law.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS
— JURISDICTION AND PROCEDURE, CRIMINAL MATTERS.

DOMESTIC RELATIONS: UNLAWFUL MARRIAGES GENERALLY.

Use of term “cohabits” indicates legislative intent that statutory definitions for “family
or household member” encompass unrelated persons in same household who are of oppo-
site sexes, living together as husband and wife. General district courts, not juvenile
courts, have jurisdiction to try criminal warrants alleging assault and battery of family
or household member when defendant and victim are unrelated persons of same sex,
sharing same residence.

July 22, 1994

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

You ask whether the general district courts or juvenile and domestic relations
district courts (“juvenile courts”) have jurisdiction to try criminal warrants alleging
an assault and battery in cases in which the defendant and the victim are not related
and are of the same sex but live together on a long-term basis in the same residence.

I. Applicable Statutes

Section 18.2-57.2(A) of the Code of Virginia makes it a Class 1 misdemeanor
to assault and batter a “family or household member,” and § 18.2-57.2(B) makes
doing so a Class 6 felony if the abuser is convicted of a third such offense. Section 18.2-57.2(C) defines “family or household member” as

(i) the defendant’s spouse, whether or not he or she resides in the same home with the defendant, (ii) the defendant’s former spouse, whether or not he or she resides in the same home with the defendant, (iii) the defendant’s parents, stepparents, children, stepchildren, brothers and sisters, grandparents and grandchildren who reside in the same home with the defendant, (iv) the defendant’s mother-in-law, father-in-law, sons-in-law, daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the defendant, (v) any person who has a child in common with the defendant, whether or not the defendant and that person have been married or have resided together at any time, or (vi) any individual who cohabits or who, within the previous twelve months, cohabited with the defendant, and any children of either of them then residing in the same home with the defendant. [Emphasis added.]

General district courts typically have jurisdiction in criminal matters involving adults. See generally § 16.1-123.1. Section 16.1-241(J), however, gives juvenile courts jurisdiction over “[a]ll offenses in which one family or household member is charged with an offense in which another family or household member is the victim.” For purposes of cases in juvenile courts, § 16.1-228 defines “family or household member” the same way as does § 18.2-57.2(C).

II. “Cohabit” Connotes Living Together as Husband and Wife; Term Does Not Encompass Persons of Same Sex Who Live Together

In customary legal usage, “cohabitation” means “[t]o live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.” BLACK’S LAW DICTIONARY 260 (6th ed. 1990).

The Supreme Court of Virginia has held that the term “cohabit” means “‘to live together in the same house as married persons live together, or in the manner of husband and wife,’” and emphasized that, while the existence of a sexual relationship between the parties is a factor in determining cohabitation, to cohabit “‘also imports the continuing condition of living together and carrying out the mutual responsibilities of the marital relationship.’” Schweider v. Schweider, 243 Va. 245, 248, 415 S.E.2d 135, 137 (1992) (quoting Johnson v. Commonwealth, 152 Va. 965, 970, 146 S.E. 289, 291 (1929); Petachenko v. Petachenko, 232 Va. 296, 299, 350 S.E.2d 600, 602 (1986); see also Frey v. Frey, 14 Va. App. 270, 273-75, 416 S.E.2d 40, 43 (1992).
In the absence of a contrary definition, words in a statute are presumed to have their usual and ordinary meaning. See Anderson v. Commonwealth, 182 Va. 560, 565-66, 29 S.E.2d 838, 840 (1944). Moreover, the General Assembly is presumed to be aware of the law existing at the time it adopts a statute, including previous judicial interpretations of the statute or of terms used in it. See Cape Henry v. Natl. Gypsum, 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985). Likewise, the General Assembly is presumed to be aware of its own previous enactments. 17 M.J. Statutes § 46 (Repl. Vol. 1979 & Supp. 1993).

Thus, when the General Assembly used the term “cohabits” in defining who would be considered a “family or household member” in determining jurisdiction under §§ 16.1-228 and 18.2-57.2, it presumably was aware that the courts have interpreted that term to connote persons living together as husband and wife without being legally married. It also is presumed to have known of its prior adoption of § 20-45.2, prohibiting marriages between persons of the same sex. In my opinion, therefore, the use of “cohabits” indicates a legislative intent that the definitions of “family or household member” in §§ 16.1-228 and 18.2-57.2 encompass unrelated persons in the same household only if they are of opposite sexes and are living as husband and wife. If the General Assembly had intended those statutory definitions to encompass unrelated persons of the same sex, either in a homosexual relationship or merely as lodgers sharing a common dwelling, in my opinion, it would have used a broader term, such as “resides” instead of the limiting term “cohabits” in the applicable definitions in §§ 16.1-228 and 18.2-57.2.

Accordingly, it is further my opinion that general district courts, rather than juvenile courts, have jurisdiction to try criminal warrants alleging assault and battery when the defendant and the victim are unrelated persons of the same sex, even if they share the same residence.

11“Virginia does not recognize common-law marriages where the relationship is created in Virginia. Virginia does recognize a common-law marriage that is valid under the laws of the jurisdiction where the common-law relationship was created.” Farah v. Farah, 16 Va. App. 329, 334, 429 S.E.2d 626, 629 (1993) (citation omitted). Section 20-45.2 expressly prohibits “[a] marriage between persons of the same sex.” Courts of other states have held that persons of the same sex cannot enter into a common-law marriage. E.g., De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952 (1984).
CRIMINAL PROCEDURE: RECOVERY OF FINES AND PENALTIES.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES.

Clerk not authorized to collect filing fee from Commonwealth when attorney acting on its behalf seeks to enforce judgment for fines or penalties. Private attorneys acting under contract with Commonwealth’s attorney to collect unpaid fines and costs owed to Commonwealth are not required to pay fees for filing judgment execution pleadings or issuing process for same.

May 2, 1994

The Honorable Robert F. McDonnell
Member, House of Delegates

You ask whether private attorneys under contract with a Commonwealth’s attorney to collect fines and costs pursuant to § 19.2-349 of the Code of Virginia must pay filing fees for judgment execution pleadings, such as debtor interrogatory summonses, garnishment summonses and requests for levy.

1. Applicable Statutes

Section 14.1-87 provides:

No clerk, sheriff or other officer shall receive payment out of the state treasury for any services rendered in cases of the Commonwealth, except when it is allowed by statute.

Section 19.2-340 provides, in part:

Fines imposed and costs taxed in a criminal prosecution for committing an offense against the Commonwealth shall constitute a judgment in favor of the Commonwealth, and, if not paid at the time they are imposed, execution may issue thereon in the same manner as upon any other monetary judgment.

Sections 19.2-348 and 19.2-349 require Commonwealth’s attorneys to superintend the issuing and collection of all judgments for fines and penalties entered on behalf of the Commonwealth in their respective counties or cities. If a Commonwealth’s attorney determines that it is impractical or uneconomical to pursue these collection efforts himself, § 19.2-349 allows the Commonwealth’s attorney to contract with private attorneys to pursue collection of the judgments for fines and costs entered on behalf of the Commonwealth, under terms and conditions promulgated
jointly by the Attorney General and the Executive Secretary of the Supreme Court of Virginia.

II. Private Attorneys Under Contract to Collect Fines and Costs Owed to Commonwealth Are Not Required to Pay Filing Fees for Judgment Execution Pleadings

Under § 19.2-340, fines and costs assessed in a criminal prosecution for an offense against the Commonwealth “shall constitute a judgment in favor of the Commonwealth.” Private attorneys who contract with Commonwealth’s attorneys under § 19.2-349 to collect these unpaid judgments are acting on behalf of the Commonwealth when filing the judgment execution pleadings about which you inquire. Section 14.1-87 plainly does not allow payment of any fees to a clerk “for any services rendered in cases of the Commonwealth, except when [expressly] allowed by statute.” Neither does anything in § 14.1-87 authorize collection of any fee merely because the Commonwealth is being represented by private counsel. No other statute authorizes a court clerk to collect a filing fee from the Commonwealth when an attorney acting on its behalf seeks to enforce a judgment for fines or penalties.

It is my opinion, therefore, that private attorneys acting under contract with a Commonwealth’s attorney to collect unpaid fines and costs owed to the Commonwealth are not required to pay fees for filing judgment execution pleadings or issuing process in those cases.

DOMESTIC RELATIONS: PROCEEDINGS TO DETERMINE PARENTAGE.

CIVIL REMEDIES AND PROCEDURE: PARTIES.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

WELFARE (SOCIAL SERVICES): SUPPORT OF DEPENDENT CHILDREN.

Guardian ad litem should be appointed to represent minor putative parent in civil proceeding to establish paternity or enforce child support obligations. Department of Social Services, or other successful plaintiff, may be required to pay court-assessed costs and expenses of guardian; Department may seek recovery from parent for guardian ad litem costs. Expenses of guardian appointed by juvenile court to serve as counsel to indigent minor putative father in support enforcement case paid from public funds in same manner as court-appointed counsel is compensated for representation of criminal defendants.

April 8, 1994
The Honorable Von L. Piersall Jr.
Judge, Portsmouth Juvenile and Domestic Relations District Court

You ask whether a juvenile and domestic relations district court ("juvenile court") should appoint a guardian ad litem for the respondent putative father in a civil child support case when that respondent is a juvenile. If so, you ask what entity is responsible for paying the fee of the guardian ad litem.

I. Applicable Statutes

Section 20-49.6 of the Code of Virginia concerns proceedings to establish paternity or enforce support obligations of males between the ages of fourteen and eighteen and states, in part:

In any proceeding to establish or enforce an obligation for support and maintenance of a child of unwed parents, a male between the ages of fourteen and eighteen who is represented by a guardian ad litem pursuant to § 8.01-9 and who has not otherwise been emancipated shall not be deemed to be under a disability as provided in § 8.01-2.

Section 8.01-9 is the general statute concerning appointment of guardians ad litem for persons under disability. Section 8.01-9(A) provides:

A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint some discreet and competent attorney-at-law as guardian ad litem to such defendant, whether such defendant shall have been served with process or not .... Any guardian ad litem so appointed shall not be liable for costs.... When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow such guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of such person; provided, if such estate is inadequate for the purpose of paying such compensation and expenses, all, or any part thereof, may be taxed as costs in the proceeding.

Section 16.1-266(A) requires the appointment of a guardian ad litem for “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” § 16.1-241(A)(4). Section 16.1-266(D) grants juvenile courts the discretion to appoint a guardian ad litem to represent the interests of a child in any other case.
Section 16.1-267 establishes how guardians *ad litem* will be paid when they have been appointed under § 16.1-266. When appointment of a guardian *ad litem* has been made under § 16.1-266(D), § 16.1-267(A) provides that compensation for his or her services shall be paid under § 19.2-163, the general statute under which the Commonwealth pays for court-appointed counsel for criminal defendants.

II. Guardian *ad Litem* Must Be Appointed in Proceeding to Establish Paternity of Juvenile Putative Father

A minor parent is “an infant” under Virginia law and is considered to be a “person under a disability” under § 8.01-2(6)(b). A minor male parent between the ages of fourteen and eighteen will not be deemed to be under a disability once a guardian *ad litem* has been appointed to represent his interest. See § 20-49.6. There is no specific requirement under § 20-49.6 for the court to appoint a guardian *ad litem*. In my opinion, however, to ensure that the support or paternity order is valid and not subject to attack, a guardian *ad litem* must be appointed to represent the minor parent. *Moses v. Akers*, 203 Va. 130, 122 S.E.2d 864 (1961).

III. Guardian *ad Litem* for Juvenile Putative Father in Paternity or Support Proceeding Is Appointed Under § 8.01-9, and Also May Be Appointed Under § 16.1-266

There are two statutes that address the appointment of guardians *ad litem* for persons under a disability. Section 16.1-266 concerns the appointment of counsel for children under the jurisdiction of the juvenile court. The first sentence of § 16.1-266(D) provides that, “[i]n all other cases which in the discretion of the court require counsel or a guardian ad litem to represent the interests of the child ... a discreet and competent attorney-at-law may be appointed by the court.” The general statute concerning the appointment of guardians *ad litem* and what entity is responsible for the cost of guardians *ad litem*, however, is § 8.01-9. *Patterson v. Trust Co.*, 156 Va. 763, 775-76, 159 S.E. 168, 172-73 (1931) (applying former § 6098, Code of 1919); see also Op. Va. Att’y Gen.: 1986-1987 at 153, 154 & n.1; 1980-1981 at 177.

The situation about which you inquire arises under § 20-49.6, which addresses proceedings to establish paternity or enforce support obligations of males between the ages of fourteen and eighteen. The first sentence of § 20-49.6 states:

In any proceeding to establish or enforce an obligation for support and maintenance of a child of unwed parents, a male between the ages of fourteen and eighteen who is represented by a guardian *ad litem* *pursuant to* § 8.01-9 and who has not otherwise been emancipated shall not
be deemed to be under a disability as provided in § 8.01-2. [Emphasis added.]

In my opinion, this language makes it clear that a guardian ad litem in such a case is appointed under § 8.01-9. This does not mean, however, that the court may not also invoke § 16.1-266 as a basis for the appointment. Indeed, as discussed in Part V below, depending on the nature of the case, the court may deem it advisable to do so.

IV. Department of Social Services or Other Successful Plaintiff May Be Required to Pay for Guardian ad Litem Appointed Only Under § 8.01-9

You ask what entity is responsible for paying for a guardian ad litem who is appointed to represent a juvenile putative father in a paternity or support proceeding.

Under § 8.01-9(A),

[w]hen ... the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow such guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out the estate of such person; provided, if such estate is inadequate for the purpose of paying such compensation and expenses, all, or any part thereof, may be taxed as costs in the proceeding.

Two Virginia circuit courts have applied this statute to require a successful plaintiff to pay guardian ad litem fees incurred on behalf of a defendant who has no estate out of which the fee can be collected, and who is under a disability pursuant to § 8.01-2. Infant C. v. Boy Scouts of Am., 23 Va. Cir. 168, 173-74 (Fairfax Cir. Ct. 1991); Englehart v. Green, 2 Va. Cir. 5, 9-12 (Henrico Cir. Ct. 1980).¹ These courts justified imposing the guardian ad litem's fee on the plaintiff, because the plaintiffs could not have maintained their suits or protected the validity of their judgments without the appointment of the guardian ad litem. Id.

In most of the cases about which you inquire, the plaintiff is the Department of Social Services. The question therefore arises whether the Department of Social Services may be ordered to pay for the guardian ad litem. Section 63.1-274.7, in part, exempts the Department of Social Services from “filing or recording fees, court fees, or fees for service of process ... by any clerk, auditor, sheriff or other local officer for the filing of any actions or documents authorized by [Chapter 13 of Title 63.1].” This section does not, however, exempt the Department from costs assessed by a court for, and expenses of, a guardian ad litem. Accordingly, it is my opinion that the Department of Social Services, as the successful plaintiff in a support or
paternity suit against a juvenile father, may be required to pay for that juvenile's guardian *ad litem* who has been appointed only under § 8.01-9(A).²

V. Counsel Appointed Under § 16.1-266(D) Is Compensated Pursuant to § 19.2-163

When the court also has invoked § 16.1-266(D) to appoint a guardian *ad litem* to serve as counsel to an indigent minor, § 16.1-267 states that the guardian *ad litem* "shall be compensated for his services pursuant to § 19.2-163." (Emphasis added.) This is mandatory language, in contrast to the permissive provision in § 8.01-9(A) that "compensation and expenses ... *may* be taxed as costs." (Emphasis added.) *See* Op. Va. Att’y Gen.: 1986–1987 at 300, 300 and opinions cited therein (use of word "shall" in statute generally indicates procedures intended to be mandatory). Thus, when the court has used § 16.1-266(D) as an additional basis of appointment, the payment provisions of § 16.1-267 take precedence, and payment should be made under § 19.2-163, and not taxed as costs against the plaintiff. In my opinion, therefore, when the plaintiff is indigent, or when the court otherwise may consider it futile or inappropriate to tax these costs against the plaintiff, the expenses of counsel appointed to defend a minor putative father in a support enforcement case should be paid from public funds in the same manner as for criminal defendants under § 19.2-163; provided that, in appointing such counsel, the court has invoked § 16.1-266(D) in addition to § 8.01-9(A).

¹But see Kollsman, a Div. of Sequa Corp. v. Cohen, 996 F.2d 702, amended, No. 92-2359, slip op. (4th Cir. June 18, 1993), concluding that, although the fee for a guardian *ad litem* could be taxed as costs under Fed. R. Civ. P. 54, the plaintiff could not be required to pay the fees of the guardian *ad litem* who also acted as attorney for an incompetent defendant. The court indicated in Kollsman, however, that, if the case had been based on diversity jurisdiction, the federal district court could have followed a state statute apportioning guardian *ad litem* fees and costs instead of being governed by Rule 54. 996 F.2d at 705 n.2, slip op. at 4 n.2.

²Section 63.1-274.10 provides authority to the Department of Social Services to assess and recover attorney’s fees from an absent parent in proceedings to enforce child support obligations. This section primarily anticipates the assessment and recovery of attorney’s fees for the cost of attorneys who represent the Department of Social Services, but, in my opinion, it does not preclude the Department from seeking recovery of guardian *ad litem* costs in the same manner.

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ELECTIONS: VOTER REGISTRATION - LOCATIONS AND TIMES FOR REGISTRATION.

Church or synagogue may be used as voter registration site on any day. On day religious service(s) and voter registration occur simultaneously, premises, other than portion used
for service(s) or while persons enter or leave service(s), must remain open and accessible to general public without invitation or restraint.

November 30, 1994

The Honorable Stephen H. Martin
Member, Senate of Virginia

You ask whether premises used as a church or synagogue qualify as a "public place open to the general public" for purposes of voter registration under § 24.2-412 of the Code of Virginia. You also ask whether the answer to this question depends on whether voter registration is held on a day when the premises are used for religious services.

I. Applicable Statutes

Section 24.2-411 designates the local general registrar's office as the "principal office for voter registration," addresses the period of time the registrar's office is to be open for such registration, and provides that, if necessary, the general registrar or the electoral board may set additional hours for the office to be open for voter registration. Section 24.2-412 provides for voter registration at locations other than the general registrar's office. Section 24.2-412(D) specifically states:

II. Premises Used as Church or Synagogue Qualify as Voter Registration Site on Day of Religious Service if Open and Accessible to General Public Without Invitation or Restraint

Att'y Gen. 171. The 1985 opinion states that “a church or synagogue may be a public place[1] for voter registration purposes ... if, as a matter of fact, the building is generally held open and accessible to the general public without invitation or restraint and is generally perceived to be so accessible.” Id. at 172 (emphasis added). That opinion also states, however, that, during a service, a church or synagogue “may be open to the public for the purpose of joining the congregation in worship, but it is not generally open and accessible at that time to persons who wish to enter for the separate purpose of registering to vote.” Id. (emphasis added).

You ask whether a church or synagogue may serve as a site for voter registration either on days when religious services are being held or on other days. A church or synagogue may qualify as a voter registration site on any day, including a day on which a religious service or services occur, as long as the premises remain open and accessible to the general public without invitation or restraint during the time in which persons are being registered. While a service is being conducted, or while persons are entering or leaving a service, access to that portion of the premises used for the service generally is limited, and, thus, at those particular times and places, registration should not occur. The 1985 opinion, however, leaves unresolved the question of whether registration may occur on portions of church premises that remain open to the general public, even though a service may be occurring elsewhere on the premises.

Whether any particular portion of the premises would qualify as a “public place” for purposes of voter registration, even though services are occurring elsewhere on the premises, is a question of fact that should be determined by the local general registrar and electoral board in light of the principles outlined in this opinion. Prior opinions of the Attorney General have established the following factors a general registrar may consider in determining the location of a public place for voter registration purposes:

1. The place must be open and accessible to the general public.

2. The place cannot be closed only to a special group or class of individuals.

3. The public generally must be permitted to go there without invitation and without restraint.

Based on the above, it is my opinion that premises used as a church or synagogue do qualify as a “public place open to the general public” for purposes of voter registration under § 24.2-412, as long as the premises are held open and are accessible to the general public without invitation or restraint, and generally are perceived to be so accessible. It also is my opinion that if voter registration is held on a day on which the premises are used for religious services, registration may not take place on that portion of the facilities used for such services during the service or when persons are entering or leaving such service, but may take place simultaneously on other portions of the premises.

1“Public place” has not been defined by statute, but is generally defined as follows: “A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public .... A place exposed to the public, and where the public gather together or pass to and fro.” BLACK’S LAW DICTIONARY 1230-31 (6th ed. 1990).

2This presumes, of course, that the religious service is not being conducted in the community room, even though such service may be conducted at the same time in a sanctuary or some other portion of the premises.

FIRE PROTECTION: FIRE DEPARTMENTS AND FIRE COMPANIES.

City of Hampton has no affirmative duty imposed by state law to provide fire protection services without compensation to federal or state properties within its boundaries, including Veterans’ Administration Medical Center, over whose property Virginia shares concurrent jurisdiction with federal government.

June 29, 1994

Mr. Donald W. Duncan
Director, Department of Veterans’ Affairs

You ask whether the city of Hampton is required to provide fire protection services without charge to the Hampton Veterans’ Administration Medical Center. Your question arises because the Comptroller General of the United States has concluded in two decisions that federal agencies have no authority to pay for fire protection services for federal property if a nonfederal governmental unit is required by state or local law to provide the services without compensation to all property
owners within the jurisdiction of that governmental unit. See 60 Comp. Gen. 637 (1981); 45 Comp. Gen. 1 (1965).

I. Facts

The Hampton Veterans' Administration Medical Center (the "Medical Center") is a federal installation located within the city of Hampton. The Medical Center comprises an area of 83.5 acres with 79 buildings, and historically has maintained its own fire department. The Medical Center has indicated an intent to abolish its fire department, and wishes to obtain fire protection services from the city fire department.

II. Applicable Statutes

Title 27 of the Code of Virginia contains the state enabling legislation for local fire protection services. Section 27-2.1 authorizes localities to

contract with the federal or state governments to provide fire service to federal or state property located within or without the boundaries of the county, city or town.

* * *

The amount of compensation to the county, city or town pursuant to the contract shall be a matter within the sole discretion of the governing body of the county, city or town.

Section 27-6.1 authorizes every locality to establish a fire department as a department of government. Section 27-7 authorizes the local governing body to "empower the fire department therein to make bylaws to promote its objects consistent with the laws of this Commonwealth and ordinances of the city, town or county." Section 27-14 authorizes the local governing body to "make such ordinances in relation to the powers and duties of fire departments, companies, chiefs and other officers as it may deem proper."

III. City Has No Statutory Duty to Provide Universal Fire Protection

A prior opinion of the Attorney General notes that all of the enabling statutes for local fire protection services in Title 27 use the discretionary term "may" rather than the mandatory term "shall." 1984–1985 Op. Va. Att’y Gen. 137. On that basis, the opinion concludes that Virginia localities do not have any affirmative obligation under state law to provide fire protection or rescue services. Id. I am not aware of any statutory amendment or court decision that would alter that conclusion.
Statutes should not be interpreted in ways that produce irrational consequences. *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952). Instead, they should be harmonized with other existing statutes where possible to produce a consistent, logical result that gives effect to the legislative intent. 1993 Op. Va. Att’y Gen. 214, 216. In § 27-2.1, the General Assembly has specifically authorized localities to contract with federal and state government entities to provide fire protection services to their respective properties within the locality. That statute gives the local governing body the sole discretion to determine the amount to be charged under such a contract. The very existence of this statutory authority supports the conclusion that localities have no affirmative duty under state law to provide universal fire protection services within their boundaries. If such a duty existed, it would be illogical for the General Assembly to have authorized localities to charge federal or state entities for those services.

Accordingly, it is my opinion that Hampton has no affirmative duty imposed by state law to provide fire protection services to properties within its boundaries, including the Medical Center.¹

¹An 1870 act of the General Assembly ceded jurisdiction over the lands comprising the Medical Center to the United States. See Ch. 325, 1869–70 Va. Acts 479. On June 24, 1977, Governor Mills E. Godwin, Jr., accepted a retrocession from the federal Administrator of Veterans Affairs that reestablished Virginia’s concurrent jurisdiction over the Medical Center property. See certificate and letter, recorded in Hampton Cir. Ct. Clk. Off., Deed Bk. 503, at 824-26.

²Under the nomenclature in Title 27, a fire company is a fire-fighting organization comprised of volunteers, and organized with the approval of the local governing body, while a fire department is a component part of the local government, employing paid fire fighters. See §§ 27-6.1, 27-8.1.

³Sections 9.01 and 9.02 of the charter for the city of Hampton make general reference to a department of public safety, including a fire division and fire chief, but § 9.02 provides only that they shall “perform such duties as may be provided by the general laws of the Commonwealth, [or] ordinances of the city, or prescribed by the city manager.” Ch. 167, 1979 Va. Acts 211, 223.

⁴Another prior opinion of the Attorney General notes that certain obligations might be imposed on fire departments or fire companies by local ordinance or the bylaws of those entities. See 1985–1986 Op. Va. Att’y Gen. 173; §§ 27-7, 27-11, 27-14 (authorizing ordinances and bylaws of fire departments and fire companies); see also Ch. 167, § 9.02, 1979 Va. Acts, supra note 3 (Hampton charter provision granting similar authority). Virginia Attorneys General consistently have declined to render opinions interpreting or applying local ordinances or determining similar questions of a purely local nature. See, e.g., Op. Va. Att’y Gen.: 1991 at 30; 1977–1978 at 31; 1976–1977 at 17. Accordingly, any opinion concerning whether Hampton city ordinances or fire department bylaws impose an affirmative obligation for universal fire protection services within the city limits must be rendered by the city attorney.
CONSTITUTION OF VIRGINIA: CONSERVATION (NATURAL OYSTER BEDS).

Constitution authorizes General Assembly to permit public uses of Baylor grounds that will benefit people of Commonwealth. Marine Resources Commission may issue permit to private nonprofit organization to construct artificial reefs that promote growth of oysters in public interest. Organization acquires no ownership interest in reefs or underlying Baylor grounds after their construction; reefs become property of Commonwealth held in trust for benefit of its people.

March 30, 1994

The Honorable William A. Pruitt
Commissioner of Marine Resources

You ask whether the Marine Resources Commission may grant permission to a private nonprofit corporation to use a portion of the natural oyster beds, rocks and shoals of the Commonwealth, as defined by the Baylor survey, for the placement of artificial reefs designed to serve as oyster preserves, fish habitat and areas for scientific study.

I. Applicable Constitutional and Statutory Provisions

Article XI, § 3 of the Constitution of Virginia (1971) affords special protection to the natural oyster beds defined by the Baylor survey:

The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but shall be held in trust for the benefit of the people of the Commonwealth, subject to such regulations and restriction as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise.


In 1892, the General Assembly directed the predecessor of the Marine Resources Commission to survey the natural oyster beds, rocks and shoals of the

Article 4, Chapter 5 of Title 28.2, §§ 28.2-551 through 28.2-562 of the Code of Virginia, continues this survey, known as the Baylor survey, as the official designation of the public oyster grounds of the Commonwealth. As a result, these public oyster grounds are commonly referred to as the “Baylor survey” or “Baylor grounds.” Other state-owned submerged lands within the Chesapeake Bay and its tributaries may be leased to private parties for oyster planting or other private activities. See § 28.2-553; §§ 28.2-600 to 28.2-622.

The first sentence of § 28.2-507 provides:

The Commission, in order to protect or promote the growth of oysters, may (i) close and open any area or restrict the manner or method of taking oysters in any area of the public rocks, grounds, or shoals, (ii) establish seed beds and plant shells and other culch, or (iii) take any other restorative measures.

Section 28.2-1203(A) provides:

It shall be unlawful for any person to build, dump, trespass or encroach upon or over ... the beds of the bays, ocean, rivers, streams, or creeks which are the property of the Commonwealth, unless such act is performed pursuant to a permit issued by the Commission or is necessary for [certain authorized uses not applicable here.]

Section 28.2-1204 authorizes the Commission to:

1. Issue permits for all reasonable uses of state-owned bottomlands not authorized under subsection A of § 28.2-1203[.]

II. Marine Resources Commission May Permit
Construction of Reefs on Baylor Grounds for Public
Benefit; May Not Grant Any Property Interest in Reefs

The Supreme Court of Virginia has held that the language now in Article XI, § 3 prohibits private uses of the Baylor grounds, but authorizes the General Assembly to allow those public uses that it deems beneficial to the people of the Commonwealth:

The prohibition against leasing, renting, or selling the natural oyster rocks prohibits the legislature from disposing of any of the proprietary
rights of the State therein, and, when taken in conjunction with the provision that they shall be held in trust for the benefit of the people of the State, impliedly prohibits the legislature from authorizing, permitting or suffering a private use to be made of them, or the bottoms and waters adjacent thereto, which would take away, destroy, or substantially impair the use of the natural rocks by the people for the purpose of taking oysters and shellfish therefrom. But it would be a strained construction to construe the section to limit the public use to which the legislature may put any of the natural rocks for the benefit of the people to the propagation and taking of shellfish by them. The reasonable and proper construction of the section is that it relates to private uses and not public uses, and has no application to restrict the power of the legislature to authorize, permit or suffer tidal waters, including those over natural oyster rocks, to be used for any public purpose to which they are at common law subject or the legislature may deem it to be for the benefit of the people to authorize or suffer.


Exercising its authority under Article XI, § 3 to permit public uses of the Baylor grounds, the General Assembly has adopted § 28.2-507, empowering the Marine Resources Commission to “establish seed beds and plant shells and other culch, or ... take any other restorative measures” to “promote the growth of oysters.” Section 28.2-507 is a broad grant of authority that clearly would allow the Commission itself to construct artificial reefs within the Baylor survey if the Commission determines that such reefs would promote the growth of oysters. Your specific question, however, is whether the Commission may issue a permit to a private nonprofit corporation to build such artificial reefs using private funds.2

Under Article XI, § 3 and decisions of the Supreme Court of Virginia, it is clear that no part of the Baylor grounds may be sold or leased to private interests. Commonwealth v. Newport News, 158 Va. at 553, 164 S.E. at 699; Com’sion v. Hampton Rds. Oyster Co., 109 Va. 565, 64 S.E. 1041 (1909) (private party could
not acquire contractual right to use grounds within Baylor survey, despite error of state oyster inspector in assigning oyster planting grounds).

Accordingly, a private nonprofit organization authorized by the Commission to build artificial reefs on Baylor grounds could acquire no ownership interest. Those reefs, once constructed, will become the property of the Commonwealth held in trust for the benefit of the people. Cf. 1981-1982 Op. Va. Att’y Gen. 245 (riparian owner lawfully placing fill on state-owned submerged lands not within Baylor survey has exclusive compensable property interest to filled area and retains title to fill material).

In my opinion, based on the above, Article XI, § 3 does not prohibit the General Assembly from authorizing construction of artificial reefs within the Baylor grounds, as long as the purpose of those reefs is to serve the public interest. Sections 28.2-507 and 28.2-1204 give the Commission authority to issue a permit to a private nonprofit organization to construct such reefs if the Commission finds that the reefs will promote the growth of oysters in the public interest, provided that the permit does not purport to give the private organization any ownership interest in the reefs or the underlying Baylor grounds after their construction.

1The survey was conducted by a team of engineers headed by Lieutenant James B. Baylor, an officer of the U.S. Coast and Geodetic Survey. Using a tugboat and a steam whistle to signal to surveyors on shore, Lieutenant Baylor and his crew identified approximately 210,000 acres of natural oyster grounds in the Chesapeake Bay and its tributaries and in the Atlantic Ocean adjacent to the Eastern Shore. See PROCEEDINGS AND DEBATES OF THE HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 548 (Ex. Sess. 1969) (historical account by Delegate Walther B. Fidler of Warsaw, Virginia); see also J.B. BAYLOR, THE OYSTER INDUSTRY (1893), reprinting a series of letters Lieutenant Baylor wrote to the Richmond Dispatch during the winter of 1893, comparing Virginia’s oyster industry and resources to those of other eastern states and describing his observations made during the survey. Years later, Fred E. Ruediger resurveyed and reestablished many of the lines of the Baylor survey. Section 28.2-553 establishes Ruediger's lines as determinative of the Baylor survey limits and authorizes the Commission to reestablish and remark any lines that cannot be located because of the loss or destruction of previous marks.

2Under § 28.2-1203, even a private nonprofit organization clearly may not deposit material to construct an artificial reef on any state-owned submerged lands, whether or not within the Baylor survey, without a permit from the Commission. Section 28.2-1204, however, gives the Commission broad authority to issue such permits “for all reasonable uses.”
MOTOR VEHICLES: HABITUAL OFFENDERS — UNLICENSED DRIVING PROHIBITED.

Intent of General Assembly that person adjudged habitual offender be prohibited from operating moped as “self-propelled machinery or equipment” on Virginia highways.

November 16, 1994

The Honorable James F. Ingram
Judge, Circuit Court of the City of Danville

You ask whether an individual who operates a moped after having been adjudicated a habitual offender under the provisions of Article 9, Chapter 3 of Title 46.2 of the Code of Virginia is in violation of the prohibition contained in § 46.2-357, a portion of Article 9.

I. Applicable Statutes

Section 46.2-100 defines the following term used in Title 46.2:

"Motor vehicle" means every vehicle as defined in this section which is self-propelled or designed for self-propulsion except as otherwise provided in this title.... For the purposes of this title, any device herein defined as a bicycle or a moped shall be deemed not to be a motor vehicle.

Section 46.2-301(B) provides:

Except as otherwise provided in §§ 46.2-304 and 46.2-357, no resident or nonresident (i) whose driver's license, learner's permit, or privilege to drive a motor vehicle has been suspended or revoked or (ii) who has been directed not to drive by any court, by the Commissioner, or by operation of law pursuant to this title or (iii) who has been forbidden, as prescribed by law, by the Commissioner, the State Corporation Commission, the Commonwealth Transportation Commissioner, any court, or the Superintendent of State Police, to operate a motor vehicle in the Commonwealth shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in the Commonwealth until the period of such suspension or revocation has terminated.... For the purposes of this section, the phrase “motor vehicle or any self-propelled machinery or equipment” shall not include mopeds.

The first sentence of § 46.2-357(A) states:
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.

II. Legislative History

The phrase “or a moped” was added in 1981 to the current statutory definition of “motor vehicle” in § 46.2-100. See Ch. 585, § 46.1-1(15), 1981 Va. Acts Reg. Sess. 905, 907. Before 1981, a “moped” had been defined as a “bicycle.” See id. at 906, 907 (amending definition of “bicycle” and adding definition of “moped” in former § 46.1-1). It is clear that mopeds were not considered motor vehicles before 1981. Accordingly, operation of a moped did not constitute a violation of § 46.2-357 before the 1990 amendment to that section, discussed below, because a moped was not within the statutory definition of a “motor vehicle.”

Section 46.2-301(B) prohibits and makes punishable the operation of a motor vehicle by an individual whose driver’s license has been suspended or revoked. The phrase “or any self-propelled machinery or equipment” in § 46.2-301(B) was added in 1964, and has been construed in three separate opinions of the Attorney General, to prohibit the operation of a moped by an individual whose driver’s license has been suspended or revoked. Ch. 239, § 46.1-350(a), 1964 Va. Acts Reg. Sess. 439, 439-40; see Op. Va. Att’y Gen.: 1984-1985 at 215, 216; 1977-1978 at 265, 266; 1975-1976 at 251, 252 (construing former § 46.1-350). Moreover, the Court of Appeals of Virginia held that operation of a moped being propelled by its motor constituted the operation of “self-propelled machinery or equipment” in violation of Code § 46.1-350 (now § 46.2-301). Diggs v. Commonwealth, 6 Va. App. 300, 305, 369 S.E.2d 199, 202 (1988) (en banc). In Diggs the court noted that “Virginia Attorney General opinions have consistently held, without contrary legislative response, that one whose license is suspended or revoked cannot legally operate a moped.” 6 Va. App. at 304, 369 S.E.2d at 201.

Section 46.2-357 prohibits and makes punishable the operation of a motor vehicle by an individual who has been adjudicated a habitual offender. The phrase “or self-propelled machinery or equipment” was added to § 46.2-357 by an amendment effective July 1, 1990. See Ch. 828, 1990 Va. Acts Reg. Sess. 1349, 1349. Before 1990, that section prohibited only the operation of “motor vehicles” by persons who had been adjudged habitual offenders.

In 1992, the General Assembly responded to the decision in Diggs and the prior opinions of the Attorney General, by adding the following last sentence to the first paragraph of § 46.2-301 (currently subsection § B of that section), containing provisions prohibiting driving on a revoked or suspended license:
For the purposes of this section, the phrase “motor vehicle or any self-propelled machinery or equipment” shall not include mopeds.

Ch. 273, 1992 Va. Acts Reg. Sess. 344, 344. Although the phrase “self-propelled machinery or equipment” had been added two years earlier to § 46.2-357 (which contains provisions prohibiting driving after being adjudged a habitual offender), the 1992 legislation did not add the same exclusionary language that had been added to § 46.2-301.

III. Statutory History Indicates That Legislature Intended to Prohibit Operation of Mopeds by Habitual Offenders

The General Assembly is presumed to be aware of both court decisions and opinions of the Attorney General construing statutes it has previously adopted. Browning-Ferris v. Commonwealth, 225 Va. 157, 161, 300 S.E.2d 603, 605-06 (1983); Deal v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983) (Attorney General’s interpretation of motor vehicle laws and arbitration statutes, respectively); see Mace v. Merchants Delivery, 221 Va. 401, 270 S.E.2d 717 (1980); Jones Construction Co. v. Martin, 198 Va. 370, 378, 94 S.E.2d 202, 207-08 (1956) (legislative response to interpretation of Workmen’s Compensation Act by Supreme Court and Industrial Commission). Thus, when it amended § 46.2-357 in 1990, the legislature presumably knew that the Diggs decision and the prior opinions of the Attorney General had construed the phrase “self-propelled machinery or equipment” in § 46.2-301 to include mopeds. Thus, the purpose of the amendment to § 46.2-357 was to include operation of mopeds within the latter statute as well.

By the same reasoning, it does not appear that the General Assembly intended to eliminate the prohibition of operating mopeds as “self-propelled machinery or equipment” in § 46.2-357 when it amended § 46.2-301 in 1992. The 1992 amendment to § 46.2-301 is specifically prefaced with the limiting words, “[f]or the purposes of this section.” 1992 Va. Acts, supra Pt. II. If the legislature had intended to alter the identical language contained in both §§ 46.2-301 and 46.2-357, it certainly could have done so. In my opinion, by limiting the amendment to remove operation of mopeds from the prohibition of § 46.2-301, without a corresponding change in § 46.2-357, the General Assembly intended that § 46.2-357 continue to prohibit a person who has been adjudged a habitual offender from operating a moped.
PRISONS AND OTHER METHODS OF CORRECTION: DEATH SENTENCES.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

1994 amendment governing all executions conducted after January 1, 1995, and implementing execution by lethal injection as alternate method of execution is adjustment in method of administering punishment for capital crimes and is not more onerous punishment than administering preexisting method of death by electrocution. Statutory designation of execution by lethal injection in absence of prisoner’s choice of method of execution—either by electrocution or lethal injection—is not violative of Ex Post Facto Clauses. Prisoner who receives stay of execution retains ability to choose method of execution, within statutorily designated time period, when new date is set for execution.

October 31, 1994

Mr. Ronald J. Angelone
Director, Department of Corrections

You ask several questions concerning the 1994 amendment to § 53.1-234 of the Code of Virginia, a new provision creating a choice between execution by electrocution or lethal injection that a prisoner under sentence of death must make. Specifically, you ask:

1. Whether the 1994 amendment applies to all prisoners scheduled to be executed on or after January 1, 1995, or whether it applies only to prisoners received by the Department of Corrections who, on or after January 1, 1995, either (i) have committed a capital crime, (ii) have been convicted of a capital crime, or (iii) have been sentenced to death upon conviction of a capital crime.

2. Whether prisoners under a sentence of death before January 1, 1995, may chose lethal injection as the method of execution.

3. Whether lethal injection is the designated method of execution after January 1, 1995, for prisoners who refuse to make a choice, including prisoners who were sentenced to death before January 1, 1995.

4. Whether a prisoner who is granted a stay of execution may change the original choice of the method of execution upon the fixing of a new date of execution.
I. Applicable Constitutional and Statutory Provisions


Article I, § IX, clause 3 of the Constitution of the United States provides that “[n]o bill of attainder or ex post facto law shall be passed” by Congress. Article I, § X, clause 1 provides that “[n]o state shall ... pass any ... ex post facto law ....”

Article I, § 9 of the Constitution of Virginia (1971) similarly prohibits the General Assembly from passing ex post facto laws.

B. Virginia Statute

The 1994 Session of the General Assembly added language to § 53.1-234 that affects three changes in the method of execution, by (1) providing for execution by lethal injection, (2) creating a waivable right of the prisoner to choose execution by either electrocution or lethal injection, and (3) designating lethal injection as the method of execution if the prisoner does not make a choice. See Ch. 921, 1994 Va. Acts Reg. Sess. 1532. The second enactment clause of that act provides that the amendment to § 53.1-234 will be effective January 1, 1995. See id. The second paragraph of § 53.1-234 provides, in part:

The Director, or the assistants appointed by him, shall at the time named in the sentence, unless a suspension of execution is ordered, cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance, until he is dead. The method of execution shall be chosen by the prisoner. In the event the prisoner refuses to make a choice at least fifteen days prior to the scheduled execution, the method of execution shall be by lethal injection.


II. 1994 Amendment to § 53.1-234

Does Not Implicate Ex Post Facto Clauses

Your questions are whether applying new § 53.1-234 to prisoners whose offense, conviction or sentencing precedes the effective date of the 1994 amendment violates the Ex Post Facto Clauses. The Constitution of the United States prohibits both federal and state legislatures from passing ex post facto laws. U.S. CONST. art. I, § 9, cl. 3; id. § 10, cl. 1. The ex post facto prohibition was considered by the framers of the Constitution to be fundamental to the “principles of the social compact, and to every principle of sound legislation.” THE FEDERALIST No. 44, at 291


In a 1915 decision, the Supreme Court of the United States held that death by electrocution rather than by hanging neither increased a prisoner’s punishment nor violated the *Ex Post Facto* Clause. *Malloy v. South Carolina*, 237 U.S. 180 (1915). The Court noted that the “inhibition of *ex post facto* laws” was not intended “to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment.” 237 U.S. at 183. In a 1993 case, relying on *Dobbert*, the United States Court of Appeals for the Eleventh Circuit decided that the *Ex Post Facto* Clauses would not be violated by future congressional legislation specifying a method for carrying out a prisoner’s federal death sentence, when the prisoner had clear notice that violation of the statute under which he was sentenced could result in imposition of the death penalty. *See U.S. v. Chandler*, 996 F.2d 1073, 1095-96 (11th Cir. 1993) *cert. denied*, 114 S. Ct. 2724, 129 L. Ed. 2d 848 (U.S. 1994); accord *State v. Fitzpatrick*, 684 P.2d 1112 (Mont. 1984), *cert. denied*, *McCormick v. Fitzpatrick*, 493 U.S. 872 (1989); *see also DeShields v. State*, 534 A.2d 630, 639 n.7 (Del. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Ex Parte Granviel*, 561 S.W.2d 503, 510 (Tex. Crim. App. 1978).

The 1994 amendment to § 53.1-234, which implements execution by lethal injection as an alternate method of execution, is a procedural adjustment in the method of administering the punishment for capital crimes and, therefore, does not violate the *Ex Post Facto* Clauses. It is my opinion, therefore, that the 1994 amendment will govern all executions conducted after January 1, 1995, without regard to the date of the prisoner’s offense, conviction or sentencing.

III. Creation of Choice of Method of Execution for Death Row Prisoners Does Not Violate *Ex Post Facto* Clauses

The 1994 amendment to § 53.1-234 does not concern the measure of punishment, but creates a choice of method, which previously was nonexistent, by which the punishment is to be carried out. The crime for which the prisoner is sentenced,
"the punishment prescribed therefor, and the quantity or degree of proof necessary to establish his guilt, all remain[] unaffected by the [amendment]."  


The statutorily created choice in new § 53.1-234 provides an exercisable option for all prisoners scheduled to be executed on or after the effective date of the amendment—January 1, 1995. The choice of the method of execution is not based on the dates of either commission of, or conviction or imposition of sentence for, the underlying capital crime.

By its specific terms, the amendment to § 53.1-234 permits a death row prisoner to choose a method of execution—either electrocution or lethal injection—and creates a single designated method of execution if the prisoner declines to make the statutory choice; that single designated method of execution is by lethal injection. Application of the single designated method of execution established by the amendment to all executions conducted after January 1, 1995, in cases where the prisoner does not make a choice, is consistent with the rationale of Dobbert and the cases that followed it. It is my opinion, therefore, that the designation of execution by lethal injection in the absence of choice by the prisoner does not violate the Ex Post Facto Clauses.

IV. Prisoner May Modify Original Choice of Method of Execution

The only restriction the 1994 amendment to § 53.1-234 places on the prisoner’s choice of the method of execution is that the choice be made at least fifteen days before the scheduled execution. Words used in a statute must be afforded their plain and ordinary meaning unless the context demands a different result. Grant v. Commonwealth, 223 Va. 680, 684, 292 S.E. 2d 348, 350 (1982). It is my opinion, therefore, that on any occasion when the date of execution is changed, the prisoner retains the ability to choose the method of execution, consistent with the statute, upon the fixing of a new date of execution—that is, the choice must be made at least fifteen days before the new date.

1The Montana Supreme Court in State v. Fitzpatrick ruled that a Montana amendment requiring the condemned to elect either hanging or lethal injection as the method of execution did not constitute a bill of attainder, but merely created alternate methods for imposing the sentence of death. 684 P.2d at 1113 (citing Malloy v. South Carolina, 237 U.S. at 185).
Mr. Edward W. Murray  
Director, Department of Corrections

You ask whether a physician employed by the Department of Corrections is subject to discipline by the Board of Medicine for participating in the execution of a condemned prisoner.

I. Applicable Statutes

Chapter 13 of Title 53.1, §§ 53.1-232 through 53.1-236 of the Code of Virginia, details the procedures for execution of death sentences. Section 53.1-234 provides that, “[a]t the execution there shall be present ... a physician employed by the Department [of Corrections] or his assistant ....”

Section 53.1-235 provides, in part:  

After execution of the death sentence as provided in this chapter, the physician in attendance shall perform an examination to determine that death has occurred. The Director [of the Department of Corrections] shall certify the fact of the execution, appending the physician’s death certificate thereto, to the clerk of the court by which such sentence was pronounced.

Article 2, Chapter 29 of Title 54.1, §§ 54.1-2911 through 54.1-2928, details the authority of the Board of Medicine (the “Board”) to regulate the conduct of physicians. Section 54.1-2914(A) provides, in part:
Any practitioner of the healing arts regulated by the Board shall be considered guilty of unprofessional conduct if he:

* * *

9. Conducts his practice in a manner contrary to the standards of ethics of his branch of the healing arts[.]

II. Ethical Opinion of American Medical Association
Has No Legal Effect When Contrary to State Statute

You note that the American Medical Association ("AMA"), in cooperation with certain other health care professional organizations,1 recently issued a statement describing as unethical any participation by health care professionals in executions. This statement includes the following:

Proscribed behaviors which constitute participation in executions include: prescribing or administering tranquilizers and other psychoactive agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician or other health care professional; determining the point at which the individual has actually died; and rendering of technical advice regarding execution.


While the ethical codes, opinions and statements of the AMA may be useful for the Board to consult in determining whether a physician has violated § 54.1-2914(A)(9), such standards adopted by a private, voluntary professional association are not conclusive as a matter of law.2 Although § 54.1-2914(A)(9) allows the Board to use the ethical standards of the AMA and other professional organizations as a basis for disciplining physicians, it does not adopt the AMA's ethical standards by reference, or require the Board to give those opinions the force of law.3 Any such sweeping adoption of the AMA's opinions arguably would be an invalid delegation of legislative authority to a private entity. In other contexts, the Supreme Court of Virginia has indicated that such a delegation to a private entity would violate Article IV, § 1 of the Constitution of Virginia (1971), which vests the legislative

The Board derives its authority from the Commonwealth, and it would be an obvious absurdity for the Commonwealth to require that a physician perform a task, then to authorize the Board to discipline the physician who does that task. Thus, whatever discretion the Board may otherwise have in the context of a disciplinary proceeding to adopt the ethical standards of the AMA or any other professional group, it has no such discretion when applicable state statutes require that a physician perform the acts in question. Accordingly, in the particular instance that you describe, the Joint Statement has no legal effect in Virginia and cannot be used by the Board as the basis to discipline a physician who performs the execution-related tasks authorized and required by §§ 53.1-234 and 53.1-235.

It is my opinion, therefore, that a physician may not be disciplined by the Board for attending or observing an execution, for making a determination that death has occurred, for issuing a certificate of death, or for performing any other function that applicable state statutes lawfully require to be performed by a physician in connection with an execution.\(^3\)

1The other organizations joining in issuance of the statement are the American College of Physicians, the American Nurses Association and the American Public Health Association.

2Although it is not central to your question, I note that the Joint Statement and the 1993 report issued on behalf of the AMA differ on at least one significant point from the AMA's previously published ethical opinion, which also proscribed participation in an execution, but said: "A physician may make a determination or certification of death as currently provided by law in any situation." 1992 *CODE OF MEDICAL ETHICS, CURRENT OPINIONS OF THE COUNSEL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION*, Op. 2.06, at 5, 5.

Determination and certification of death are the acts that § 53.1-235 specifically requires to be performed by a physician in attendance at an execution.

3In contrast to medical ethics standards, ethical canons and disciplinary rules applicable to attorneys are promulgated by the Supreme Court of Virginia pursuant to statute and under the inherent constitutional authority of the judicial branch of government to regulate practice and procedure in the courts. See § 54.1-3909; *Button v. Day*, 204 Va. 547, 552-53, 132 S.E.2d 292, 296 (1963). Ethical opinions of the Virginia State Bar are rendered under this same statutory and constitutional authority, and thus can have the force of law. Nevertheless, the General Assembly retains the ultimate power to override or limit these ethical and disciplinary standards and opinions by statute. See VA. CONST. art. VI, § 5 (1971); *Button*, 204 Va. at 554, 132 S.E.2d at 297; 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 733-35 (1974).

4Although you have not indicated what position, if any, the Medical Society of Virginia has taken concerning the Joint Statement, my conclusion would be the same even if that organization fully adopts the views of the AMA.

5In rendering this opinion, I am aware of the AMA's view that, regardless of one's views about capital punishment, the role of a physician fundamentally is inconsistent with participation in an execution. The appropriate course of action for those who hold this view, however, is to seek a
change in the statutory requirements under which executions are conducted, not to criticize physicians who perform what is now a statutorily required role in the administration of justice.

PRISONS AND OTHER METHODS OF CORRECTION: PROBATION AND PAROLE.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

Abolishing parole in Virginia retroactively to apply to current inmates, either by statute or administrative action, would violate Ex Post Facto Clauses of U.S. and Virginia Constitutions. Parole may be abolished prospectively only for persons who commit offenses on or after effective date of its abolition.

September 14, 1994

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether parole of persons currently incarcerated for criminal offenses may be abolished, effective immediately, by statute, administrative regulation, or by directive to the Virginia Parole Board.

I. Applicable Constitutional and Statutory Provisions


Article I, § IX, Clause 3 of the Constitution of the United States provides that “[n]o Bill of Attainder or ex post facto Law shall be passed” by Congress. Article I, § X, Clause 1 provides that “[n]o State shall ... pass any ... ex post facto law.”

Article I, § 9 of the Constitution of Virginia (1971) similarly prohibits the General Assembly from passing ex post facto laws.

B. Virginia Statutes

Section 53.1-154 of the Code of Virginia states:

The Virginia Parole Board shall by regulation divide each calendar year into such equal parts as it may deem appropriate to the efficient administration of the parole system. Unless there be reasonable cause for extension of the time within which to review and decide a case, the Board shall review and decide the case of each prisoner no later than
that part of the calendar year in which he becomes eligible for parole, and at least annually thereafter, until he is released on parole or discharged, except that upon any such review the Board may schedule the next review as much as three years thereafter, provided there are ten years or more or life imprisonment remaining on the sentence in such case. The Board, in addition, may review the case of any prisoner eligible for parole at any other time and may review the case of any prisoner prior to that part of the year otherwise specified. In the discretion of the Board, interviews may be conducted by the Board or its representatives and may be either public or private.

Section 53.1-155(A) states:

No person shall be released on parole by the Board until a thorough investigation has been made into the prisoner’s history, physical and mental condition and character and his conduct, employment and attitude while in prison. The Board shall also determine that his release on parole will not be incompatible with the interests of society or of the prisoner. The provisions of this section shall not be applicable to persons released on parole pursuant to § 53.1-159.

The first two paragraphs of § 53.1-159 state:

Every person who is sentenced and committed under the laws of the Commonwealth to the Department of Corrections or as provided for in §§ 19.2-308.1, 53.1-152 or § 53.1-153 shall be released on parole by the Virginia Parole Board six months prior to his date of final release. Each person so sentenced or committed, however, shall serve a minimum of three months of his sentence prior to such a release. Persons who are so released on parole shall be subject to a minimum of six months’ supervision and an additional period of parole ending on the date upon which the parolee would have served the maximum term of confinement, or any period the Board otherwise deems appropriate in accordance with § 53.1-156. Such persons shall also be subject, for the entire period of parole fixed by the Board, to such terms and conditions prescribed by the Board in accordance with § 53.1-157.

Notwithstanding the provisions of the preceding paragraph, if within thirty days of a release scheduled pursuant to this section, new information is presented to the Board which gives the Board reasonable cause to believe that the release poses a clear and present danger to the life or physical safety of any person, the Board may delay the release for up to six months to investigate the matter and to refer it to law-
enforcement, mental health or other appropriate authorities for investigation and any other appropriate action by such authorities.

II. Virginia Inmates Have No Constitutional Right to Parole Release, but Have Protected Interest in Parole Consideration

A state has no duty to establish a parole system, and a state prisoner has no constitutional right to be released on parole prior to the expiration of a valid sentence. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Once a state chooses to establish a system of parole, however, that state creates a liberty interest protected by due process considerations, and the procedures used in that system must be fundamentally fair. *Franklin v. Shields*, 569 F.2d 800, 801 (4th Cir. 1978) (en banc), aff'g in part and rev'g in part 569 F.2d 784 (4th Cir. 1977), cert. denied, 435 U.S. 1003 (1978); see also *Jackson v. Shields*, 438 F. Supp. 183, 184 (W.D. Va. 1977). Generally, this constitutional requirement for due process is satisfied when the inmate is fairly considered for parole and notified of the reasons for denial. *Id.*

Virginia has created a parole system through which inmates may be released at the sound discretion of the Virginia Parole Board. Section 53.1-154; see *Gaston v. Taylor*, 946 F.2d 340, 344 (4th Cir. 1991) (en banc). While Virginia inmates clearly have no right to be released on parole, by creating that parole system, the General Assembly has created a right for current inmates to be considered fairly for parole release in accordance with the statutes governing parole eligibility. *Fender v. Thompson*, 883 F.2d 303, 305 (4th Cir. 1989); *Schwartz v. Muncy*, 834 F.2d 396 (4th Cir. 1987); *Krawetz v. Murray*, 742 F. Supp. 304, 305 (E.D. Va. 1990).

III. *Ex Post Facto* Considerations Apply to Parole Eligibility in Virginia

The Constitution of the United States prohibits both the federal and the state legislatures from passing *ex post facto* laws. U.S. CONST. art. I, § 9, cl. 3; id. § 10, cl. 1. The *ex post facto* prohibition is one of the few provisions of the United States Constitution that applies both to federal and state government without reference to the Fourteenth Amendment. The *ex post facto* prohibition was considered by the framers of the Constitution to be fundamental to the “principles of the social compact, and to every principle of sound legislation.” THE FEDERALIST No. 44, at 291 (James Madison). The Constitution of Virginia imposes this same prohibition on the General Assembly. VA. CONST. art. I, § 9.

As early as 1798, the Supreme Court of the United States held that the *Ex Post Facto* Clauses made it unconstitutional to enact, amend or apply laws that enhance punishment beyond what was contemplated by the law at the time the inmate

A 1982 opinion of the Attorney General applies the principles of these court decisions to conclude that the Ex Post Facto Clauses prohibit a retroactive application of restrictions on inmates’ accumulation of “good time” credits. 1982–1983 Op. Va. Att’y Gen. 379. That opinion, issued following the decision of the Supreme Court in Weaver v. Graham, concludes that a 1982 amendment to § 53.1-116 reducing the accrual rate for “good time” affected only persons committing offenses after the effective date of the amendment, and could not constitutionally be applied to persons already sentenced. Id. The same principles would apply to statutory conditions on parole eligibility, which are part of the punishment of a crime. Repealing parole eligibility for inmates who previously were considered eligible for parole at the time they committed their offenses clearly presents an ex post facto violation. Warden v. Marrero, 417 U.S. 653, 663 (1974).

The United States Court of Appeals for the Fourth Circuit has specifically held that the Virginia statutes providing for discretionary parole consideration are annexed to a Virginia inmate’s sentence at the time he committed his offense. These laws, therefore, may not be amended retroactively to the detriment of Virginia inmates. Fender v. Thompson, 883 F.2d at 305; Schwartz v. Muncy, 834 F.2d at 396. In a case decided just this year, the Supreme Court of Virginia likewise has held that “[t]he parole eligibility statute in effect on the date of the offenses for which the felon is convicted is the statute that controls the convict’s eligibility for parole.” Vaughan v. Murray, 247 Va. 194, 197, 441 S.E.2d 24, 25 (1994) (citing Ruplenas v. Commonwealth, 221 Va. 972, 978, 275 S.E.2d 628, 632 (1981)).

The fact that an inmate has no vested right to parole release is immaterial to the ex post facto analysis. Roller v. Cavanaugh, 984 F.2d 120, 122-23 (4th Cir.), cert. granted, 113 S. Ct. 2412, 124 L. Ed. 2d 635, cert. dismissed, 510 U.S. ___, 114 S. Ct. 593, 126 L. Ed. 2d. 409 (1993) (per curiam) (citing Weaver v. Graham, 450 U.S. at 29-30). The relevant issue is whether parole eligibility was a condition of the inmate’s sentence at the time he committed his offense, and that question has been answered affirmatively by the federal courts for inmates currently incarcerated in Virginia correctional facilities. Fender v. Thompson, 883 F.2d at 306 (“statutes enacted or amended after a prisoner was sentenced [in Virginia] cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility”).
It is my opinion, therefore, that the current parole system in Virginia may not be abolished retroactively; it may be abolished prospectively only for persons who commit offenses on or after the effective date of the abolition of parole.

IV. *Ex Post Facto* Prohibition Applies Whether Parole Is Abolished Legislatively or Administratively

Mere procedural changes in parole consideration that do not affect substantive rights do not offend the *Ex Post Facto* Clause. See *Dobbert v. Florida*, 432 U.S. 282 (1977). For example, parole boards lawfully may change their guidelines for rendering the parole decision without violating the federal or state constitutional prohibitions, in part because those guidelines are purely discretionary and inmates have no legitimate expectation that the guidelines will be followed strictly. These administrative guidelines simply are not substantive “laws” for *ex post facto* purposes. *Franzese v. Clark*, 732 F. Supp. 653 (E.D. Va. 1990); *Cruz v. Clark*, 684 F. Supp. 1335 (E.D. Va. 1988).

Administrative changes in parole consideration may offend the *Ex Post Facto* Clause when the agency action has the force of law. ² See *Akins v. Snow*, 922 F.2d 1558, 1561 (11th Cir.), cert. denied, 501 U.S. 1260 (1991); accord *Griffin v. State*, 433 S.E.2d 862 (S.C. 1993), cert. denied sub nom. *South Carolina v. Griffin*, 114 S. Ct. 924, 127 L. Ed. 2d 217 (U.S. 1994). The Supreme Court of the United States has stated that the *ex post facto* prohibition applies to the effect and not to the form of substantive changes in penal laws:

The Virginia statutory scheme of discretionary parole consideration clearly has created substantive rights for current Virginia inmates. These include legislative direction as to the timing of the parole review and the factors to be considered. Sections 53.1-154, 53.1-155. Abolishing parole altogether, effective retroactively to apply to those current inmates, cannot withstand an *ex post facto* challenge. *Fender v. Thompson*, 883 F.2d at 303; *Schwartz v. Muncy*, 834 F.2d at 396.

Authority for administrative regulations or executive directives that have the force of law must be derived from statutes. If a retroactive change in parole
eligibility would be unconstitutional when imposed by statute, it cannot be made constitutional by administrative or executive action. Accordingly, any regulation or directive to the Virginia Parole Board that had the effect of completely abolishing parole eligibility for Virginia inmates currently incarcerated would violate the *Ex Post Facto* Clauses just as if it were a change in statute. It is my opinion, therefore, that parole may not be abolished retroactively in Virginia, either by statute or by administrative action.

1Under current law, Virginia inmates also may be released on what is deemed mandatory parole, pursuant to § 53.1-159. Mandatory parole occurs six months prior to the inmate’s final discharge date, which is calculated with reference to “good time” credits. Mandatory parole release generally does not involve the exercise of discretion of the Virginia Parole Board, unless the Board discovers “new information” that gives it “reasonable cause to believe that the release poses a clear and present danger to the life or physical safety of any person.” *Id.*

Because this mandatory parole release occurs automatically, legal challenges are infrequent. It is clear that because Virginia has created this system of mandatory parole release, it is subject to minimal due process safeguards, and, as discussed in this opinion, *ex post facto* considerations apply. *Jones v. Murray*, 962 F.2d 302, 310-11 (4th Cir.), *cert. denied*, 113 S. Ct. 472, 121 L. Ed. 2d 378 (U.S. 1992).

2The district court decision in *Cruz v. Clark* takes pains to demonstrate that the procedural guidelines of the federal Parole Commission being retroactively applied in that case do not have the force of law, stating: “The Commission retains the discretion to set presumptive parole dates above or below the guidelines for appropriate circumstances.” 684 F. Supp. at 1340. Clearly, if *Cruz* had involved a statute or administrative regulation eliminating the Parole Commission’s discretion to grant parole, the *Ex Post Facto* Clause would have prohibited its retroactive application.

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PROFESSIONS AND OCCUPATIONS: PRACTITIONER SELF-REFERRAL ACT.

HEALTH: REGULATION OF MEDICAL CARE FACILITIES AND SERVICES - HOSPITAL AND NURSING HOME LICENSURE AND INSPECTION.

Practitioner who directly or indirectly has legal or beneficial ownership interest in entity that operates licensed hospital may refer patients to such hospital for health services.

November 15, 1994

The Honorable Eric I. Cantor
Member, House of Delegates

You ask whether a health practitioner who directly or indirectly has a legal or beneficial ownership interest in an entity that operates a licensed hospital may refer patients to that hospital for health services, without violating the provisions of
§ 54.1-2411(A) of the *Code of Virginia*, a portion of the Practitioner Self-Referral Act.

I. Applicable Statutes

Section 54.1-2410 defines the following terms used in the Practitioner Self-Referral Act:

"*Entity*" means any person, partnership, firm, corporation, or other business that delivers health services.

* * *

"*Investment interest*" means the ownership or holding of an equity or debt security, including, but not limited to, shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity or debt instruments, except investment interests in a hospital licensed pursuant to Article 1 (§ 32.1-123 et seq.) of Chapter 5 of Title 32.1.

"*Investor*" means an individual or entity directly or indirectly possessing a legal or beneficial ownership interest, including an investment interest.

* * *

"*Practitioner*" means any individual certified or licensed by any of the health regulatory boards within the Department of Health Professions, except individuals regulated by the Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine.

Section 54.1-2411(A) pertains to prohibited patient referrals by practitioners, and states:

Unless the practitioner directly provides health services within the entity and will be personally involved with the provision of care to the referred patient, or has been granted an exception by the Board [of Health Professions] or satisfies the provisions of subsection D[1] of this section, a practitioner shall not refer a patient for health services to an entity outside the practitioner’s office or group practice if the practitioner or any of the practitioner’s immediate family members is an investor in such entity.
II. Practitioner with Investment Interest in Entity Operating Licensed Hospital Is Not Prohibited from Referring Patients to Hospital for Health Services

If the definition of the term “investor” is read without modification by the definition of the term “investment interest,” and solely in conjunction with the statutory prohibition in § 54.1-2411(A), then a practitioner who has an investment interest in a licensed hospital clearly would be prohibited from referring patients to that hospital. It is, however, a fundamental principle of statutory construction that statutes must be read as a whole, with every provision given effect, if possible. See Gallagher v. Commonwealth, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964); 1993 Op. Va. Att’y Gen. 173, 174. The definition of “investor,” therefore, must be read in conjunction with the definition of the term “investment interest.”

The definition of the term “investment interest” specifically excludes investment interests in a hospital licensed pursuant to Article 1, Chapter 5 of Title 32.1. It is well-settled that “[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it.” Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); 1993 Op. Va. Att’y Gen. 256, 257. It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous. See Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 1993 Op. Va. Att’y Gen. 99, 100. In those situations, the statute’s plain meaning and intent govern.

A practitioner who has a legal or beneficial ownership interest (and “investment interest”) in a licensed hospital, or in an entity that owns or operates such a hospital, may, therefore, in accordance with § 54.1-2411(A), refer patients to that hospital regardless of the nature of that investment interest.

It is my opinion, therefore, that a practitioner who directly or indirectly has a legal or beneficial ownership interest in an entity that operates a licensed hospital may refer patients to such hospital for health services without violating the provisions § 54.1-2411(A).

1Section 54.1-2411(D) permits a practitioner’s referral of patients for health services to a publicly traded entity in which the practitioner has an investment interest, which is not an issue in this opinion.
PROPERTY AND CONVEYANCES: CREATION AND LIMITATION OF ESTATES; THEIR QUALITIES.

TAXATION: STATE RECORDATION TAX.

Grantors in deed in trust and beneficiaries in underlying land trust agreement are identical. Real estate conveyance of grantors/initial beneficiaries passes as personalty to trustee; title to personalty owned by any beneficiary vests in executor or administrator upon beneficiary's death. Neither executor nor administrator is beneficiary of trust; only beneficiaries under land trust agreement are grantors named in deed in trust. Because beneficiaries and grantors are same persons, deed in trust is exempt from recordation tax.

November 16, 1994

The Honorable Charles E. King Jr.
Clerk, Circuit Court of Gloucester County

You refer to a 1993 opinion of the Attorney General concluding that a deed conveying property to a living trust with both current and contingent beneficiaries is not exempt from recordation tax under § 58.1-811(A)(12) of the Code of Virginia. You present another deed and land trust agreement and ask whether these documents meet the statutory criteria for that exemption.¹

I. Applicable Statutes

Section 55-17.1 states, in part:

No trust relating to real estate shall fail nor shall any use relating to real estate be defeated because no beneficiaries are specified by name in the recorded deed of conveyance to the trustee or because no duties are imposed upon the trustee. The power conferred by any such instrument on a trustee to sell, lease, encumber or otherwise dispose of property therein described shall be effective and no person dealing with such a trustee shall be required to make further inquiry as to the right of such trustee to act nor shall he be required to inquire as to the disposition of any proceeds.

In any case under this section, where there is a recorded deed of conveyance to a trustee, the interest of the beneficiaries thereunder shall be deemed to be personal property.

Section 58.1-811 provides, in part:
A. The taxes imposed by § 58.1-801 [on the recordation of deeds] shall not apply to any deed conveying real estate:

* * *

12. To trustees of a trust, when the grantors in the deed and the beneficiaries of the trust are the same persons; and to the original beneficiaries of a trust from the trustees holding title under a deed in trust[.]

II. Prior Opinion and Relevant Instruments

The 1993 opinion to which you refer concludes that the exemption in § 58.1-811(A)(12) does not apply to recordation of a deed conveying real estate to a trust when, by the terms of the trust, the grantor of the deed is the initial beneficiary, and assets of the trust are conveyed to a subsequent beneficiary at the death of the initial beneficiary. 1993 Op. Va. Att’y Gen. 258, 259-60. The 1993 opinion cited a ruling of the Tax Commissioner, concluding that such a deed does not qualify for the exemption because the grantors in the deed and the beneficiaries in the trust are not identical. Id. at 259 & 260 n.1 (citing Comm’r Rul. 87-38 (CCH) ¶ 201-416, at 12,188 (Feb. 24, 1987)).

The Land Trust Agreement and Deed in Trust you present are significantly different than those discussed in the 1993 opinion. The Deed in Trust reflects the conveyance from the grantors to the trustee, and does not name the beneficiary. The underlying Land Trust Agreement, however, shows the grantors as the initial beneficiaries. Furthermore, it provides that the trust shall not terminate at the death of any beneficiary, but that the interest of a deceased beneficiary is to pass as personal property (and not as real property) to the decedent’s executor or administrator. The Land Trust Agreement clearly provides that it is created under § 55-17.1, and its provisions are consistent with that statute. As required by the second paragraph of § 55-17.1, quoted in Part I and reiterated in the Land Trust Agreement, the interest of each beneficiary of a trust created under that statute is personalty, not realty.

III. Recordation Tax Exemption Applicable to Conveyance in Trust for Benefit of Grantors When There Are No Contingent Beneficiaries

The exemption from recordation taxes contained in § 58.1-811(A)(12) applies to any deed conveying property to trustees when the grantors in the deed and the beneficiaries of the trust are the same persons. The instrument described in the 1993 opinion named the grantor as the initial beneficiary, but then named as contingent beneficiaries the heirs at law of the original beneficiary. 1993 Op. Va. Att’y Gen., supra, at 259. The Tax Commissioner’s ruling cited in the 1993 opinion states that “[§ 58.1-811(A)(12)] does not distinguish between beneficiaries with different types
of interests. It is clear that the grantor in the deed in question and the beneficiaries named in the declaration of trust are not identical.” Comm’r Rul. 87-38 (CCH), supra § 201-416.

In contrast, the Land Trust Agreement you present designates no contingent beneficiaries, either by name or by class. It provides that the original beneficiaries’ interest, which is personality, will pass to their executor or administrator. Title to the personality owned by a decedent vests in the executor or administrator by operation of law upon the decedent’s death. *Air Power, Inc. v. Thompson*, 244 Va. 534, 422 S.E.2d 768 (1992); *see also Prudential Ins. Co. of America v. Stephens*, 498 F. Supp. 155 (E.D. Va. 1980); *Brent v. Washington’s Adm’r*, 59 Va. (18 Gratt.) 526, 530 (1868). Neither an executor nor an administrator, however, is a beneficiary of such a trust. Accordingly, the only beneficiaries under the Land Trust Agreement are the grantors named in the Deed in Trust.

In my opinion, therefore, because the Land Trust Agreement has been established in accordance with the provisions of § 55-17.1, and, further, because no beneficiaries are named in that Land Trust Agreement, except the same persons who are the grantors in the Deed in Trust, the accompanying Deed in Trust is exempt from the recordation tax under § 58.1-811(A)(12).¹


²This opinion assumes that each of the grantors actually has a substantive interest in the property being conveyed. If a person who has no interest in the property is intended to be a beneficiary of the land trust and is named as a grantor solely to avoid the payment of recordation taxes, then the § 58.1-811(A)(12) exemption would not apply. The form of the transaction will be secondary to its substance. *See Op. Va. Att’y Gen.: 1990 at 265, 266; 1987-1988 at 519, 520; 1982-1983 at 491, 496.*

³Your letter also notes that the Land Trust Agreement permits the beneficiary to assign his interest in the trust to a third party. A right to assign or convey an interest in the trust does not create any beneficial interest in any third person, unless and until that right is exercised. Therefore, the mere existence of such a right is not a basis for denial of exemption from recordation taxes. This conclusion is supported by another ruling of the Tax Commissioner. *See Comm’r Rul. 87-121 (CCH) ¶ 201-379, at 12,149 (Mar. 31, 1987).* The ruling applied the second part of § 58.1-811(A)(12) to a conveyance “to the original beneficiaries ... from the trustees.” *Id.* (quoting § 58.1-811(A)(12)). The beneficiary was not the “original” beneficiary because he had purchased the rights of the beneficiary named in the trust, but his acquisition of those rights occurred before the ownership by the trust of any property. The ruling granted the exemption from recordation taxes because the grantee “was the original beneficiary at the time the trust acquired its first, and only, property.” *Id.*
TAXATION: LICENSE TAXES.

Commissioner of revenue must make factual determination whether company's activities involve separate businesses performed independently, or are so integrated as to comprise single business, for proper tax rate classification. Company should be taxed at professional rate only if substantial portion of its business is professional; if company's professional services are only ancillary and subordinate to other nonprofessional business services that are substantial, commissioner should tax company's gross receipts at lower rate. Commissioner may rely on company's hourly billing rates for employees' services in determining proper classification.

October 28, 1994

The Honorable Walter A. Stosch
Member, Senate of Virginia

You ask how a county's commissioner of the revenue should calculate the business license tax owed by a particular business headquartered in the county, whose activities you describe. Specifically, you ask if the gross receipts of that business must be assigned to a single business license classification and taxed at a single rate, or if it is appropriate to divide the receipts of the business into two or more classifications, taxing each portion at the applicable rate.

I. Facts

You state that the firm in question (the "Company") conducts a defense contracting business from an office located in a Virginia county. As authorized by § 58.1-3706 of the Code of Virginia, the county imposes a higher business license tax rate on the gross receipts of a business providing professional services than it does on one providing general business services.

The Company offers management, technical and engineering support services, primarily with respect to surface ship radio communications systems. Many of its contracts are with the Department of Defense or other defense contractors. For a typical contract, the Company provides engineering and technical assistance in areas including radio communications system design, integration, testing and evaluation; acquisition planning and management; installation and installation planning and management; program planning and management; developmental, operational and acceptance test planning and execution; and life-cycle support planning. You state that the predominant expertise of the Company lies in the areas of business and management and Navy field operational experience in ship communications, rather than in engineering services. The Company is not required to be a licensed professional corporation nor do its contracts necessarily require the services of certified or licensed engineers.
The Company has 155 employees at its county office, of whom only one is a professional engineer (licensed, but not in Virginia). Forty-nine employees hold bachelor's or advanced degrees (37 of which are nonengineering degrees), and 106 employees do no hold any collegiate or advanced degrees (of whom 53 are former enlisted military technicians).

II. Applicable Statutes and Regulations

A. Statutes

Section 58.1-5 states:

When any person, firm or corporation is engaged in more than one business which is made by law subject to taxation, such person, firm or corporation shall pay the tax provided by law on each branch of his, their or its business.

Section 58.1-3703(A), a part of Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735, authorizes counties, cities and towns to levy “license taxes on businesses, trades, professions, occupations and callings.”

Section 58.1-3706 classifies businesses subject to local license taxes into four general types and sets a maximum allowable rate for each of the four classes. Section 58.1-3706(A)(3) sets a maximum rate of “fifty-eight cents per $100 of gross receipts” on “financial, real estate and professional services.” Section 58.1-3706(A)(4) sets a maximum rate of “thirty-six cents per $100 of gross receipts” for “repair, personal and business services, and all other businesses and occupations not specifically listed or excepted.”

The first paragraph of § 58.1-3701 directs the Department of Taxation to “promulgate guidelines defining and explaining the categories listed in subsection A of § 58.1-3706 for the use of local governments in administering the taxes imposed under authority of this chapter.”

B. BPOL Guidelines

Under that authority, on January 1, 1984, the Department of Taxation promulgated Guidelines for Local Business, Professional and Occupational License Taxes (the “BPOL Guidelines”). Paralleling § 58.1-5, the BPOL Guidelines state:

If the conduct of a business, trade or occupation at a single place of business involves operations that fall within two or more of the four
categories as set forth, the licensee is subject to the rate ceiling applicable to each operation.


The BPOL Guidelines define “professional service” as

[a] person ... engaged in rendering any service specifically enumerated below or engaged in any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study is used by its practical application to the affairs of others, either advising, guiding, or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. The word profession implies attainments in professional knowledge as distinguished from mere skill, and the application of knowledge to uses for others as a vocation.

Id. pt. II, para. 3-4, at 19.

Paragraph 3-4.1 lists engineers among “[t]hose engaged in rendering a professional service.” Id. at 20.

Paragraph 3-4.2 states:

The performing of services dealing with the conduct of business itself, including the promotion of sales or services of such business and consulting services, do not constitute the practice of a profession, even though the services involve the application of a specialized knowledge.

Id.

Paragraph 3-4.3 states:

(a) Certification as a professional by itself is not sufficient to establish liability for local license taxation. Also, the fact that a professional is compensated by means of a salary is not sufficient by itself to relieve that professional from local license tax liability.

(b) Gross receipts for purposes of local license taxation as a professional include only those gross receipts obtained from the practice of that profession as a business ....

Id. at 20-21.
Paragraph 4-4 defines “business service” as

[a]ny service rendered for compensation to any business, trade, occupation or governmental agency ... unless the service is specifically provided for under another section of these guidelines.

*Id.* at 22.

Paragraph 4-5 lists numerous examples of “repair, personal or business service,” including “business research and consulting services,” “data processing, computer and systems development services,” and “drafting services.” *Id.* at 23-24.

III. Taxpayer Conducting Business, Trade or Occupation at Single Location Involving Business Activities Within Two of These Categories Is Subject to Tax Rate Applicable to Each Activity

Your question is whether all activities of a firm must be taxed at a single rate. Section 58.1-5 specifically provides that if a “person, firm or corporation is engaged in more than one business ... such person, firm or corporation shall pay the tax provided by law on each branch of his, their or its business.” The BPOL Guidelines parallel § 58.1-5 by providing that, “[i]f the conduct of a business, trade or occupation at a single place of business involves operations that fall within two or more of the four categories ... the licensee is subject to the rate ceiling applicable to each operation.” *Id.* pt. I, para. 5, at 4. Clearly, then, a single corporation or other business entity may be taxed on its gross receipts at more than one license tax rate. A difficulty arises in distinguishing instances when the firm is carrying on two or more separate businesses from instances when the firm merely performs some function ancillary to its primary business activity that, performed alone, would be taxed at a different rate.

Although, in a proper case, a company may be subject to more than one license tax rate, court decisions make it clear that a locality cannot merely split a company into its component parts and tax those parts separately. *Hill v. City of Richmond*, 181 Va. 744, 26 S.E.2d 48 (1943). In a 1989 case, the Supreme Court of Virginia addressed the issue of taxing a company based on its component parts and ruled that a company will be classified as a single business activity—in that particular case, as a manufacturer—if a substantial portion of its business consists of that activity. *County of Chesterfield v. BBC Brown Boveri*, 238 Va. 64, 70-72, 380 S.E.2d 890, 893-94 (1989). In *BBC Brown Boveri*, the corporation was engaged in both manufacturing and nonmanufacturing activities. The Court looked at the corporation’s physical plant, its financial receipts from manufacturing, the proportion of its entire corporate income attributable to manufacturing, and the percentage of its capital invested in manufacturing activities, among other factors, and ruled that
the corporation was a manufacturer for license tax purposes. Id. at 71, 72-73, 380 S.E.2d at 894.

The test of substantiality of a business activity, which the Court adopted in BBC Brown Boveri, "does not lend itself to a rigid definition. Rather, the business must be considered as a whole in determining whether it qualifies as a manufacturer." 238 Va. at 71, 380 S.E.2d at 893. The Court also stated that to be substantial, the manufacturing component must "not be de minimis, merely trivial, or only incidental to its principal business." Id. at 71, 380 S.E.2d at 893-94. A 1984 opinion of the Attorney General also addresses the question of classification of business activities, and discusses the substantiality test. 1984-1985 Op. Va. Att’y Gen. 364. That opinion notes that “substantial” is not the same as a “preponderance.” Id. at 367. That is, when determining whether a firm is, for example, a manufacturer, there is no requirement that the manufacturing activity be greater than the nonmanufacturing activity.

In both BBC Brown Boveri and the 1984 Attorney General opinion, the issue considered was whether the subject business should be classified as a manufacturer for purposes of § 58.1-3703(B)(4). Under that section, if a business is classified as a manufacturer, it is exempt from license taxation entirely when selling its goods at the place of manufacture. A different result would occur when a business is performing both professional and nonprofessional services and is taxed at two different rates. In the first instance, the business has an interest in ensuring a single classification as a manufacturer; in the second instance, the business may well benefit from being classified and taxed at two rates. In BBC Brown Boveri, the Court touched on this distinction, stating that the case before it was “[u]nlike a business that is engaged in two separate trades, one of which is exempt and one of which is not, [the business’s] non-manufacturing activities are ancillary to its primary business of manufacturing.” 238 Va. at 72, 380 S.E.2d at 894 (citation omitted).

Even in the case of a manufacturer with a retail operation, it is possible to determine that a firm is engaging in two separate business activities, as was done by the Court in Caffee v. City of Portsmouth, 203 Va. 928, 128 S.E.2d 421 (1962). In Caffee, a bakery, which baked various products in the rear of its building and sold most of those products in a showroom at the front of its building, challenged the city’s classification of its showroom as a retail merchant on the ground that state tax authorities had classified the bakery as a manufacturer. The Court did not dispute that, as to its baking activity, the bakery was a manufacturer. The Court, however, affirmed that in the bakery’s showroom sales, it also had a retail merchandising activity. 203 Va. at 930, 128 S.E.2d at 422. The Court found that the bakery was “engaged in two separate trades or occupations, the one of which, manufacturing, may be performed completely independent of, and without relation to the other—retail merchandising.” Id. at 930, 128 S.E.2d at 423.
Attorneys General have, for many years, declined to render opinions making factual determinations involving the application of tax statutes to the property or business of a particular taxpayer, concluding instead that such factual determinations must be made on a case-by-case basis by the commissioner of the revenue or comparable local tax official. See, e.g., Op. Va. Att’y Gen.: 1985–1986 at 282, 283; 1983–1984 at 371, 372; 1982–1983 at 534, 535; 1974–1975 at 510, 511. As with any such factual issue concerning a local taxpayer, the ultimate determination as to whether the Company’s activities involve more than one business, or are a single business with some ancillary activities, rests with the local commissioner of the revenue, as the finder of fact, and, therefore, cannot be decided in this opinion. See Op. Va. Att’y Gen.: 1993 at 231, 233; 1991 at 248, 250; 1984–1985, supra, at 367. If the commissioner finds the business activities of the Company involve separate business activities that could each be performed independently of the other, then it is my opinion the separate business activities can be taxed as such. If, however, the Company’s business activities are not separated, but are so integrated as to comprise a single business, then the Company is properly taxed at a single rate based on whichever constitutes the “substantial” activity of the Company, and not on its ancillary activities.

IV. If Company Operates as Single Business, Proper Classification as Professional Service or Other Business Service Must Be Based on Surrounding Facts and Circumstances, Including Hourly Rates Charged

The statutory framework for local business, professional and occupational license taxes, quoted in Part II above, was a result of a study undertaken in 1977. See 1 H. & S. Docs., Report of the Revenue Resources and Economic Commission, S. Doc. No. 16 (1978). Noting that it would prefer to recommend that such taxes be abolished and replaced, the Revenue Resources and Economic Commission recommended a rate framework that it believed would make the taxes more equitable. About this rate framework, the Commission noted:

The relationship between the ceiling rates reflects the relative differences in operating ratios between broad categories of similar activities, i.e., the gross profit ratios for similar business activities as reported by the Internal Revenue Service in Statistics of Income: Business Income Tax Returns, 1970.

S. Doc. No. 16, supra, at 3. This legislative history makes it clear that the current statutory rate structure exists to alleviate the inequity of a tax on gross receipts.

To be taxed at the professional rate, a business must perform a “professional service,” as contemplated by the BPOL Guidelines. One Virginia circuit court has held that it is not necessary for a taxpayer to have been issued a regulatory license
by the state in order to be classified as an engineer for local business license taxation purposes. *Advanced Marine Enterprises v. Arlington County*, No. 26562, final order at 2 (Arlington Co. Cir. Ct. June 5, 1989). Nevertheless, simply labeling an employee an “engineer” does not, by itself, convert his or her duties into professional services. When employees of a firm hold no state regulatory license, the commissioner of the revenue must determine that those individuals are “engaged in [an] occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study is used by its practical application to the affairs of others,” in order to find that they are engaged in professional services. BPOL Guidelines, *supra* pt. II, para. 3-4, at 19.¹ Often the hourly billing rates for the employees in question may be of some assistance in determining the proper classification. Thus, if a substantial portion of the hourly rates billed by the Company under its contracts is equivalent to those prevailing for comparable professionals in the locality, the commissioner may conclude that the Company is doing business in professional services. Use of such a basis for making the determination is in keeping with the original purposes of the rate limitations in § 58.1-3706, which set a higher rate cap for professional services, presumably because professionals’ hourly rates generally are higher. *See* S. Doc. No. 16, *supra*.

As discussed in Part III above, the Company should be taxed at the professional rate only if a substantial portion of its business is professional. In *BBC Brown Boveri*, the Court stated:

> To be considered substantial, the manufacturing component of a business must not be *de minimis*, merely trivial, or only incidental to its principal business.

238 Va. at 71, 380 S.E.2d at 893-94. In my opinion, this definition is the appropriate one for the commissioner of the revenue to use in deciding whether or not the Company should be taxed at the professional rate. Professionals typically are assisted by nonprofessional support staff in fulfilling their obligations under a contract. If the Company’s professional engineering services are substantial, its performance of other business services will not preclude the commissioner from classifying the Company as professional. Conversely, if the Company’s engineering services are ancillary and subordinate to other nonprofessional business services, and, further, if the latter are a substantial component of its business, the commissioner should disregard the professional services and tax the Company’s entire gross receipts at the lower rate.

¹There is clearly no requirement that a majority of a firm’s employees have professional training in order for the firm to be engaged in a profession. Nevertheless, the Company’s low ratio of engineers to nonengineers is one important indicator the commissioner of the revenue must consider in deciding how to tax its gross receipts.
TAXATION: LICENSE TAXES.

Hampton may impose business license tax on gross receipts of out-of-state corporation derived from sales in interstate commerce, for privilege of doing business in state, if tax meets four-part test applying nexus, apportionment, nondiscrimination and related services. Burden is on corporation to establish risk of double or multiple taxation of its gross receipts, in violation of U.S. Constitution's Due Process and Commerce Clauses.

November 17, 1994

The Honorable Ross A. Mugler
Commissioner of the Revenue for the City of Hampton

You ask what portion of the gross receipts of a particular corporation with administrative offices in your city, whose primary business is the sale of merchandise through mail order catalogs, is subject to the city’s local business license tax.

I. Facts

You state that the taxpayer is a Delaware corporation (the “Company”) with offices in Hampton and in the State of New York. In addition, the Company has a distribution facility in Newport News, Virginia. Newport News does not impose a local license tax on that facility. You do not state whether the Company pays a local business license tax in any other jurisdiction outside Virginia.

The business of the Company is mail order merchandising; its customers typically call a toll-free number to place an order. Calls are answered by customer service representatives who may be located in Virginia or elsewhere. Merchandise orders are transmitted by computer to a data facility in Illinois for credit approval. Approved orders are then transmitted to Hampton to be filled. All of the Company’s customer service and accounting functions are located in Hampton. The majority of employees are located in Hampton, with the remainder working at the Company’s headquarters in New York. The Company contends that the business license tax payable to Hampton should be based only on gross receipts generated by sales to Virginia customers.

II. Applicable Constitutional and Statutory Provisions

The Commerce Clause of the Constitution of the United States grants to Congress the authority to regulate commerce with foreign nations and among the several states. U.S. CONST. art. I, § 8, cl. 3.
Section 58.1-3703 of the *Code of Virginia* provides that a locality may assess a license tax on the gross receipts of any person, firm or corporation that is operating a licensable business within the locality. Section 58.1-3706(A)(2) establishes a limit on the rate of tax that may be collected for retail sales. Section 58.1-3708(A) provides that the situs for local taxation of a licensable business is the locality in which the firm has a definite place of business or maintains an office.

III. Commissioner Must Apply Four-Part Test to Determine Whether to Tax Business’s Gross Receipts from Sales in Interstate Commerce

The fact that the Company does business in interstate commerce raises the question whether any local gross receipts tax may violate the Commerce Clause of the United States Constitution by placing an undue burden on interstate commerce.

In a 1977 case, the Supreme Court of the United States addressed the constitutionality of state sales taxes assessed for the privilege of doing business within the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In that case, the Court overruled earlier decisions and adopted a four-part test to determine whether a local tax unduly burdens interstate commerce. *Id.* at 277-78. The test applies to gross receipts taxes as well as to sales taxes. Under the test, a tax applied to activity in interstate commerce will be constitutional if the tax (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Id.* at 279.

IV. Four-Part Test Applies to Local Business License Taxes on Gross Receipts from Interstate Sales

In a 1992 decision, the Supreme Court of Virginia applied the *Complete Auto* four-part test to a local business license tax and upheld the constitutionality of the tax, even though it was imposed on gross receipts from sales made in interstate commerce. *Short Brothers, Inc. v. Arlington County*, 244 Va. 520, 423 S.E.2d 172 (1992). In *Short Brothers*, a Massachusetts corporation, with its headquarters in Arlington County, Virginia, and sales throughout the United States, challenged Arlington’s imposition of its business license tax on the corporation. *Id.* at 522, 423 S.E.2d at 173. *Short Brothers* had reported zero gross receipts, because it had no sales to Virginia purchasers. *Id.* After an audit, however, Arlington County had assessed business license taxes on all the corporation’s gross receipts. *Id.* The corporation, in *Short Brothers*, challenged the constitutionality of the assessment because it was imposed on receipts from sales of products delivered outside Virginia. *Id.* at 522, 423 S.E.2d at 173-74.
The first contention in *Short Brothers* was that the license tax was effectively a tax on property, and that only the states to which the products sold were actually delivered had the authority to tax the revenue generated by those deliveries. *Id.* at 523, 423 S.E.2d at 174. The Virginia Supreme Court dismissed this contention, noting that a tax imposed on revenue is not necessarily a tax on property. *Id.* The Court found instead that the Arlington County tax was a tax on the business activity of the corporation, as measured by gross receipts, and not a tax on the products sold. *Id.*

The second contention in *Short Brothers* was that Arlington County could not constitutionally use income from property sold or leased in another state as the basis for its license tax, even if services related to the sale or lease were performed in the county. *Id.* at 524, 423 S.E.2d at 174. The Court found the argument inconsistent with the decision in *Complete Auto*, which rejected the proposition that a tax on local services incidental to an interstate sale unconstitutionally interferes with interstate commerce. *Id.* Under *Complete Auto*, the key to the constitutionality of a state or local tax is now whether a business is availing itself of the public services of a state or locality, and whether the tax assessed is fairly related to those services. *Id.* at 524, 423 S.E.2d at 174-75. The fairness of the assessment will depend, in part, on the extent of the taxpayer’s operations in the taxing jurisdiction.

A related challenge made by the taxpayer in *Short Brothers* was that the Arlington County tax was unconstitutional because it was not fairly apportioned, and thus did not meet the second part of the *Complete Auto* test. 244 Va. at 525, 423 S.E.2d at 175. The Virginia Supreme Court ruled that if a tax is based on revenue attributed solely to the taxing jurisdiction and the taxpayer is not subject to the same type of tax based on the same revenue elsewhere, there is no risk of double or multiple taxation and therefore no need to apportion. *Id.* Arlington assessed the tax on Short Brothers based on financial information in tax returns and other documents. *Id.* In none of those documents was income allocated to another jurisdiction. *Id.* No evidence was presented that the income would or could be subjected to tax in another jurisdiction. *Id.* The Court found that the burden was on the taxpayer to show a risk of double or multiple taxation, and that Short Brothers had not met that burden. *Id.*

As the Court also noted in *Short Brothers*, in order for a tax to be constitutional, there must be a nexus between the taxing authority and the taxing entity. *Id.* The nexus must be substantial. *Id.* Mere contact with a state through common carriers or mails is insufficient. *Id.* at 526, 423 S.E.2d at 175-76 (citing *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1910, 119 L. Ed. 2d 91, 113 (U.S. 1992)). Therefore, the state of destination of a mail or telephone order sale, without some additional connection to the taxpayer, does not have the authority to impose a tax on gross receipts generated from such a transaction.
The Court found in *Short Brothers* that there was no evidence of a place of business in another state, and thus no basis on which to require apportionment. 244 Va. at 526, 423 S.E.2d at 176. All revenue-generating operations were based in Arlington, as were all sales and accounting functions and other business aspects of the operation. *Id.* The Arlington-based activities were an integral part of the sales and leases, and added value to the transactions. *Id.* The same analysis may be applied to the Company.

I assume, for purposes of this opinion, that the business license tax in Hampton, like the tax in Arlington County, is imposed for the privilege of doing business in the city. Accordingly, I am of the opinion that the City of Hampton may impose its business license tax on the Company’s gross receipts that are derived from sales in interstate commerce if that tax meets the four-part test set forth in *Complete Auto*; that is, (1) the Company’s activity must have a substantial nexus with Hampton, (2) if the Company is subject to tax in other jurisdictions on the same sales, the tax must be fairly apportioned, (3) Hampton’s tax must not discriminate against interstate commerce, and (4) the tax must be fairly related to governmental services Hampton provides to the Company. The burden is on the Company to establish any risk of double or multiple taxation. The Company must present evidence to show that it will or may be subject to the same type of tax on the same revenues in another jurisdiction. It is not enough, however, to show that sales occur in other jurisdictions. The Company must show that the tax assessed is subject to the risk of multiple gross receipts taxes in violation of the Due Process and Commerce Clauses of the U.S. Constitution.¹

¹A 1987 opinion of the Attorney General addresses a similar question and concludes that “gross receipts generated from sales in Virginia are taxable.” 1987–1988 Op. Va. Att’y Gen. 512, 513. To the extent that opinion implies that gross receipts generated by a mail order business on sales to customers in other states are not taxable, it is overruled.

**TAXATION: LICENSE TAXES.**

Legislative subcommittee report indicates that General Assembly’s use of term “research and development,” incorporating definition from Federal Acquisition Regulation, refers to broader definitions of FAR’s three general terms applying limited local business license tax rate on gross receipts from federal contractors’ research and development activities, rather than to separate limited combined definition applying rate limitation only to federal contractors’ costs for “independent research and development.”

July 5, 1994
The Honorable Ross A. Mugler
Commissioner of the Revenue for Hampton

You ask what types of research and development contracts are subject to § 58.1-3706(D) of the Code of Virginia, which establishes a maximum rate for local business license taxes on businesses’ receipts from certain of such contracts.

I. Applicable Statute and Regulation

A. Virginia Statute

Section 58.1-3706(D)(1) states:

Any person, firm, or corporation designated as the principal or prime contractor receiving identifiable federal appropriations for research and development services as defined in § 31.205-18 (a) of the Federal Acquisition Regulation in the areas of (i) computer and electronic systems, (ii) computer software, (iii) applied sciences, (iv) economic and social sciences, and (v) electronic and physical sciences shall be subject to a license tax rate not to exceed three cents per $100 of such federal funds received in payment of such contracts ....

B. Federal Regulation

Title 48 of the Code of Federal Regulations contains the Federal Acquisition Regulations System (“FAR”) prepared, issued and maintained jointly by the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. See 48 C.F.R. § 1.102(b) (1993). Unless otherwise specifically provided, the FAR governs all acquisitions “by contract with appropriated funds of supplies or services ... by and for the use of the Federal Government.” 48 C.F.R. § 2.101; see § 1.103.

Part 31 of the FAR, 48 C.F.R. §§ 31.000 through 31.703, establishes “contract cost principles and procedures.” Section 31.205-18 addresses “independent research and development and bid and proposal costs.” Section 31.205-18(a) contains the following definitions:

Applied research, as used in this subsection, means that effort which (1) normally follows basic research, but may not be severable from the related basic research, (2) attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques, and (3) attempts to advance the state of the art. Applied research does not include efforts whose
principal aim is design, development, or test of specific terms or services to be considered for sale; these efforts are within the definition of the term development, defined in this subsection.

Basic research, as used in this subsection, means that research which is directed toward increase of knowledge in science. The primary aim of basic research is a fuller knowledge or understanding of the subject under study, rather than any practical application thereof.

* * *

Development, as used in this subsection, means the systematic use, under whatever name, of scientific and technical knowledge of the design, development, test, or evaluation of a potential new product or service (or of an improvement in an existing product or service) for the purpose of meeting specific performance requirements or objectives. Development includes the functions of design engineering, prototyping, and engineering testing. Development excludes: (1) Subcontracted technical effort which is for the sole purpose of developing an additional source for an existing product, or (2) development effort for manufacturing or production materials, systems, methods, tools, and techniques not intended for sale.

Independent research and development (IR&D), as used in this subsection, means a contractor’s IR&D cost that consists of projects falling within the four following areas: (1) Basic research, (2) applied research, (3) development, and (4) systems and other concept formulation studies. The term does not include the costs of effort sponsored by a grant or required in the performance of a contract. IR&D effort shall not include technical effort expended in developing and preparing technical data specifically to support submitting a bid or proposal.

The balance of § 31.205-18 details the criteria and procedures under which some federal contractors’ independent research and development costs, as defined above (i.e., those that are not either sponsored by a federal grant or required in the performance of a federal contract), may, nevertheless, be reimbursed from federal appropriations.

II. State Statute’s Incorporation of Definition from Federal Regulation Creates Ambiguity About Application of Business License Tax Rate Limitation

As you have noted, despite the reference in Virginia Code § 58.1-3706(D)(1) to “research and development,” as defined in § 31.205-18(a) of the FAR, the latter
does not contain a combined definition of “research and development” generally. Instead, § 31.205-18(a) contains definitions of the three general terms “basic research,” “applied research” and “development,” as well as a separate definition of the combined term “independent research and development.” This creates an ambiguity about whether the limited business license tax rate established in § 58.1-3706(D)(1) applies to all payments received by federal contractors for research and development costs, including those payments made under grants and for research and development required in contracts, or whether the General Assembly’s intent was to apply the rate limit only to the much more infrequent payments received by contractors for independent research and development costs. The purpose of your question is to resolve this ambiguity.

III. Joint Subcommittee Report Indicates Legislative Intent Not to Limit Definition of Federal Contractors’ Receipts Subject to Business License Tax Rate Cap to Independent Research and Development Receipts as Defined in Federal Regulations

The primary goal in construing an ambiguous statute is to discern and give effect to the legislative intent. “The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms.” Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976). In this instance, ascertaining the legislative intent is made easier by the fact that the 1992 act adding § 58.1-3706(D) was introduced on recommendation of a legislative subcommittee that produced a published report. See Ch. 632, 1992 Va. Acts Reg. Sess. 925, 925-26; see also 2 H. & S. Docs., Report of the Joint Subcommittee to Study the Measures Necessary to Assure Virginia’s Economic Recovery, H. Doc. No. 37 (1992). Among other strategies to establish Virginia as a national leader in technology, the joint subcommittee made the following recommendation: “To assist technology firms in maintaining a competitive position, eliminate the Business ... License tax on research and development and ‘pass-through’ business done with the Federal Government.” H. Doc. No. 37, supra, at 11-12. As finally adopted, however, § 58.1-3706(D) did not completely eliminate local business license taxation of federal contractors’ gross receipts from research and development activity, but imposed a low ceiling of three cents per $100 on such gross receipts. See 1992 Va. Acts Reg. Sess., supra; see also 1984-1985 Op. Va. Att’y Gen. 351 (concluding that locality has authority to exempt gross receipts of research and development businesses from license taxes altogether, if local governing body articulates reasonable public policy basis for doing so).

In view of this clear legislative history indicating that the General Assembly adopted the rate limit in § 58.1-3706(D)(1) to encourage high technology federal contractors to locate or remain in Virginia, it would be illogical to assume that the legislature intended that rate limit to apply only to the relatively small proportion of
such contractors' gross receipts coming within the limited definition of "independent research and development" found in § 31.205-18(a) of the FAR. In my opinion, the General Assembly intended its reference in § 58.1-3706(D)(1) to the definition of "research and development" to incorporate the three broader definitions of "applied research," "basic research" and "development" also found in § 31.205-18(a).

Accordingly, it is further my opinion that the rate limitation of three cents per $100 in § 58.1-3706(D)(1) applies to local license taxes on federal contractors' receipts from all such research and development, including that funded through grants or specifically required under federal contracts, and not solely to receipts from such contractors' independent research and development services.

1The joint subcommittee was created in 1991 by House Joint Resolution No. 433. See 1991 Va. Acts Reg. Sess. 1951. Despite the wording of that resolution and of the title to 1992 House Document No. 37, the joint subcommittee was popularly known as the Economic Recovery Commission, and that title is used throughout the report. Senator John Chichester, a member of the Commission, introduced 1992 Senate Bill No. 475, later enacted as Chapter 632 of the 1992 Acts of Assembly, which in its adopted form contained the language now found in § 58.1-3706(D)(1). See infra note 2.

2As originally introduced on January 21, 1992, Senate Bill No. 475 amended § 58.1-3703 to prohibit local license taxes "[u]pon any person, firm, or corporation for engaging in a federally funded research and development service." The Senate Finance Committee Amendment in the Nature of a Substitute, proposed on February 6, 1992, eliminated the amendment to § 58.1-3703 and added § 58.1-3706(D) with a limitation on license tax rates for research and development services of three cents per $100. The Senate Committee version contained no reference to the definition in the FAR. The Senate agreed to the substitute and passed the bill. See S. JOUR. 443, 457 (1992 Reg. Sess.). On February 21, 1992, the House Finance Committee proposed a new substitute. See H. JOUR. 1229 (1992 Reg. Sess.). In that version, § 58.1-3706(D) included a reference to the definition in § 31.205-18(a) of the "Federal Acquisition Register [sic]." The House Committee version also used different descriptions of the areas of research and development that would be subject to the reduced rate and added the requirement for taxpayers claiming the reduced rate to submit documentation to local tax officials. The full House adopted the House Committee substitute. See H. JOUR., supra, at 1329. The Senate rejected the House substitute. See S. JOUR., supra, at 861-62. The House then requested a Committee of Conference. See H. JOUR., supra, at 1408. On March 6, 1992, the Conference Committee proposed still another amendment in the nature of a substitute, containing the language finally adopted. See S. JOUR., supra, at 1201, 1207-08: H. JOUR., supra, at 1762-63, 1769.

3A further amendment in 1993 renumbered the language added by the 1992 act as § 58.1-3706(D)(1), and added two additional subdivisions to subsection D. See Ch. 918, 1993 Va. Acts Reg. Sess. 1396, 1398. One of the added subdivisions, § 58.1-3706(D)(3), excepts "any county operating under the county manager plan of government" from the three cent rate limit. See id. The statutes creating the county manager plan of government currently apply only to Arlington County. See Henrico v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941) (applying statutes now codified as §§ 15.1-674 to 15.1-696).
TAXATION: LICENSE TAXES.

PROFESSIONS AND OCCUPATIONS: CONTRACTORS.

Local contractors' licenses for regulatory purposes and those that generate revenue through taxation are not mutually exclusive. Person whose work meets statutory definition of "contractor" in either regulatory licensing or business licensing scheme must obtain local license required under applicable statute; contractor who falls within both statutory definitions must obtain both licenses if locality requires both. Only local license taxes apply to Class A contractors regulated by State. Localities' broad authority to set amount and conditions of bonds that may be required before issuance of such licenses should be consistent with General Assembly's intent and purpose in authorizing those two types of licensing, such as providing assurance of payment of license taxes, or protecting public from unscrupulous contractors and assuring contractors' compliance with Uniform Statewide Building Code.

July 22, 1994

The Honorable W. Edward Meeks III
Commonwealth Attorney for Amherst County

You ask the following questions concerning the authority of local governments to require contractors to post bonds:

1. Does § 58.1-3714 of the Code of Virginia authorize a locality to require all building contractors to post bonds, regardless of whether they have State Class A building contractors' licenses issued under Title 54.1?

2. May a locality require bonds from contractors to assure their compliance with the Uniform Statewide Building Code?

3. May such bonds be required to compensate both the locality, for the costs of enforcement, and citizens, for losses incurred on account of a contractor's failure to comply with the Uniform Statewide Building Code?

I. Applicable Statutes

Section 58.1-3703 authorizes counties, cities and towns to impose business license taxes on various businesses, including contractors.

Section 58.1-3714 states:

Whenever a license tax is levied on contractors by any county, city or town the governing body of such county, city or town may, in its
discretion, require a bond from the person licensed, with such surety, penalty and conditions as it may deem proper.

B. For the purpose of license taxation pursuant to § 58.1-3703, the term “contractor” means 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 54.1-1117(A) authorizes counties, cities and towns to license contractors (other than Class A contractors) engaging in “the business of home improvement, electrical, plumbing or heating or air conditioning contracting or the business of constructing single- or multi-family dwellings.” Local government ordinances under that section may require the contractor “(i) to furnish evidence of his ability and proficiency; and (ii) to successfully complete an examination to determine his qualifications.” Section 54.1-1117(B). Section 54.1-1117(B) also allows localities to
require these contractors “to furnish bond in a reasonable penal sum, with reasonable condition, and with surety as the governing body deems necessary.”

II. Local Contractors’ Licenses Allowed Under §§ 58.1-3714 and 54.1-1117 Serve Different Purposes and Are Not Mutually Exclusive

The Supreme Court of Virginia has recognized that the General Assembly has authorized two separate types of local licensing of contractors, serving two distinct purposes—regulatory licenses required under what is now § 54.1-1117 and revenue-generating licenses under current §§ 58.1-3703 and 58.1-3714. See Bowen Elec. Co. v. Foley, 194 Va. 92, 96-97, 72 S.E.2d 388, 391 (1952) (applying former § 54-113, et seq., and § 58-298, et seq.).

The Court has held that local contractors’ licenses for regulatory purposes and those required for tax purposes are not mutually exclusive. See id. at 97, 72 S.E.2d at 392. A person whose work meets either the definition of “contractor” in § 54.1-1117 or that in § 58.1-3714 must obtain any local license required under whichever statute applies to him. If he falls within the definition of “contractor” in both laws, and the locality requires both licenses, the contractor must obtain both. Section 54.1-1117, by its own terms, does not authorize localities to require regulatory licenses from Class A contractors, who instead are regulated by the State. Sections 58.1-3703 and 58.1-3714, however, contain no exclusion for Class A contractors. Local license taxes enacted under those sections, therefore, may apply to Class A contractors as well as others.

III. Bonds May Be Required in Connection with Both Business License Tax and Regulatory License, but for Different Purposes

Both §§ 58.1-3714 and 54.1-1117 authorize localities to require bonds as a condition precedent for obtaining the licenses authorized under those sections. Both sections give the localities broad authority to set the amount and conditions of those bonds, but do not specify the precise purposes for which the bonds may be required.

The primary object of statutory construction and interpretation is to ascertain and give effect to the legislative intent. Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). To determine legislative intent, statutes dealing with the same subject matter should, to the extent possible, be read together. Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1976). “The purpose for which a statute is enacted is of primary importance in its interpretation or construction. ‘A statute often speaks as plainly by inference, and by means of the purpose that underlies it, as in any other manner.’” Norfolk So. Ry. Co. v. Lassiter, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952) (citation omitted). Accordingly, the terms and conditions of bonds required by localities under §§ 58.1-3714 and
54.1-1117, respectively, should be consistent with the intent and purpose of the General Assembly in authorizing the two types of licensing contemplated by those sections.

As the Supreme Court of Virginia has recognized, the sole purpose of business licenses required under license tax provisions such as those in § 58.1-3703 is to raise revenue. See Bowen Elec. Co., 194 Va. at 97, 72 S.E.2d at 391; Welles v. Revercomb, 189 Va. 777, 784, 54 S.E.2d 878, 881 (1949). In my opinion, therefore, the legislative purpose in giving localities the option to require bonds under § 58.1-3714 is to permit the localities to obtain a reasonable financial guarantee of payment of the license taxes that will become due. Accordingly, the terms and conditions of bonds required under those sections should serve that purpose.

In contrast, the purpose of local licenses required under § 54.1-1117 is "to protect the public from inexperienced, unscrupulous, irresponsible, or incompetent contractors." Bowen Elec. Co., 194 Va. at 96, 72 S.E.2d at 391. Accordingly, the terms and conditions of bonds required by localities under that section should facilitate that statutory purpose. In my opinion, conditioning such bonds on compliance with the Uniform Statewide Building Code is consistent with the General Assembly’s purpose in enacting § 54.1-1117. Similarly, it appears consistent with that statutory purpose for a locality to require such bonds to inure to the benefit of either the locality, which may incur enforcement expenses in dealing with an unscrupulous or incompetent contractor, or its citizens, who may suffer losses in dealing with such a contractor.

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1Class A contractors are those contractors licensed by the Board for Contractors to perform contracting work on a single contract of $70,000 or more or perform total work within a twelve-month period of $500,000 or more. See §§ 54.1-1100, 54.1-1106.

2As noted above, §§ 58.1-3703 and 58.1-3714 contain no exclusion for Class A contractors. Whether a contractor holds a State Class A license thus is not relevant to a locality’s authority to require a bond under § 58.1-3714. Because localities may not require licenses under § 54.1-1117 from Class A contractors, obviously they may not require bonds from Class A contractors under that section.

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TAXATION: REAL PROPERTY TAX - EXEMPTIONS FOR ELDERLY AND HANDICAPPED.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

COUNTIES, CITIES AND TOWNS: GENERAL.
Property of qualified elderly or disabled persons that is exempt, in whole or in part, from general real estate taxes by ordinance remains within constitutional category of property subject to taxation. Locality not required to extend such property tax exemption to taxes levied for creation of special service district. By amending its tax exemption ordinance, locality may extend exemption to service district levies.

May 6, 1994

Mr. Paul S. McCulla
County Attorney for Fauquier County

You ask whether the exemption from real estate taxes enacted by Fauquier County under § 58.1-3210 of the Code of Virginia applies to taxes on real property imposed under §§ 15.1-18.2 and 15.1-18.3.

I. Applicable Constitutional and Statutory Provisions

Article X, § 1 of the Constitution of Virginia (1971) provides that “[a]ll property, except as hereinafter provided, shall be taxed.” Article X, § 6(b) exempts some property from taxation and authorizes the General Assembly to provide for certain other exemptions. Article X, § 6(b) states:

The General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for the exemption from local property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate and personal property designed for continuous habitation owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said property in relation to their income and financial worth.

Article X, § 6(f) states that “[e]xemptions of property from taxation as established or authorized hereby shall be strictly construed ....”

The statutes authorizing the real property tax exemption permitted under Article X, § 6(b) are codified in Article 2, Chapter 32 of Title 58.1, §§ 58.1-3210 through 58.1-3218. Section 58.1-3210(A) provides, in part:

The governing body of any county, city or town may, by ordinance, provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of taxation of real estate ... and upon
such conditions and in such amount as the ordinance may prescribe. Such
real estate shall be owned by, and be occupied as the sole dwell-
ing of anyone at least sixty-five years of age or if provided in the ordi-
nance, anyone found to be permanently and totally disabled as defined
in § 58.1-3217.

The remaining sections of Article 2 establish income and net worth limits and other
standards for localities granting such exemptions.

Section 15.1-18.2(A) allows certain consolidated cities to maintain service dis-
tricts to provide “additional or more complete services of government than are
desired in the city as a whole.” Section 15.1-18.3 extends this power to all counties,
cities or towns.

Once a service district is established in a locality under either § 15.1-18.2 or
§ 15.1-18.3, the local governing body has the powers enumerated in § 15.1-18.2(C).
Section 15.1-18.2(C)(6) authorizes the governing body

[t]o levy and collect an annual tax upon any property in such service
district subject to local taxation to pay, either in whole or in part, the
expenses and charges for providing the governmental services author-
ized by subdivisions C 1 and C 2 and for constructing, maintaining
and operating such facilities and equipment as may be necessary and
desirable in connection therewith ....

II. Locality Not Required to Extend Property Tax Exemption
Under § 58.1-3210(A) to Cover Special Service District Taxes
Under §§ 15.1-18.2 and 15.1-18.3, but May Elect to Do So

You state that at the time the Fauquier County board of supervisors first
adopted an ordinance creating tax exemptions for the dwellings of elderly and dis-
abled persons under § 58.1-3210, the county imposed no taxes on real estate other
than its general real estate taxes under Chapter 32 of Title 58.1. The board is now
considering establishing a special taxing district under § 15.1-18.3. Your question,
therefore, is whether tax exemptions granted under § 58.1-3210 necessarily must
extend to special district taxes levied under §§ 15.1-18.2 and 15.1-18.3.

demonstrates any legislative intent that a local governing body is precluded from imposing a special district tax on property that it has exempted from general property taxes
by adopting an ordinance under § 58.1-3210(A).
Section 15.1-18.2(C)(6) authorizes the imposition of special district taxes on “any” of the service district property “subject to local taxation.” (Emphasis added.) All property is subject to taxation under Article X, § 1, unless exempted by the Constitution or by statutes enacted by the General Assembly pursuant to the Constitution. See 1984–1985 Op. Va. Att’y Gen. 328, 329. No constitutional provision or statute excludes all property owned and occupied by qualified elderly or disabled persons from local taxation. While § 58.1-3210(A) permits a locality to exempt it from taxation, in whole or in part, such property generally remains within the constitutional category of property subject to taxation. Accordingly, it is my opinion that property exempt or partially exempt from general real estate taxes by ordinance enacted under § 58.1-3210(A) remains property “subject to” taxation within the language of § 15.1-18.2(C)(6). See 1986–1987 Op. Va. Att’y Gen. 298 (property of public service corporation subject to local taxation and, therefore, subject to tax levied under § 15.1-18.2).

In my opinion, therefore, a locality that has chosen to grant an exemption from property taxes to qualified elderly and disabled taxpayers by adopting an ordinance under § 58.1-3210(A) is not required to extend that exemption to cover special service district taxes imposed under §§ 15.1-18.2 and 15.1-18.3.

Indisputably, however, a service district levy under § 15.1-18.2(C)(6) is “an annual tax upon ... property in such service district.” Section 58.1-3210(A) authorizes local ordinances granting the dwellings of qualified elderly or disabled persons exemption from “taxation of real estate,” without expressly excluding service district taxes from that exemption authority. By authorizing local adoption of such exemptions, “upon such conditions and in such amount as the ordinance may prescribe,” the General Assembly has indicated an intention to give localities latitude in determining the scope of the exemptions. Section 58.1-3210(A). None of the statutory limitations on such exemption ordinances detailed in §§ 58.1-3211 through 58.1-3218 limits a locality’s ability to extend the exemption to service district taxes levied under §§ 15.1-18.2 and 15.1-18.3. It is further my opinion, therefore, that, if Fauquier County decides to impose such service district taxes, it may amend its tax exemption ordinance adopted under § 58.1-3210(A) to extend that exemption to the service district levies.
Real estate taxes constitute both personal obligation of owner and lien against assessed property. Judicial sale of land in 1995 for local property taxes delinquent in 1990 and before eliminates entire delinquent tax debt, up to date of sale, so that title passes to purchaser free and clear of tax encumbrances. Former owner remains personally liable for unsatisfied amount during five-year statute of limitations period. Following such sale, clerk must mark all liens satisfied, whether or not taxes have been paid in full. Locality may not conduct tax sale of property subject to liens for more recent delinquencies, even though advertisement states sale is for taxes delinquent through 1990 only.

March 29, 1994

The Honorable W.S. Harris Jr.
Treasurer for the City of Emporia

You ask two questions about the sale of land for delinquent local property taxes. Your questions assume that a suit is brought in 1993 to sell property for taxes delinquent in 1990 and before, but the actual sale does not take place until 1995. Your questions are:

1. If the sale proceeds are not sufficient to pay all taxes, penalties and interest, owed on the property, including those for years after 1990, should the assessments for 1990 through 1995 be marked “satisfied” on the delinquent land lists?

2. If so, would the result differ if the advertisement of sale clearly states that the sale is for taxes delinquent through 1990 only?

I. Applicable Statutes

Article 4, Chapter 39 of Title 58.1, §§ 58.1-3965 through 58.1-3979 of the Code of Virginia, governs the sale of real property. Section 58.1-3965 authorizes sale of land after three years of delinquency “for the purpose of collecting all delinquent taxes on such property.” (Emphasis added.) Section 58.1-3965 further permits the owner to redeem the property at any time before the sale “by paying all accumulated taxes, penalties, interest and costs thereon.” (Emphasis added.) Section 58.1-3974 likewise allows a right of redemption by paying “all taxes, penalties and interest due with respect to such real estate.” (Emphasis added.) Under § 58.1-3967,
the proceeds of a tax sale remaining after paying "the taxes, penalties, interest, costs and any liens chargeable thereon" are to be paid to the former owner.

Section 8.01-98 provides:

In any proceedings for the sale of real estate or to subject real estate to the payment of debts, it appears to the court that the real estate cannot be sold for enough to pay off the liens of taxes, levies, and assessments returned delinquent against it, and it further appears that the purchase price offered is adequate and reasonable, such sale shall be confirmed, and the court shall decree the payment and distribution of the proceeds of such sale pro rata to the taxes, levies, and assessments due the Commonwealth or any political subdivision thereof, after having first deducted the cost of such proceedings in court. Such decree shall be certified to the clerk of the appropriate court who has charge of the delinquent tax books, and such clerk shall cause the lien of such taxes, levies, and assessments to be marked satisfied upon the list of delinquent lands regardless of whether the same shall have been paid in full.

II. Purpose of Delinquent Tax Sale Is to Convey Property Free of Liens

The current procedure in § 58.1-3965 for the judicial sale of delinquent tax lands was enacted in 1973 following a legislative study. See H. & SEN. DOCS., Report of the Virginia Advisory Legislative Council on Delinquent Tax Lands, H. DOC. No. 10 (Reg. Sess. 1973) [hereinafter the 1973 VALC Report]. That study found that the previous procedure, a complex mixture of nonjudicial tax sales conducted by clerks of court and subsequent waiting periods, was neither adequately collecting delinquent taxes nor producing a marketable title by which delinquent land could be returned to the tax rolls. The 1973 VALC Report proposed use of a bill in equity for sale of delinquent tax lands, which the VALC hoped "would result in restoring more delinquent tax lands to a revenue producing status, and would produce titles which are good and marketable because they would be the result of regular judicial procedure." Id. at 4.

Under the plain language of § 58.1-3965, the tax sale proceeding is "for the purpose of collecting all delinquent taxes" on the property. Words in a statute are to be given their usual, commonly understood meaning. See, e.g., Virginia-Am. Water Co. v. Prince William Serv. Auth., 246 Va. 509, 436 S.E.2d 618 (1993). If that statutory language leaves any doubt that the General Assembly intended a sale for delinquent taxes to cover all delinquent taxes up to the date of the sale, the 1973 VALC Report lends weight to that interpretation. In your example, if the property were sold subject to the taxes that became delinquent after 1990, the price would be
discounted by the amount of the taxes, the new owner would receive a title already encumbered by tax liens, and the locality would immediately be faced with the problem of subsequent tax collections. This result would undermine the legislative purposes described in the 1973 VALC Report.

Any doubt about the answer to your first question is resolved by the plain language of the last sentence of § 8.01-98, which states clearly that following any judicial sale of real estate, the clerk shall cause the lien for any delinquent taxes, levies or assessments to be marked satisfied on the clerk’s delinquent list, “regardless of whether the same shall have been paid in full.”

In answer to your first question, therefore, it is my opinion that a sale for delinquent taxes covers the entire delinquent tax debt, up to the date of sale.

III. Locality Not Authorized to Sell Property Subject to Remaining Tax Liens

When a statute contains a specific grant of authority, the authority exists only to the extent specifically granted in the statute. The mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute. See Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); Christiansburg v. Montgomery County, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976); see also 1992 Op. Va. Att’y Gen. 145, 146. The grant of authority to sell delinquent land for all taxes, and to give title to the purchaser free and clear of tax encumbrances, does not include the authority to conduct a partial sale, or one subject to remaining tax liens. Moreover, as discussed in Part II above, the plain language of § 8.01-98 dictates that following a judicial sale of property for delinquent taxes, all liens must be marked satisfied, regardless of whether the taxes have been paid in full. In my opinion, therefore, a locality would not be authorized to conduct a tax sale in which the property remains subject to liens for the more recent delinquencies, even if the sale were advertised on that basis.

1Under § 58.1-3922, real property taxes are “delinquent” if they are not paid when due or, in the case of taxes payable in installments, when the last installment is due.

2One Virginia circuit court has held that, to redeem property that is subject to sale for delinquent taxes, the landowner must pay all delinquent taxes, including those for the most recent three years. City of Fairfax v. Wood, Ch. No. 102180 (Fairfax Cir. Ct. 1987). In his letter opinion, Judge Jack B. Stevens stated: “One clear purpose of these statutes is to ensure recovery of money to which the City is entitled without repetitive litigation.” See also 1979-1980 Op. Va. Att’y Gen. 336.

That circuit court decision is not in conflict with the opinion expressed above. The statutory scheme adopted by the General Assembly contemplates that the owner must pay all delinquent taxes and assessments to prevent a judicial sale, but that, if the judicial sale produces insufficient proceeds to pay all such delinquencies, the property will be conveyed to a new owner free of any liens. Compare §§ 58.1-3965 and 58.1-3974 with § 8.01-98.
Real estate taxes constitute both a personal obligation of the owner and a lien against the property assessed. See §§ 58.1-3340 to 58.1-3345. Accordingly, even though the judicial sale of property for delinquent taxes eliminates the lien, the former owner remains liable for the unsatisfied amount, provided the applicable statute of limitations has not expired on that personal obligation. Under § 58.1-3940(A), the statute of limitation on that personal obligation is five years.

TAXATION: VIRGINIA RETAIL SALES AND USE TAX ACT — MISCELLANEOUS TAXES.

Catered meal prepared in Virginia locality, but delivered to and consumed in another state, may be exempt from locality's meals tax if meal (1) is delivered to purchaser in other state (a) in caterer's vehicle or by independent trucker or contract carrier hired by caterer, or (b) from caterer by common carrier or through U.S. mail; or (2) is purchased for resale and immediately transported to other state.

January 12, 1994

The Honorable Richard L. Fisher
Member, House of Delegates

You ask whether a Virginia municipality that imposes a tax on meals may collect that tax on catered meals prepared in the municipality but delivered to and consumed in a jurisdiction in another state that also imposes a tax on such meals.

I. Applicable Constitutional and Statutory Provisions

Article I, § 8, clause 3 of the Constitution of the United States (the "commerce clause"), grants Congress the power "[t]o regulate commerce ... among the several states."

Sections 58.1-600 through 58.1-639 of the Code of Virginia comprise the Virginia Retail Sales and Use Tax Act.

Section 58.1-3840 authorizes any city or town with general taxing powers to impose an excise tax on certain sales in addition to the general retail sales tax:

The provisions of Chapter 6 (§ 58.1-600 et. seq.) of [Title 58.1] to the contrary notwithstanding, any city or town having general taxing powers established by charter pursuant to or consistent with the provision of § 15.1-841 may impose excise taxes on cigarettes, admissions, transient room rentals, meals, and travel campgrounds ....
Section 58.1-3841 establishes the situs for imposition of a local meals tax:

A. The situs for taxation for any tax levied on the sale of food and beverages or meals shall be the county, city, or town in which the sales are made, namely the locality in which each place of business is located without regard to the locality of delivery or possible use by the purchaser....

B. If any person has a definite place of business or maintains an office in more than one locality, then such other locality may impose its tax on the sale of food and beverages or meals which are made by such person, provided the locality imposes a local tax on the sale of food and beverages or meals.

II. Commerce Clause May Prohibit Imposition of Localities' Meals Tax on Interstate Sale

Section 58.1-3841(A) is clear that sales by a catering operation with a place of business in a locality in the Commonwealth are subject to the locality's meals tax, regardless of whether the meals are delivered or consumed in another locality within the Commonwealth. See 1992 Op. Va. Att'y Gen. 168, 171. Section 58.1-3841(A) thus resolves questions about which of two localities within Virginia may impose its meals tax if the sale and the delivery or consumption of the meal occur in different localities within the Commonwealth. Under § 58.1-3841, an intrastate sales transaction will not be subject to tax in more than one locality. Section 58.1-3841, however, does not resolve questions about the situs for the taxation of a meal if the sale occurs in Virginia and the delivery or consumption of the meal occurs in another state, that is, if the transaction is interstate.

No state statute expressly authorizes a Virginia locality to exempt the type of interstate transaction you describe or to give the seller a credit against the meals tax due in the Virginia locality for a similar tax paid in another state. The commerce clause of the federal constitution, however, generally prohibits a local tax that subjects interstate commerce to the risk of a double or multiple tax burden to which intrastate commerce is not exposed.1 McGoldrick v. Berwind-White Co., infra note 1, 309 U.S. at 45 (state taxation that tends to place interstate commerce at disadvantage as compared to intrastate commerce has unconstitutional regulatory effect on commerce between states); Gwin, etc., Inc. v. Henneford, 305 U.S. 434, 438-39 (1939) (state taxation in any form prohibited if it discriminates against interstate commerce); see 1973-1974 Op. Va. Att'y Gen. 374, 375.

Whether the commerce clause prohibits a tax on an interstate sales transaction depends on the circumstances of the particular transaction. Compare Harvester

Section 58.1-3840 authorizes a town tax on the “sale” of meals. For purposes of the general retail sales tax, § 58.1-602 defines “sale” to include “any transfer of title or possession ... by any means whatsoever, of any tangible personal property.” Section 58.1-609.10(4), however, exempts from the general retail sales tax those transactions in which tangible personal property is delivered “outside the Commonwealth for use or consumption outside of the Commonwealth.” The purpose of this exemption is to avoid possible constitutional problems in the taxation of interstate sales. See Commonwealth v. Miller-Morton, 220 Va. 852, 858, 263 S.E.2d 413, 418 (1980).


Under § 630-10-51 of the Sales Tax Regulations, therefore, the general retail sales tax does not apply to sales of tangible personal property if the property is placed in interstate commerce for delivery to the purchaser. See 1991 Op. Va. Att’y Gen. 274, 275. Examples included in this regulation include sales when the property (1) is “delivered to the purchaser outside of the state in the seller’s vehicle;” (2) is “delivered to the purchaser outside of the state by an independent trucker or contract carrier hired by the seller;” or (3) is “delivered by the seller to a common carrier or to the U.S. Post Office for delivery to the purchaser outside of the state.” Sales Tax Reg. § 630-20-51(A)(1)-(3).

If the interstate transaction about which you inquire fits within any of the examples provided in this general retail sales tax regulation, so that it is exempt from
that tax, in my opinion, a Virginia locality also should exempt that transaction from its local meals tax to avoid any possible commerce clause violation.\footnote{The commerce clause does not prohibit per se the imposition of a local sales tax on transactions that affect interstate commerce and does not prohibit the taxation of a sale merely because the goods are delivered out of state. See \textit{McLeod v. Dilworth Co.}, 322 U.S. 327, 329-30 (1944) (sale takes place in state where order received by phone or mail and from which goods are shipped out of state); \textit{McGoldrick v. Berwind-White Co.}, 309 U.S. 33, 46 (1940) (not purpose of commerce clause to relieve those engaged in interstate commerce of their just share of state tax burden).}

\footnote{Under § 58.1-203, the Tax Commissioner is empowered to issue regulations relating to the interpretation and enforcement of all taxes administered by the Department of Taxation.}

\footnote{Also not subject to the general retail sales tax are purchases “for resale and immediate transportation out of the state by a dealer properly registered in another state.” Sales Tax Reg. § 630-10-51(A)(4).}

\footnote{If the goods are not “placed in interstate commerce” before title or possession passes to the purchaser in the Virginia locality (e.g., if the purchaser takes possession of the goods in the Virginia locality and subsequently delivers them for use outside of the state in his own vehicle), the subsequent delivery of the goods outside of the state will not render the transaction nontaxable in the Virginia locality. See \textit{Commonwealth v. Miller-Morton}, supra Pt. II, 220 Va. at 858, 263 S.E.2d at 418; \textit{Commonwealth v. Pounding Mill Quarry}, 215 Va. 647, 651-52, 212 S.E.2d 428, 431 (1975). In such instances, the taxable event, the sale, clearly occurs in the locality.}

I express no opinion about whether the out-of-state locality also could tax the meals in such instances, but note that such other jurisdictions would have the same obligation as Virginia localities to avoid unconstitutional double taxation of interstate transactions.
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Specific statutory authority for judges to compel presence of Commonwealth's attorney for misdemeanor prosecutions in certain traffic offenses implies that courts do not have authority to do so more generally.

**CONSTITUTION OF THE UNITED STATES**

Abolishing parole in Virginia retroactively to apply to current inmates, either by statute or administrative action, would violate *Ex Post Facto* Clauses of U.S. and Virginia Constitutions. Parole may be abolished prospectively only for persons who commit offenses on or after effective date of its abolition.

Bill of Rights. Constraints imposed by federal and state Bills of Rights apply to governmental action at state and local level.

Commerce Clause (*see infra* Powers of Congress (commerce clause))

Due process. Procedures used for consideration of parole must be fundamentally fair.

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General. For purposes of § 15.1-19.2:1, entry of nolle prosequi constitutes dismissal of criminal charge.

General. Local governing body has discretion to reimburse legal fees and expenses incurred in defense of local officer or employee on criminal charge arising out of performance of official duties. Entry of order of nolle prosequi effectively dismisses pending criminal indictment or warrant so that governing body may exercise discretion to reimburse officer or employee. Governing body may elect not to do so when nolle prosequi has been entered for technical reasons and it appears new charge may be brought.


General. Property of qualified elderly or disabled persons that is exempt, in whole or in part, from general real estate taxes by ordinance remains within constitutional category of property subject to taxation. Locality not required to extend such property tax exemption to taxes levied for creation of special service district. By amending its tax exemption ordinance, locality may extend exemption to service district levies.

General. Subject to constitutional limitations, permitting solicitation of charitable donations from government employees in workplace is matter of employers' discretion. Charitable solicitations protected by First Amendment. Amendment does not require political subdivision to permit charitable solicitations in workplace, but by allowing some charities to solicit employee contributions by payroll deductions, locality may create limited public forum; control over access...
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Government of Cities and Towns. Failure of General Assembly to grant specific statutory authority to local governments and other political subdivisions to permit charitable contributions by payroll deduction does not indicate legislative opposition. Virginia localities have necessarily implied power to regulate employee payroll deductions. Exercise of such implied power must be reasonable and consistent with legislative intent; may not unduly burden citizens' constitutional rights. Political subdivisions' regulation of charitable organizations' access to workplace or to payroll deduction system must survive First Amendment scrutiny. By permitting some charitable solicitations and charitable payroll deductions, governmental entity creates limited public forum. Locality's restrictions on speech and method of selecting charitable organizations that will solicit donations in limited public forum must not be based on content, and will survive constitutional challenge only if such restrictions serve compelling governmental interest and are narrowly drawn to achieve that end

Government of Cities and Towns. Subject to constitutional limitations, permitting solicitation of charitable donations from government employees in workplace is matter of employers' discretion. Charitable solicitations protected by First Amendment. Amendment does not require political subdivision to permit charitable solicitations in workplace, but by allowing some charities to solicit employee contributions by payroll deductions, locality may create limited public forum; control over access to that forum is subject to First Amendment. Validity of restrictions on speech in limited public forum begins with analysis of whether restrictions are content-based; whether regulation is content-based depends on facts. Content-based restrictions on speech must serve compelling state interest and be narrowly drawn. Time, place and manner restrictions on speech must further important government goal and may not substantially burden free speech

Governmental Charters. If approved in November 1994 referendum, change to county manager form of government will abolish offices of treasurer and commissioner without further referendum
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Governmental Charters. If Hanover County voters approve adoption of county manager form of government in referendum to be conducted concurrently with November 8, 1994, general election, elective constitutional offices of treasurer and commissioner of revenue will be abolished on January 1, 1996, following November 1995 election of new board of county supervisors. County need not conduct additional referendum to abolish two offices by seeking charter or other special act from General Assembly. Change in form of government that will occur at conclusion of incumbent officers' terms does not conflict with constitutional mandate that term of person holding office at time of election not be reduced. County's holding of such referendum and, if approved, its implementation eliminating two elective offices must be submitted to U.S. Department of Justice for preclearance under § 5 of federal Voting Rights Act.

Police powers. Locality is allowed to use discretion in selecting means to exercise its police powers, as long as mechanism it chooses is reasonable and does not unduly restrict any constitutional rights.

Powers of Cities and Towns. County has authority under general police powers to regulate operation of shooting range, unless specifically prohibited by state statute, and as long as none of obligations ordinance imposes infringes on any constitutional right.

Powers of Cities and Towns. Under general police powers, county may adopt ordinance to regulate operation of shooting range, unless specifically prohibited by state statute or preempted by state regulation; county ordinance is reasonable means of exercising police power.

Rescue services. Localities do not have affirmative obligation under state law to provide fire protection or rescue services.

COURTS NOT OF RECORD

District Courts. Decision whether to prosecute misdemeanor violations of state law left to discretion of Commonwealth’s attorney; Norfolk city attorney has same discretionary authority over prosecution of misdemeanor city ordinance violations. General district court judge not authorized to override such statutory authority by adopting rule to require either Commonwealth’s attorney or city attorney, or one of their assistants, to appear daily in court to review and prosecute citizen-initiated misdemeanor complaints.
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required to pay for guardian appointed only under § 8.01-9. Counsel appointed under § 16.1-266(D) is compensated pursuant to § 19.2-163.

Juvenile and Domestic Relations Courts. Guardian *ad litem* should be appointed to represent minor putative parent in civil proceeding to establish paternity or enforce child support obligations. Department of Social Services, or other successful plaintiff, may be required to pay court-assessed costs and expenses of guardian; Department may seek recovery from parent for guardian *ad litem* costs. Expenses of guardian appointed by juvenile court to serve as counsel to indigent minor putative father in support enforcement case paid from public funds in same manner as court-appointed counsel is compensated for representation of criminal defendants.

Juvenile and Domestic Relations Courts. In proper case, circuit court or juvenile court may transfer legal custody of child to local board of public welfare or social services without board’s filing petition.

Juvenile and Domestic Relations Courts. Juvenile court acting on custody petition filed by parent or relative, or circuit court in divorce and custody case, may transfer custody of child to local board of public welfare or social services, if court makes specific statutory findings of abuse or neglect, that child is in need of services or supervision, is status offender or delinquent, or when petition requests relief from child’s care and custody. Board, to be properly before court, must have received reasonable notice of, and opportunity to be heard on, pending custody issue, unless emergency exists, and board may be required to accept child for up to 14 days without having received prior notice or opportunity for hearing. In such cases, local board need not file custody petition; petition filed by parent or relative gives court jurisdiction over child’s custody.

Juvenile and Domestic Relations Courts. Use of term “cohabits” indicates legislative intent that statutory definitions for “family or household member” encompass unrelated persons in same household who are of opposite sexes, living together as husband and wife. General district courts, not juvenile courts, have jurisdiction to try criminal warrants alleging assault and battery of family or household member when defendant and victim are unrelated persons of same sex, sharing same residence.

Rule-making authority presumably would not rest with single judge acting independently, but would be exercised by several of court’s judges acting in concert, or by chief judge, under statute giving him administrative authority over court’s operations.
COURTS OF RECORD

Circuit Courts. Circuit court in divorce and custody case, or juvenile court acting on custody petition filed by parent or relative, may transfer custody of child to local board of public welfare or social services, if court makes specific statutory findings of abuse or neglect, that child is in need of services or supervision, is status offender or delinquent, or when petition requests relief from child's care and custody. Board, to be properly before court, must have received reasonable notice of, and opportunity to be heard on, pending custody issue, unless emergency exists, and board may be required to accept child for up to 14 days without having received prior notice or opportunity for hearing. In such cases, local board need not file custody petition; petition filed by parent or relative gives court jurisdiction over child's custody.

Circuit Courts. General district court may impose sanctions on creditor's attorney for filing motion for judgment and supporting affidavit stating amount debtor owes that, while correct at time pleadings signed, attorney knew to be incorrect at time of filing. Sanction compensating adverse party for expenses or attorney's fees incurred is civil matter appealable to circuit court. Circuit court may conduct de novo hearing to determine whether to impose sanction.

Circuit Courts. May adopt rules of practice that do not contravene Constitution or statutes, or affect substantive law.

Circuit Courts. Monetary sanctions may be imposed for knowingly filing erroneous motion for judgment and supporting affidavit; sanction imposed under § 8.01-271.1 is civil matter independently appealable de novo to circuit court.

Rule-making authority presumably would not rest with single judge acting independently, but would be exercised by several of court's judges acting in concert, or by chief judge, under statute giving him administrative authority over court's operations.

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Crimes Against Property - Trespass to Realty. Civil trespass on personal property such as school bus, if coupled with breach of peace, is common-law crime.

Crimes Against Property - Trespass to Realty. Conviction for criminal trespass cannot be sustained if individual acts under sincere, but perhaps mistaken, good faith belief that he has legal right to be on property.

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Proceedings to Determine Parentage. Guardian ad litem must be appointed in proceeding to establish paternity of juvenile putative father and to enforce support obligation of father under § 8.01-9; also may be appointed under § 16.1-266. Department of Social Services or other successful plaintiff may be required to pay for guardian appointed only under § 8.01-9. Counsel appointed under § 16.1-266(D) is compensated pursuant to § 19.2-163.

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Federal, Commonwealth, and Local Officers - Constitutional and Local Officers. If Hanover County voters approve adoption of county manager form of government in referendum to be conducted concurrently with November 8, 1994, general election, elective constitutional offices of treasurer and commissioner of revenue will be abolished on January 1, 1996, following November 1995 election of new board of county supervisors. County need not conduct additional referendum to abolish two offices by seeking charter or other special act from General Assembly. Change in form of government that will occur at conclusion of incumbent officers’ terms does not conflict with constitutional mandate that term of person holding office at time of election not be reduced. County’s holding of such referendum and, if approved, its implementation eliminating two elective offices must be submitted to U.S. Department of Justice for preclearance under § 5 of federal Voting Rights Act ......................................................... 33

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EMPLOYEE/EMPLOYER (contd.)

First Amendment scrutiny. By permitting some charitable solicitations and charitable payroll deductions, governmental entity creates limited public forum. Locality’s restrictions on speech and method of selecting charitable organizations that will solicit donations in limited public forum must not be based on content, and will survive constitutional challenge only if such restrictions serve compelling governmental interest and are narrowly drawn to achieve that end ........................................ 40

Charitable contributions. Subject to constitutional limitations, permitting solicitation of charitable donations from government employees in workplace is matter of employers’ discretion. Charitable solicitations protected by First Amendment. Amendment does not require political subdivision to permit charitable solicitations in workplace, but by allowing some charities to solicit employee contributions by payroll deductions, locality may create limited public forum; control over access to that forum is subject to First Amendment. Validity of restrictions on speech in limited public forum begins with analysis of whether restrictions are content-based; whether regulation is content-based depends on facts. Content-based restrictions on speech must serve compelling state interest and be narrowly drawn. Time, place and manner restrictions on speech must further important government goal and may not substantially burden free speech .... 40

Payroll deductions. Failure of General Assembly to grant specific statutory authority to local governments and other political subdivisions to permit charitable contributions by payroll deduction does not indicate legislative opposition. Virginia localities have necessarily implied power to regulate employee payroll deductions. Exercise of such implied power must be reasonable and consistent with legislative intent; may not unduly burden citizens’ constitutional rights. Political subdivisions’ regulation of charitable organizations’ access to workplace or to payroll deduction system must survive First Amendment scrutiny. By permitting some charitable solicitations and charitable payroll deductions, governmental entity creates limited public forum. Locality’s restrictions on speech and method of selecting charitable organizations that will solicit donations in limited public forum must not be based on content, and will survive constitutional challenge only if such restrictions serve compelling governmental interest and are narrowly drawn to achieve that end ........................................ 40

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License Taxes. Single corporation or other business entity may be taxed on its gross receipts at more than one license tax rate; instances when firm carries on two or more separate businesses must be distinguished from those when firm merely performs function ancillary to its primary business that, performed alone, would be taxed at different rate.

License Taxes. Sole purpose of business licenses required under license tax provisions is to raise revenue.

License Taxes. State statute's incorporation of definition from federal regulation creates ambiguity about application of business license tax rate limitation. Joint subcommittee report indicates legislative intent not to limit definition of federal contractors' receipts subject to business license tax rate cap to independent research and development receipts, as defined in federal regulations.

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Real estate taxes constitute both personal obligation of owner and lien against assessed property. Judicial sale of land in 1995 for local property taxes delinquent in 1990 and before eliminates entire delinquent tax debt, up to date of sale, so that title passes to purchaser free and clear of tax encumbrances. Former owner remains personally liable for unsatisfied amount during five-year statute of limitations period. Following such sale, clerk must mark all liens satisfied, whether or not taxes have been paid in full. Locality may not conduct tax sale of property subject to liens for more recent delinquencies, even though advertisement states sale is for taxes delinquent through 1990 only.

Sale of delinquent tax land passes title free from entire delinquent tax debt, up to date of sale.

WELFARE (SOCIAL SERVICES)

Support of Dependent Children. Guardian ad litem must be appointed in proceeding to establish paternity of juvenile putative father and to enforce support obligation of father under § 8.01-9; also may be appointed under § 16.1-266. Department of Social Services or other successful plaintiff may be required to pay for guardian appointed only under § 8.01-9. Counsel appointed under § 16.1-266(D) is compensated pursuant to § 19.2-163.

Support of Dependent Children. Guardian ad litem should be appointed to represent minor putative parent in civil proceeding to establish paternity or enforce child support obligations. Department of Social Services, or other successful plaintiff, may be required to pay court-assessed costs and expenses of guardian; Department may seek recovery from parent for guardian ad litem costs. Expenses of guardian appointed by juvenile court to serve as counsel to indigent minor putative father in support enforcement case paid from public funds in same manner as court-appointed counsel is compensated for representation of criminal defendants.
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