OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
FROM
JANUARY–DECEMBER 1995


COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
RICHMOND
1995
THE 1995 REPORT OF THE ATTORNEY GENERAL

WAS PREPARED

BY

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CONTENTS

Page

LETTER OF TRANSMITTAL ...................................................... v
PERSONNEL OF THE OFFICE ................................................. ix
ATTORNEYS GENERAL OF VIRGINIA ................................. xvii

*CASES:
  DECIDED IN THE SUPREME COURT OF VIRGINIA ..................... xix
  PENDING IN THE SUPREME COURT OF VIRGINIA ....................... xxiii
  PENDING AND DECIDED IN THE SUPREME COURT OF THE UNITED STATES . xxvi

**OPINIONS ............................................................... 1

***NAME INDEX .......................................................... 293

SUBJECT INDEX ............................................................... 295

STATUTES, CONSTITUTIONAL PROVISIONS AND RULES OF COURT:
  ACTS OF ASSEMBLY ................................................... 411
  CODE OF VIRGINIA ...................................................... 413
  CONSTITUTION OF VIRGINIA ........................................... 428
  RULES OF SUPREME COURT OF VIRGINIA ............................ 429

*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, 1995, to December 31, 1995. Opinions begin on the page on which the headnote first appears.
LETTER OF TRANSMITTAL

May 1, 1996

The Honorable George F. Allen
Governor of Virginia

My dear Governor Allen:

The Attorney General is charged by Article V, § 15 of the Constitution of Virginia (1971) and by § 2.1-117 of the Code of Virginia with providing legal representation to all agencies and institutions of the Commonwealth, and by § 2.1-118 with providing formal advisory opinions interpreting many aspects of the law. As contemplated by the provisions of § 2.1-128, I am providing you with this report containing the opinions of the Attorney General. This publication will be helpful in promoting a uniform construction of the Commonwealth's laws. In 1995, I rendered 104 formal opinions, as well as a number of informal opinions, in response to requests from state and local government officials. I also rendered conflict of interests advisory opinions to state officials and to state legislators, as required by the State and Local Government and the General Assembly Conflict of Interests Acts.

I continue to focus considerable effort on what I consider to be my highest responsibility to the Commonwealth—to continue providing for the safety of its citizens. My staff has provided support for your Commission on Juvenile Justice Reform. We made substantial contributions to the legislative package of recommendations to the General Assembly that ultimately comprised a major portion of the juvenile justice reform legislation considered at the 1996 Session. In addition, my staff provided support for the Commission on Family Violence Prevention, which, through its Law Enforcement Subcommittee, issued a report recommending mandatory arrest of the primary physical aggressor and law-enforcement officer training in domestic or family abuse cases. As a result, the Commission proposed legislation to the 1996 Session of the General Assembly to implement these recommendations.

The Criminal Law Division continued to handle all postconviction litigation filed by prisoners in state institutions. The Division defended 836 petitions for writs of habeas corpus filed in both the state and federal courts, and represented the Commonwealth in 167 criminal appeals in the Supreme Court of Virginia and 342 criminal appeals in the Court of Appeals of Virginia.

The Criminal Litigation Section defended on appeal and collateral attack the convictions of persons under the sentence of death in Virginia, which now numbers fifty-four. The 1995 Session of the General Assembly passed a legislative reform package that greatly expedites the litigation of habeas corpus cases filed by death row prisoners. In addition, a Capital Litigation Unit was established that allows five attorneys to specialize in the litigation of death penalty cases. As a result, five cases were won in the United States Court of Appeals for the Fourth Circuit where various federal district courts had granted relief to death row prisoners.
In the interest of the public welfare of the citizens of the Commonwealth, I have appointed a public-private bipartisan Factories Behind Fences Task Force, comprised of business leaders throughout the State, a labor representative, a prison warden, and two key legislators. The Task Force has identified ways to expand and enhance inmate work opportunities to benefit not only the inmates, but also law-abiding Virginians. In the context of parole abolition, Factories Behind Fences becomes an important inmate management tool. The Task Force allows Virginia’s business community to assist in identifying potential inmate work opportunities without endangering private sector jobs in the Commonwealth.

During 1995, I represented the Commonwealth in more than 13,000 cases, including the areas of insurance and utilities regulation, antitrust and consumer protection, employment law, real estate and construction litigation, and debt collection.

As part of my duty as consumer counsel for the Commonwealth, I continued an examination of Trigon Blue Cross Blue Shield. In July 1995, I filed with the State Corporation Commission a report detailing the results of my criminal investigation of Trigon’s practice of calculating subscriber copayments without factoring the discounts obtained from hospitals. While this investigation did not find sufficient evidence for criminal prosecution, it did reveal a disregard for the economic well-being of consumers. During the remainder of 1995, two opportunities arose to address consumer interests implicated in Trigon’s conduct: the first involved Trigon’s application for approval to convert from a not-for-profit nonstock mutual company to a for-profit stock corporation; the second involved millions of dollars in a copayment refund program ordered by the State Corporation Commission in 1994.

Under Trigon’s June 1995 demutualization application filing with the State Corporation Commission, all of Trigon’s value would have been distributed to policyholders on the date of Trigon’s conversion to a stock corporation. I advised Trigon that consumer counsel would seek a different result—one that would recognize the history of Trigon’s legal status as a not-for-profit and tax-exempt organization. After adversarial negotiations and pretrial discovery, Trigon agreed to change its demutualization proposal to satisfy these concerns. Under the amended filing, $165 million of Trigon’s value will be distributed to benefit the citizens of Virginia. The remaining value will be distributed as cash and stock to Virginia policyholders. Moreover, under the amended plan, two independent members will be placed on Trigon’s board of directors. This would begin to remedy my long-standing concern for consumers by creating independent oversight of Trigon.

Another consumer issue arose in 1995 from Trigon’s copayment practices. At the outset of the 1994 refund program, my staff advised Trigon that any refunds that were not claimed by policyholders would be payable to the Treasurer of Virginia under the Unclaimed Property Act. In October 1995, the Division of Debt Collection filed suit against Trigon to recover all unclaimed copayment refunds. Within several weeks Trigon agreed to pay that claim in full, as part of a second court-ordered program to refund an additional $50 million in copayment overcharges. We expect the Treasury’s Division of Unclaimed Property to recover more than $18 million, which sum will benefit the Commonwealth’s Literary Fund.
In fulfilling my duty as consumer counsel, I advised the 1995 General Assembly concerning the need for legislation to open Virginia's local telecommunications markets to greater competition. When the State Corporation Commission promulgated proposed rules to implement this legislation, attorneys in the Insurance and Utilities Regulatory Section appeared in hearings and submitted briefs supporting rules to maximize competition in these markets, while protecting consumers from deceptive or unfair practices. The Commission adopted rules, effective January 1, 1996, to open these markets, and telephone companies quickly filed applications to compete.

My staff in the Antitrust and Consumer Protection Section produced another successful year in which we settled or litigated more than sixteen major cases. This Section recovered $104,600 in civil penalties, earned $116,981 in costs and attorneys' fees, and collected $1,016,212 in consumer refunds and damages in 1995. Also, after a year-long investigation, this Section achieved a settlement in a nationwide price-fixing suit against a major shoe manufacturer. Virginia's recovery of $200,000 was distributed to benefit athletic and recreational programs for young people in five localities throughout the Commonwealth.

During this past year, the Trial Section concluded the federal retirees' pension tax litigation, *Harper v. Commonwealth*, by successfully defending an $8 million attorneys' fee suit filed by lawyers representing some of the federal retirees. Litigation caseloads in the Trial Section showed a marked increase over 1994 totals, particularly in the area of tort defense and workers' compensation claims. Tort actions, including general liability, medical malpractice and motor vehicle suits, increased by 38% (from 130 in 1994 to 179 in 1995), while contested workers' compensation cases rose by 33% (from 301 to 401). Overall, the Trial Section set 59 cases for trial in 1995, with 35 favorable decisions, 18 settlements and only 6 adverse judgments. In addition, we represented the Commonwealth in 66 separate appeals in the state and federal appellate courts.

The attorneys in the Employment Law Section led the defense in a lawsuit challenging your efforts, as Chief Personnel Officer, to achieve greater efficiency by eliminating duplicative positions in state government, in the case of *Mandel v. Allen*, 889 F. Supp. 857 (E.D. Va. 1995). The United States District Court upheld every employment action at issue, finding the State's conduct entirely lawful.

The Real Estate and Construction Litigation Section completed its second year of combining “vertical” (buildings) and “horizontal” (roads and bridges) litigation and counseling numerous agencies on construction issues and real property transactions, to effect a reduction in claims against the State. This Section has been instrumental in resolving disputes before they reach the claim or litigation stage. It participated vigorously in important government initiatives, including the Norfolk Public Health Center, the Virginia Commonwealth University Biotech Research Park, and the construction of new correctional facilities.

This Office was active during 1995 in preparing and presenting several seminars dealing with a wide range of legal issues, including procurement practices and antitrust, freedom of information and conflicts of interests concerns. The Office also cooperated
with a number of other agencies and organizations to provide legal training and briefings
to state and local officials.

It is my firm belief that the Commonwealth and its agencies, as well as the agen-
cies and institutions of local government, are best served by an active program of educa-
tion and training to prevent legal problems from arising. Such a program, I believe, will
be extremely cost-effective in preventing legal crises and their attendant legal expenses,
resulting in a more effective, more cost-efficient use of government services.

I have attempted to provide a broad overview of the activities of this Office during
the past year. The guiding thrust of the efforts of this Office has been to provide the most
efficient and effective legal services possible to the agencies and institutions of state
government, while developing procedures and practices designed to anticipate potential
legal problems and to prevent them from arising.

While no single document covers all the duties and activities of this Office, this
review serves as a guide to our efforts to continue to meet our mandate as the Depart-
ment of Law of 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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1 This list includes all persons employed on a full-time basis in the Office of the Attorney General at any time during 1995.
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<td>Office Services Specialist</td>
</tr>
<tr>
<td>Ellett A. Ohree</td>
<td>Henrico</td>
<td>Office Technician</td>
</tr>
<tr>
<td>John J. Richardson II</td>
<td>Richmond</td>
<td>Receptionist</td>
</tr>
<tr>
<td>Yvonne Johnson</td>
<td>Richmond</td>
<td>Receptionist</td>
</tr>
<tr>
<td>Jean B. Priddy</td>
<td>Richmond</td>
<td>Receptionist</td>
</tr>
<tr>
<td>Tesha N. Wilkins</td>
<td>Richmond</td>
<td>Receptionist</td>
</tr>
</tbody>
</table>
ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 1995

Edmund Randolph ........................................ 1776-1786
James Innes .............................................. 1786-1796
Robert Brooke ............................................. 1796-1799
Philip Norborne Nicholas ............................... 1799-1819
John Robertson ........................................... 1819-1834
Sidney S. Baxter ......................................... 1834-1852
Willis P. Bocock .......................................... 1852-1857
John Randolph Tucker .................................. 1857-1865
Thomas Russell Bowden ................................ 1865-1869
Charles Whittlesey (military appointee) ............. 1869-1870
James C. Taylor .......................................... 1870-1874
Raleigh T. Daniel ....................................... 1874-1877
James G. Field .......................................... 1877-1882
Frank S. Blair ............................................ 1882-1886
Rufus A. Ayers ........................................... 1886-1890
R. Taylor Scott ........................................... 1890-1897
R. Carter Scott ........................................... 1897-1898
A.J. Montague ............................................. 1898-1902
William A. Anderson .................................... 1902-1910
Samuel W. Williams ..................................... 1910-1914
John Garland Pollard ................................... 1914-1918
J.D. Hank Jr. 1 ............................................. 1918-1918
John R. Saunders ........................................ 1918-1934
Abram P. Staples 2 ....................................... 1934-1947

1The 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.

2The 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.
Harvey B. Apperson\(^3\) .......................... 1947-1948
J. Lindsay Almond Jr.\(^4\) .......................... 1948-1957
Kenneth C. Patty\(^3\) ............................... 1957-1958
A.S. Harrison Jr. .................................. 1958-1961
Frederick T. Gray\(^6\) ............................... 1961-1962
Robert Y. Button .................................. 1962-1970
Andrew P. Miller .................................. 1970-1977
Anthony F. Troy\(^7\) ................................. 1977-1978
Gerald L. Baliles .................................. 1982-1985
William G. Broaddus\(^8\) .......................... 1985-1986
Mary Sue Terry ..................................... 1986-1993
James S. Gilmore III .............................. 1994-

\(^3\)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.

\(^4\)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.

\(^5\)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.

\(^6\)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.

\(^7\)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.

\(^8\)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.

CASES DECIDED IN THE SUPREME COURT OF VIRGINIA


*Beavers v. Director, Dep’t of Corrections.* From Hampton Cir. Ct. Appeal of denial of habeas corpus petition challenging capital murder conviction. *Aff’d.*

*BiChemicals v. Dep’t of Taxation.* From Richmond Cir. Ct. Appeal of denial of sales and use tax exemption for certain chemicals purchased by pharmaceutical manufacturer. *Writ denied.*

*Carr v. Dep’t of Taxation.* From Newport News Cir. Ct. Appeal of denial of sales and use tax exemption for publications. *Judgment rev’d; final order for appellant.*

*Cash v. Commonwealth.* From Buena Vista Cir. Ct. Appeal of conviction for refusal to submit to alcohol blood or breath test. *Aff’d.*


*Coviello v. Metro.* From Warren Cir. Ct. Appeal of verdict for Commonwealth in suit for injuries plaintiff received when car was struck by trooper’s car. *Dismissed.*

*Cross v. Rankin.* From Norfolk Cir. Ct. Appeal of dismissal of tort claim suit for injuries received in automobile accident involving state vehicle. *Writ denied.*


*Desrochers v. Diamond.* From York Cir. Ct. Appeal of dismissal of suit for injuries plaintiff received in accident involving state vehicle. *Writ denied.*


Evans v. Commonwealth. From Richmond Cir. Ct. En banc court affirmed conviction for possession of cocaine after appeals court panel reversed on search and seizure issue. Aff'd.

Fitzgerald v. Commonwealth. From Pittsylvania Cir. Ct. Appeal challenging capital murder conviction and death sentence; impartiality of jury; jury instruction. Aff'd.


Giesecke v. Dep't of Taxation. From Fairfax Cir. Ct. Appeal from denial of refund for taxes collected as result of denial of credit paid to District of Columbia for unincorporated business tax. Writ denied.


Henderson v. Dep't of Corrections. From Workers' Comp. Comm'n. Appeal of award of benefits to Corrections officer injured while descending stairs. Aff'd.


Hughes v. Cole. From Chesapeake Cir. Ct. Appeal of summary judgment for defendant regarding ownership of winning Virginia lottery ticket. Lottery is stakeholder rather than party in interest. Aff'd.

In re Anderson. From Prince William Cir. Ct. Pro se petition to prohibit judge from hearing any matters concerning petitioner. Dismissed.
In re Atkisson. From Fairfax Cir. Ct. Mandamus petition to have court order obstruction removed from easement on petitioners' property. Dismissed.

In re Billings. From Amherst Cir. Ct. Mandamus petition to prohibit judge from hearing any cases involving petitioner. Dismissed.


In re Harris. From Va. Ct. App. Appeal from mandamus order directing circuit court judge to provide habeas petitioner with free copy of trial transcript. Appeal granted; judgment rev'd.

In re Hay. From Prince Edward Cir. Ct. Appeal to suspend court order prohibiting enforcement of administrative suspension of driver's license for drunk driving. Appeal granted.

In re Howard. From Washington Cir. Ct. Mandamus petition to compel judge to review pending case and render decision within 30 days. Mandamus denied.


In re Norfolk S. Ry. From Danville Cir. Ct. Petitions to have circuit court hear transferred cases. Appeal dismissed.

In re Robertson. From Fairfax Cir. Ct. Petitions to vacate, and prohibit enforcement of, court orders stemming from action for slander and libel. Appeal dismissed.


In re Sorrell. From Arlington Cir. Ct. Mandamus petition requesting judge to suspend execution of judgment pending appeal of underlying cause. Mandamus granted.

In re Steingold. From Virginia Beach Cir. Ct. Mandamus petition requesting that judge be prohibited from taking further action in estate matter. Dismissed.


Louisa Co. v. Virginia Elec. & Power Co. From St. Corp. Comm’n. Appeal from decision dismissing county’s application for review and correction of local assessment ratios for public service company real property or, alternatively, declaration that § 58.1-2604 is unconstitutional. Aff’d.


Monk v. Dep’t of Transportation. From Russell Cir. Ct. Appeal of decision dismissing several actions, including procurement, fraud, contract, among others, seeking damages and other relief from Department. Appeal denied.

Rodriguez v. Commonwealth. From Va. Ct. App. Appeal of conviction for possession of cocaine with intent to distribute complaining that evidence of prior crimes should not have been allowed. Aff’d.

Rone v. Director, Dep’t of Corrections. Orig. jurisd. Petition for writ of habeas corpus challenging legality of conviction on three counts of robbery. Dismissed.


Steingold v. Rosenblatt. From Va. Beach Cir. Ct. Petition to prohibit further action in matter involving judgment for marital support against pro se petitioner/attorney. Dismissed.

Stout v. Director, Dep’t of Corrections. From Pittsylvania Cir. Ct. Appeal of dismissal of habeas corpus petition attacking capital murder conviction and death sentence. Aff’d.


Williams v. Sgro. From Richmond Cir. Ct. Appeal of judgment for defendants, alleging that demotion and denial of grievance procedures were violations of constitutional rights. Denied.


Young v. Halifax Cir. Ct. From Halifax Cir. Ct. Pro se mandamus petition to have lower court release inmate from plea bargain. Mandamus dismissed.

CASES PENDING IN THE SUPREME COURT OF VIRGINIA


Burket v. Director, Dep’t of Corrections. Orig. jurisd. Petition for writ of habeas corpus challenging legality of capital murder conviction and death sentence.

Cardwell v. Director, Dep’t of Corrections. From Henrico Cir. Ct. Habeas corpus challenge to validity of capital murder conviction and death sentence.
Charles E. Smith Mgmt. Co. v. Dep’t of Taxation. From Arlington Cir. Ct. Appeal of holding that Department may assess use tax on aircraft owned by nonresidents and based at Washington National Airport.

Chichester v. Director, Dep’t of Corrections. Orig. jurisd. Habeas corpus challenge to capital murder conviction.

Cole v. Twiford. From Chesapeake Cir. Ct. Appeal of award of attorney fees in Hughes v. Cole dispute regarding ownership of winning Virginia lottery ticket. Lottery is stakeholder rather than party in interest.

Curmak v. Commonwealth. From Hanover Cir. Ct. Appeal of convictions for distribution of, and conspiracy to distribute, marijuana.


Halberstam v. Commonwealth. From Fairfax Cir. Ct. Appeal of dismissal of tort claim suit for slip and fall on campus.


In re Clarke. Orig. jurisd. Pro se inmate petition for writ of mandamus compelling court to provide record of earlier conviction.

In re Cranwell. From St. Bar Disc. Bd. Appeal to stay order suspending attorney’s license to practice law.


Mueller v. Director, Dep't of Corrections. From Chesterfield Cir. Ct. Appeal of denial of habeas corpus petition in death penalty case.

Ramdass v. Director, Dep't of Corrections. Orig. jurisd. Habeas corpus challenge to capital murder conviction.

Roach v. Commonwealth. From Greene Cir. Ct. Appeal of capital murder conviction and death sentence.


Weeks v. Director, Dep't of Corrections. From Va. Beach Cir. Ct. Habeas corpus petition challenging legality of capital murder conviction and death sentence.

Westmoreland v. Director, Dep't of Corrections. From Norfolk Cir. Ct. Habeas corpus petition challenging second-degree murder conviction and 20-year penitentiary sentence.


Williams v. Commonwealth. From Chesapeake Cir. Ct. Appeal of capital murder conviction.


Wright v. Warden, Mecklenburg Correc. Cir. From Fairfax Cir. Ct. Habeas corpus challenge to validity of capital murder conviction and death sentence.
CASES IN THE SUPREME COURT OF THE UNITED STATES


Metcalf v. Rehab. Ass'n of Va. From 4th Cir. Ct. App. Petition questioning whether Department of Medical Assistance Services was required to pay full medicare cost-sharing amounts for Part B covered services furnished qualified medicare beneficiaries (i.e., those individuals eligible for both medicare and medicaid). Cert. denied.


Solem v. Courter. From 4th Cir. Ct. App. Appeal of decision denying that Solem has constitutional right to sell unpasteurized milk. Cert. denied.


ADMINISTRATION OF GOVERNMENT GENERALLY: HOLIDAYS AND SPECIAL DAYS; HOURS OF WORK, ETC.

Use of term “Christmas break” by county public schools to denote period of vacation taken by students in late December of each year, when schools customarily are closed is not prohibited.

April 14, 1995

The Honorable William C. Mims
Member, House of Delegates

You ask whether county public schools may refer to the period of student vacation when public schools customarily are closed in late December of each year as “Christmas break,” or whether such vacation period must be referred to by a secular term, such as “winter break.”

Neither the Constitution of the United States nor any provision of the Constitution of Virginia or statutory law requires the public school divisions to refer to the customary and long-standing student vacation period taken in late December of each year by secular terms. School divisions may choose to use such terminology, but the mere reference to “Christmas break” does not constitute an impermissible establishment of religion.

I know of no court decisions regarding the use of certain nomenclature to designate the Christmas holiday period. There are, however, court decisions that have considered the constitutionality of recognizing certain holiday periods, such as Christmas, and have upheld the constitutionality of recognizing Christmas as an official holiday. I am aware of no court decision that has taken a contrary view. In the context of another recognized holiday period, Good Friday, a federal appellate court has stated:

There is nothing impermissible about considering for holiday status days on which many people choose to be absent from work for religious reasons. That the state legislature was able to accomplish its secular purpose [of providing citizens with a holiday] and at the same time accommodate the widespread religious practices of its citizenry is hardly a reason to invalidate the statute.

Under this analysis, recognizing Christmas Day and the period surrounding it as official holidays in the school calendar also should qualify as a permissible accommodation of religious practices. Therefore, I am aware of no constitutional impediment to naming the period of vacation when school customarily is closed in late December of each year as “Christmas break.”

Consequently, it is my opinion that the use of the terminology “Christmas break” is not prohibited.\(^5\)

\(^{1}\) I note that § 2.1-21 of the Code of Virginia recognizes Christmas as a legal holiday for the Commonwealth, and does so not only by referring to “December 25,” but also by using the traditional term “Christmas Day.”


\(^{4}\) Necessarily, the public schools must be sensitive to the religious pluralism of the student body and avoid impermissible state sponsorship of religion. See, e.g., Lee v. Weisman, 505 U.S. 577 (1992) (pervasive public school supervision of personal prayer at high school graduation is constitutionally prohibited).

\(^{5}\) See generally Lemon v. Kurtzman, 403 U.S. 602 (1971), aff’d, 411 U.S. 192 (1973) (holding that school policies genuinely supported by secular purposes, which neither advance religion in primary effect nor foster excessive entanglement with religion, are constitutionally permitted).

ADMISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

Corporation whose corporate officer is mayor or member of city council is prohibited from contracting with city’s public works department, unless exception to COI Act’s contract prohibitions applies.

June 5, 1995

The Honorable Harry J. Parrish
Member, House of Delegates

You ask whether the State and Local Government Conflict of Interests Act, §§ 2.1-639.1 through 2.1-639.24 of the Code of Virginia, prohibits a corporation that has as a corporate officer either the mayor of the City of Manassas or a member of the city council from contracting with the city’s Public Works Department (the “Department”) should that corporation be awarded a supply contract by the Department pursuant to an Invitation to Bid under the Virginia Public Procurement Act.\(^1\)

You relate that the Department has advertised for sealed bids from companies to provide the Department with unspecified materials. You further advise that the city council approves the budget of the Department. You ask whether the Act prohibits a
corporation that has as a corporate officer either the mayor or a member of the council from responding to the advertisement for bids and ultimately contracting with the Department.

The mayor,² as well as each member of the council, is an "officer" of a "governmental agency," subject to the prohibitions and restrictions of the Act.³ The mayor or a council member would have a personal interest in a corporation if he owns more than three percent of the equity of the corporation, or if his annual income from the corporation exceeds $10,000.⁴

Section 2.1-639.7(A) provides that

[n]o person elected or appointed as a member of the governing body of a county, city or town shall have a personal interest in ... (ii) any contract with any governmental agency which is a component part of his local government and which is subject to the ultimate control of the governing body of which he is a member.

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

The charter for the City of Manassas provides that "[t]he council may appoint a city manager who shall be the chief administrative officer of the city."⁵ The city manager is empowered to appoint, employ, remove or discharge certain city officers and employees, subject to review by the council.⁶ The city manager is accountable only to the council.⁷ The council has general power over all officers and employees of the city.⁸

The Department is clearly a component part of the city government. The council, over which the mayor presides and serves as tie breaker, approves the budget of the Department and has general power over its employees. It is my opinion that the charter for the City of Manassas contemplates that the Department be subject to the ultimate control of the council. I am further of the opinion that, unless one of the exceptions in § 2.1-639.7 or § 2.1-639.9 applies, the Act prohibits a corporation that has as a corporate officer the mayor or a member of the council from contracting with the Department.⁹

¹Section 2.1-639.23(B), a portion of the State and Local Government Conflict of Interests Act, provides that "[t]he provisions of [the Act] relating to an officer or employee serving at the local level of government shall be enforced by the Commonwealth's attorney within the political subdivision for which he is elected." Section 2.1-639.23(B) also requires "[e]ach Commonwealth's attorney [to] render advisory opinions as to whether the facts in a particular case would constitute a violation of the provisions of [the Act] to the governing body and any local officer or employee in his jurisdiction ...." If the Commonwealth's attorney's opinion concludes that certain facts constitute a violation of the Act, the local official may ask the Attorney General to review that opinion. "A
conflicting opinion by the Attorney General shall act to revoke the opinion of the Commonwealth’s attorney.” *Id.*

2The charter for the City of Manassas provides that “[t]he mayor shall preside at the meetings of the council,” but “shall have no right to vote in the council except ... in every case of a tie vote of the council.” Ch. 721, § 8, 1976 Va. Acts 1120, 1122.

*See § 2.1-639.2.

*See id.* (defining “personal interest”).


*See id.*


*Your request does not set forth sufficient facts upon which a conclusion may be reached regarding application of the exceptions contained in the Act.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

Act provides citizen access to public records and to meetings of public bodies. General Assembly did not intend to expose to public scrutiny records of private corporations and businesses that contract with public bodies. Assembly did not intend for Act to apply to private corporation that receives public funds to pay for property, goods or services it provides, when corporation is not supported wholly or principally by public funds. Private corporation that has entered into management contract with Hotel Roanoke Conference Center Commission is not “public body” subject to Act.

January 9, 1995

The Honorable Clifton A. Woodrum
Member, House of Delegates

You ask whether a private corporation that has entered into a management contract with the Hotel Roanoke Conference Center Commission (the “Conference Center” and the “Commission”) is a “public body” subject to The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the “Act”).

You relate that the Commission entered into an Interim Conference Center Management Agreement (“Interim Agreement”) with a private corporation that manages hotels, conference centers and civic centers throughout the nation. The corporation is not supported wholly or principally by public funds. Under the Interim Agreement, the private corporation books reservations for groups of guests, with no involvement by the Commission. Section 9 of the Interim Agreement states that “[t]he private corporation is being engaged hereunder as an independent contractor, and not as an employee, joint venturer or partner of the Commission.” *1* Section 4 of the Interim Agreement provides:
In addition to the Initial Services expenses, the Commission shall pay to [the private corporation] an initial services fee in the sum of $37,500.00, for Initial Services to be performed by [the private corporation] hereunder. Such fee shall be paid to [the private corporation] in monthly installments of $1,400.00 commencing on September 1, 1993, and on the first day of each month thereafter through and including June 1, 1994, and monthly installments of $2,937.50 commencing on July 1, 1994, and on the first day of each month thereafter through and including February 1, 1995 ....[2]

The Commission is in the process of drafting a five-year term Management Agreement as a successor to the Interim Agreement. Under the Management Agreement, the private corporation will possess and exercise sole ownership and control over the records and documents pertaining to the booking of guests or other uses of the Conference Center.

Your question arises because of a written request, pursuant to the Act, from a privately owned hotel in Roanoke to the Commission's acting director asking for a current listing of all groups booked into the Conference Center whose reservations are confirmed or tentative, and a weekly update on new bookings, to include a contact name, phone number and type of function.3

The question of whether circumstances may exist in which a private corporation may become a "public body" subject to the Act has not been addressed by Virginia courts.4 The Circuit Court of the City of Richmond noted, however, that the "mere realignment of responsibilities is insufficient to bring an otherwise private entity within the coverage of the [Act]."5

The General Assembly has stated that the primary purpose of the Act is to ensure the people of this Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted.... The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government....

This [Act] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.6

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature.7 Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms.8 The purpose underlying a statute's enactment is particularly significant in construing it.9 Moreover, statutes
should not be interpreted in ways that produce absurd or irrational consequences. Instead, they should be harmonized with other existing statutes where possible to produce a consistently logical result that gives effect to the legislative intent.

In promulgating the Act, the General Assembly intended to give citizens access both to official records in the possession of public bodies and to meetings of public bodies. In my view, the General Assembly did not intend to expose the records of private corporations and businesses that have contracted with public bodies to the scrutiny of the public. Under both the Interim Agreement and the Management Agreement, all bookings of guests to the Conference Center will be made by the private corporation, and all records associated with bookings will be maintained at the offices of the corporation. The Commission is not involved in the booking process and keeps no records relating to bookings.

It is my opinion that the General Assembly did not intend for the Act to apply to a private corporation receiving public funds to pay for property, goods or services it provides, when that corporation is not supported wholly or principally by public funds. To determine otherwise would open the records of many private corporations and businesses that have contracted with state or local government agencies to public scrutiny, and would likely have a chilling effect on the willingness of private corporations and businesses to enter into contracts with public bodies. It is, therefore, my opinion that the private corporation that has entered into the subject management contract is not a “public body” subject to the Act.

1Interim Agr. at 6.
2Id. at 4.
3A prior opinion of the Attorney General concludes that the Act does not authorize a person to make a continuing request for official records that are not in existence at the time the request is made. 1991 Op. Va. Att’y Gen. 7, 9.
4A Virginia circuit court held that because the “peculiar relationship between the [Virginia Retirement System] Board of Trustees and the RF&P Board of Directors makes the later [sic] subject to the [Act], the Court need not decide the more difficult questions of whether circumstances exist in which a private corporation may become merely an arm of the state and whether such a relationship alone would make the private corporation subject to the Act.” Little v. Virginia Retirement System, 28 Va. Cir. 411, 414 (Richmond Cir. Ct. 1992).
5Id. at 422.
6Section 2.1-340.1.
AGRICULTURE, HORTICULTURE AND FOOD: SLAUGHTERHOUSES, MEAT AND DRESSED POULTRY - VIRGINIA MEAT AND POULTRY PRODUCTS INSPECTION ACT.

Central kitchen of retail grocer prepares meals made from inspected product that are sold in grocer’s commonly owned retail outlets to customers for consumption in seating areas within outlets or for takeout, and are kept segregated from retail store’s inspected product; operations of kitchen do not involve slaughtering, canning, salting, packing or rendering of its meat products, and are not subject to continuous federal inspection. Central kitchen operation does not meet federal “retail store” exemption because kitchen is not place where products are sold to consumers; its operation is not exempt from continuous inspection because exemption applies only to operations at single retail establishments. Federal “restaurant” exemption is not limited to single establishment. Because retail grocer meets restaurant exemption, its central kitchen operation is exempt from continuous federal inspection.

April 20, 1995

The Honorable John S. Reid
Member, House of Delegates

You ask several questions regarding the operation of a central kitchen by a retail grocer. You first ask whether the operation of a central kitchen by a retail grocer in which restaurant and delicatessen products are prepared is subject to continuous inspection under the Virginia Meat and Poultry Products Inspection Act, §§ 3.1-884.17 through 3.1-884.36 of the Code of Virginia. You next ask whether the operations of the central kitchen by the retail grocer are exempted as a “retail store” from continuous inspection under the Rules and Regulations Pertaining to Meat and Poultry Inspection under the Virginia Meat and Poultry Products Inspection Act, 9:15 Va. Regs. Reg. 115-02-19, § 1.3, 2356, 2357 (1993). Finally, you ask whether the operations of the central kitchen by the retail grocer are exempted from continuous inspection as a “restaurant” under these state rules and regulations.

You relate that a retail grocer has established a central kitchen to supply its 24 retail grocery outlets with food products prepared for restaurants and delicatessens situated within the outlets. The central kitchen and retail outlets are under common ownership. The products prepared by the central kitchen include pizzas, entrees, roasted meats and chicken, and other prepared meat and vegetable dishes which, after reheating, are ready to eat. The products are prepared in quantities designed for individual or family consumption. The meals are prepared and consumed in normal retail quantities. All of the meals are prepared from inspected product, are shipped in ready-to-eat form in the retail grocer’s trucks, are sold at the retail outlets to customers for consumption either in seating areas or for takeout, and are kept segregated from inspected product in the retail outlets. Separate inventory records are kept for the meat or poultry products cooked in the central kitchen. The products prepared at the central kitchen may be displayed in
the same case as raw meat and poultry that has been butchered under federal inspection. None of the meat or poultry processed in the central kitchen and then transported to the retail outlets is in raw form. The products are not sold at wholesale to any other company.  

The only reported court decision dealing with whether retail grocers are subject to the provisions of the Federal Meat Inspection Act is the case of D & W Food Centers, Inc. v. Block [hereinafter D & W]. The factual situation of this case is similar to the facts you provide. D & W operated a chain of 13 retail grocery stores in the Grand Rapids, Michigan, area and processed pizzas from a central kitchen, which it sold in the retail grocery stores. The Act requires the Secretary to examine and inspect “all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment ....” The Act defines “prepared” as “slaughtered, canned, salted, rendered, boned, cut up or otherwise manufactured or processed.” The Secretary of Agriculture took the position that since D & W used pepperoni in assembling its pizzas, it was required to be inspected by officials of the United States Department of Agriculture. The central kitchen did not distribute to any retail stores other than D & W’s retail grocery stores. The pepperoni used in the pizza operation was federally inspected meat.

Relying on an opinion of the United States Attorney General, the Court of Appeals for the Sixth Circuit held in D & W that retail establishments that do an exclusively intra-state business in meat products were not “‘similar’ to a slaughtering, meat-packing, canning, or rendering plant’” and, therefore, not subject to federal inspection.

The operations of the central kitchen by the retail grocer in your facts go beyond the operations considered by the Sixth Circuit to be exempted from the Federal Meat Inspection Act. The operations you describe include the preparation of various types of meat products, both for consumption on premises and for takeout. None of the operations of the retail grocer, in my opinion, however, falls within the class of operations listed in § 606 of the Federal Meat Inspection Act. Therefore, I am of the opinion that the central kitchen operations of the retail grocer you describe are not subject to the provisions of the Act.


Under the facts you provide, the central kitchen does not qualify as a retail store because it is not a place where sales are made to individual consumers. Therefore, it is my opinion that the central kitchen operation of the retail grocer you describe does not meet the “retail store” exemption, and, therefore, the central kitchen operation of the grocer is not exempt from continuous inspection because the retail store exemption applies only to operations at single retail establishments.
Finally, you ask whether the retail grocer meets the “restaurant” exemption found in 9 C.F.R. § 303.1(d)(2)(iv). The regulation allows a restaurant to use a central kitchen to supply prepared meat products without inspection to restaurants under common ownership. Section 303.1(d)(2)(iv) defines a “restaurant” for purposes of exemption as

(a) ... any establishment where:

(1) Product is prepared only for sale or service in meals or as entrees directly to individual consumers at such establishments;

(2) Only federally or State inspected and passed product or such product prepared at a retail store exempted under paragraph (d)(2)(iii) of this section is handled or used in the preparation of any product;

(3) No sale of product is made in excess of a normal retail quantity as defined in paragraph (d)(2)(ii) of this section; and

(4) The preparation of product is limited to traditional and usual operations as defined in paragraph (d)(2)(i) of this section.

* * *

(c) For purposes of this paragraph, operations conducted at a restaurant central kitchen facility shall be considered as being conducted at a restaurant if the restaurant central kitchen prepares meat or meat food products that are ready to eat when they leave such facility (i.e., no further cooking or other preparation is needed, except that they may be reheated prior to serving if chilled during transportation), transported directly to a receiving restaurant by its own employees, without intervening transfer or storage, maintained in a safe, unadulterated condition during transportation, and served in meals or as entrees only to customers at restaurants, or through vending machines, owned or operated by the same person that owns or operates such facility, and which otherwise meets the requirements of this paragraph ....

The facts you relate appear to support the conclusion that the central kitchen meets each of these requirements. All meals prepared at the central kitchen are made from inspected product, are shipped in ready-to-eat form in the retail grocer’s trucks, are sold at the retail outlets to customers either for consumption in seating areas or for takeout, and are kept segregated from the retail store’s inspected product. Further, the “restaurant” exemption is not limited to a single establishment. The central kitchen may supply any number of outlets under common ownership. Therefore, it is my opinion that the retail grocer meets the “restaurant” exemption, and that the central kitchen operation of the grocer is exempt from continuous inspection.
The Virginia Meat and Poultry Products Inspection Act provides for the inspection of meat and meat products and poultry and poultry products in intrastate commerce. Section 3.1-884.19 states that it is the purpose of the Act "to provide for meat and poultry products inspection programs that will impose and enforce requirements with respect to intrastate operations and commerce that are at least equal to those imposed and enforced under the Federal Meat Inspection Act and the Federal Poultry Products Inspection Act with respect to operations and transactions in interstate commerce ...."


The Federal Meat Inspection Act is a comprehensive law regulating the inspection of meat and meat products: "For the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary [of Agriculture] shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, goats, horses, mules, and other equines before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce ...." 21 U.S.C.A. § 603(a) (West Supp. 1994).

The purpose of the Federal Meat Inspection Act is to ensure the cleanliness and safety of meat products: "It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged." Id. § 602 (West 1972); see also id. (West Supp. 1994) ("Purpose" para. 2).

The Sixth Circuit held that the Secretary of Agriculture must promulgate a rule of general application for his interpretation to be given deference. 786 F.2d 751 (6th Cir. 1986). See id. at 754 (quoting 42 ATT'Y GEN. ANN. REP. 459, 461 (1972)).

The Sixth Circuit held that the Secretary of Agriculture must promulgate a rule of general application for his interpretation to be given deference. 786 F.2d at 757-58. The Secretary did, in fact, promulgate rules under the Federal Meat Inspection Act in August 1986. See 51 Fed. Reg. 29,905 (1986). The regulations, however, did not attempt to clarify the scope of the Federal Meat Inspection Act. Accordingly, the decision in D & W will apply to this matter.

"The requirements of the Act and the[se] regulations ... for inspection of the preparation of products do not apply to operations of types traditionally and usually conducted at retail stores and restaurants, when conducted at any retail store or restaurant or similar retail-type establishment for sale in normal retail quantities or service of such articles to consumers at such establishments." 9 C.F.R. § 303.1(d)(1) (1994).

A retail store is any place of business where:

(a) The sales of product are made to consumers only;
"(b) At least 75 percent, in terms of dollar value, of total sales of product represents sales to household consumers and the total dollar value of sales of product to consumers other than household consumers does not exceed the dollar limitation per calendar year set by the Administrator [of the Food Safety and Inspection Service]....

"(c) Only federally or State inspected and passed product is handled or used in the preparation of any product, except that product resulting from the custom slaughter or custom preparation of product may be handled or used in accordance with paragraph (a)(2) and (b) of this section but not for sale;

"(d) No sale of product is made in excess of a normal retail quantity as defined in paragraph (d)(2)(ii) of this section;

"(e) The preparation of products for sale to household consumers is limited to traditional and usual operations as defined in paragraph (d)(2)(i) of this section; and

"(f) The preparation of products for sale to other than household consumers is limited to traditional and usual operations as defined in paragraph (d)(2)(i)(a), (b), (d), and (e) of this section. (A retail store at which custom slaughtering or preparation of products is conducted is not thereby disqualified from exemption as a retail store under this paragraph (d).)" Id. § 303.1(d)(2)(iii) (footnote omitted).

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

1960 joint airport agreement permits withdrawal by localities from joint airport authority at any time, provided that any obligation of any withdrawing localities shall remain outstanding until discharged. Members of withdrawing localities no longer may serve on authority. Authority will dissolve by operation of law if only one locality remains after other localities withdraw. Dissolution will occur by affirmative vote of majority of localities that formed authority, or by majority vote to amend 1960 agreement to provide for dissolution by amendment.

February 13, 1995

Mr. Gordon F. Saunders
County Attorney for Bath County

You ask whether the Allegheny-Bath-Clifton Forge-Covington Joint Airport Authority ("Joint Airport Authority" or "Authority") may be dissolved. If the Authority may not be dissolved, you also ask whether members may withdraw from the Authority.

You provide documents pertaining to this matter. One of the documents you provide reflects that on March 16, 1960, Allegheny and Bath Counties and the cities of Clifton Forge and Covington ("Localities") entered into a Joint Airport Agreement ("1960 Agreement") to provide for the establishment and operation of Ingalls Field. The 1960 Agreement creates a Joint Airport Committee ("Committee") to be the governing
board operating Ingalls Field.\(^3\) Under the terms of the 1960 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.\(^4\) In addition, the 1960 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.\(^5\)

On June 15, 1978, the Localities entered into an Agreement of Amendment ("Amendment") to the 1960 Agreement. The name of the governing body of Ingalls Field was changed from the Committee to the Joint Airport Authority.\(^6\) Under the terms of the Amendment, the Joint Airport Authority is authorized to acquire land for Ingalls Field on behalf of the Localities.\(^7\) 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*.\(^8\) Additionally, the Authority may apply for and receive federal grant payments in accordance with the Federal Airport Act.\(^9\) 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.\(^10\)

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.\(^11\) 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.\(^12\) 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.

The Authority was created pursuant to §§ 5.1-35 and 5.1-36, which are found in Article 1, Chapter 3 of Title 5.1.\(^13\) I can find no language in §§ 5.1-35 and 5.1-36 addressing withdrawal from the Authority. The Localities, however, have provided for withdrawal in the 1960 Agreement.\(^14\) The Assumption Agreement, dated October 2, 1978, has effectively rescinded the second sentence of section 7 in the 1960 Agreement, as it applies to obligations to the Federal Aviation Administration, by stating:

\[\text{The Joint Airport Authority does hereby expressly assume and agree to keep and perform all covenants, assurances, conditions, commitments, and obligations according to the terms and provisions recited in each of the aforesaid [grant] instruments with the same effect as though the Authority were the party in privity with the Federal Aviation Administration under said instruments.}\]
Any outstanding obligations, however, that any of the withdrawing Localities has to the Authority, the successor to the Committee, would remain outstanding until paid per section 7 of the 1960 Agreement. Consequently, I am of the opinion that any of the Localities may withdraw at any time, utilizing the method and procedure contained in the 1960 Agreement.

You report that three of the Localities—Clifton Forge, Covington and Allegheny County—have given clear evidence of their intent to withdraw from the Authority. Once a resolution to that effect is received by the Authority, then a locality is deemed to have withdrawn. Under the Joint Airport Authority bylaws, once one of the Localities has withdrawn, the members it has appointed to the Authority no longer may serve on the Authority.\textsuperscript{15}

If only one of the Localities remains after the other three withdraw, however, the Authority, by operation of law, will dissolve. Sections 5.1-35 and 5.1-36 mandate that two or more political subdivisions are necessary to exercise jointly the powers granted under § 5.1-31. If the General Assembly had intended to allow an airport authority created under § 5.1-35 to continue to exist with only one political subdivision exercising the powers under § 5.1-31, it could have so provided in the statute.\textsuperscript{16}

The Joint Airport Authority has only those powers set out in § 5.1-31 and conferred upon it by an agreement drafted pursuant to §§ 5.1-35 and 5.1-36. Neither the applicable statutes nor the 1960 Agreement entered into by the Localities addresses dissolution of the Joint Airport Authority. Section 9 of the 1960 Agreement provides for amendment “by an affirmative vote of a majority of the governing bodies of the participating political subdivisions.”

Sections 5.1-35 and 5.1-36 do not contain any specific language describing how an airport authority may be dissolved, relying on and leaving to the participating political subdivisions to devise how such dissolution may occur. Since there is no other provision in the 1960 Agreement specifically addressing dissolution, I am of the opinion that the Authority may be dissolved only by an affirmative vote of a majority of the Localities that formed the Authority. This action, although a dissolution, would be an amendment to the 1960 Agreement under its amendment provisions in section 9.

Therefore, I am of the opinion that the Authority will dissolve by operation of law should three of the four Localities exercise their rights under the 1960 Agreement to withdraw from the Authority. In addition, the Authority will dissolve should three of the four Localities exercise their rights under section 9 of the 1960 Agreement to provide for dissolution by amendment.
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); (5) Assumption Agreement of 10/2/78, between Localities and Joint Airport Authority; and (6) Bylaws of the Joint Airport Authority (undated).

1960 Agr., supra note 1, sec. 4.

1d. sec. 2.

4Id. sec. 5(a).

5Id. sec. 7.

6Amend., supra note 1, sec. 1.

7Id. sec. II.

8Id. sec. III(3).

9Id. sec. III(4).

10Id. sec. IV.

111978 Deed, supra note 1, at 1.

12This additional fact has been obtained from the Commonwealth’s Department of Aviation.

13The first sentence of § 5.1-35 provides that “[a]ll 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.”

14“Any participating political subdivision may withdraw from the said Joint Airport Committee at any time. Upon withdrawing, any obligations of said political subdivision to the Joint Airport Committee shall remain outstanding until paid.” 1960 Agr., supra note 1, sec. 7.

15Bylaws, supra note 1, art. III, sec. III.1.

The Honorable Jackson E. Reasor Jr.
Member, Senate of Virginia

You ask whether a public body, which has been granted the power of eminent domain, voluntarily may surrender or relinquish the right to condemn a certain tract of land that is required for public safety purposes.

You relate that during the early 1980s, the Smyth Wythe Joint Airport Commission ("Airport Commission") sought to acquire, by exercising the power of eminent domain, certain property of adjoining landowners across a public road next to the eastern end of the runway at Mountain Empire Airport ("Airport"). You advise that the adjoining landowners countered with a lawsuit against the Airport Commission because it was the second such condemnation effort. The Airport Commission abandoned its first proceedings when the condemnation commission returned an award the Airport Commission deemed too high.

The two pending actions were settled between the landowners and the Airport Commission by entry of an Order in the Circuit Court of Smyth County. In the first paragraph of that Order, the Airport Commission agrees to displace the runway threshold at the Airport to such an extent that a clear zone easement involving the trees or the house will not be required over the landowners' property, as long as they or their children own the property. The Airport Commission further agrees in paragraph 2 of the Order that it does not intend to acquire any interest, either clear zone easements or otherwise, over or on the landowners' property. In addition, paragraph 8 provides that the entry of the Order shall be final, as provided by law, as to any further right of the Airport Commission to condemn any of the landowners' property located across a public road next to the eastern end of the airport runway, as long as the landowners or their children own such property.

You also relate that from July 5, 1984, to the present, the trees, which were the cause of the initial condemnation action to establish a clear zone easement, have continued to grow in height, requiring the Airport Commission to continue to displace the
threshold further down the runway, so as to render a larger part of the runway unavailable for takeoffs and landings. The Virginia Aviation Board has denied Commonwealth Transportation Fund grants to the Airport Commission,\(^3\) because the landing threshold has been displaced due to the height of the trees on the landowners' property and the protrusion of their house into safety air spaces at the end of the airport runway. Until this situation is resolved, the Virginia Aviation Board is reluctant to exercise its discretion to authorize expenditure of funds at an airport where the runway length is decreasing.

You ask whether the terms of paragraph 8 of the Order are enforceable against the Airport Commission.\(^4\)

"Eminent domain" has been defined by the Supreme Court of Virginia as "the right on the part of the state to take or control the use of private property for the public benefit when public necessity demands it, is inherent in every sovereignty, and is inseparable from sovereignty, unless denied to it by its fundamental law."\(^5\) The Court also has stated that the only constitutional limitations imposed on the power of eminent domain are contained in the just compensation clause in Article I, § 11 of the Constitution of Virginia (1971).\(^6\) There is "no constitutional right to a hearing on the issue of necessity [for such a taking]."\(^7\) The necessity or expediency of the condemnor's project is a legislative question and is not reviewable by the courts.\(^8\)

The Supreme Court of Virginia has commented that "[a]s sovereign, the State has the right of jurisdiction and dominion for governmental purposes over all the lands ... within its territorial limits," which is sometimes termed *jus publicum*.\(^9\) The *jus publicum* and all rights of the people, which are by their nature inherent and inseparable incidents thereof, are incidents of the sovereignty of the state.\(^10\) The Virginia Constitution impliedly denies to the legislature the power to relinquish, surrender or destroy, or substantially impair the *jus publicum*.\(^11\)

The General Assembly may delegate its power of eminent domain to political subdivisions and governmental bodies.\(^12\) The delegated right of eminent domain, however, must be exercised on such terms, and in such manner, and for such public uses as the General Assembly may direct.\(^13\)

Under §§ 5.1-31 and 5.1-34 of the *Code of Virginia*, the General Assembly delegates to counties, cities and towns the authority to condemn land reasonably necessary for the purpose of operating and maintaining an airport. Pursuant to § 5.1-32, that power is extended to the acquisition of easements and privileges outside the boundaries of an airport. In §§ 5.1-35 and 5.1-36, these powers are to be exercised jointly by two or more political subdivisions, such as the counties of Smyth and Wythe, in an airport authority such as the Airport Commission.

The Airport Commission is the governmental entity that operates the Airport and that has been granted the power of eminent domain by the General Assembly. The need
to acquire clear zone easements for the protection and safety of the public clearly is a public necessity as described in § 5.1-32. Section 5.1-32 provides that, "[w]here necessary to provide unobstructed airspace for the landing and taking off of aircraft," easements through lands, or other interests or privileges with respect to lands outside an airport's boundaries, which are necessary to ensure safe approaches to airports, as well as the safe and efficient operation of those airports, may be acquired by condemnation.

The General Assembly has not granted to the Airport Commission the power to relinquish, surrender or barter away the power of eminent domain. The practical effect of the language contained in paragraph 8 of the Smyth County Circuit Court Order is a surrender by the Airport Commission of the power of eminent domain. Consequently, absent authority from the General Assembly, I am of the opinion that the Airport Commission may not surrender the right to condemn a certain tract of land that is required for public safety purposes.

1Organized pursuant to the authority of §§ 5.1-35 and 5.1-36 of the Code of Virginia, the counties of Smyth and Wythe combined to operate the Airport. You state that the property rights sought to be acquired were to provide a clear zone for takeoffs and landings, and involved the removal or topping of trees.

2The July 5, 1984, Smyth County Circuit Court Order you provide is styled Smyth Wythe Joint Airport Commission v. Evans, No. CL 81-001313. Applicable provisions of this Order are paraphrased herein.

3Such funds are allocated by the Virginia Aviation Board on a discretionary basis under § 58.1-638(A)(3)(c).

4Prior opinions of the Attorney General conclude that the propriety of a circuit court's action on the same question posed in an official opinion request made pursuant to § 2.1-118 is not subject to the review of the Office of the Attorney General "and must be treated as the binding determination with regard to the case before the court." 1987-1988 Op. Va. Att'y Gen. 140, 141; see also id. at 352, 353. The conclusions set out herein, therefore, address only my opinion concerning whether a public body voluntarily may surrender or relinquish the right of eminent domain and are not intended to call into question the validity of the Smyth County Circuit Court's determination in the case before it.


6Hamer v. School Bd. of the City of Chesapeake, 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990) [hereinafter Hamer].

7Id.; see also Railway Company v. Llewellyn, 156 Va. 258, 278-80, 157 S.E. 809, 815-16, amended on other grounds, 156 Va. 288, 162 S.E. 601 (1931).

8Hamer, supra note 6, 240 Va. at 70, 393 S.E.2d at 625; Stewart v. Highway Commissioner, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972).


10Id. at 546-47, 164 S.E. at 696-97.

11Id. at 547, 164 S.E. at 697.


13Blondell v. Guntner, 118 Va. 11, 12, 86 S.E. 897, 897 (1915).
CIVIL REMEDIES AND PROCEDURE: ACTIONS.

Use of “may” in statutory requirement for mailing of written notice to drawer that check has been refused does not limit permissible methods of mailing to use of registered mail, certified mail, or regular mail with sender retaining U.S. Postal Certificate of Mailing. Determination whether proof of mailing presented by plaintiff in action constitutes sufficient proof of mailing of such notice is factual matter to be made on case-by-case basis by trier of fact. Attorney’s signature on certificate of mailing at bottom of written notice to drawer that above notice was mailed, postage prepaid, is representation by attorney, as officer of court subject to reprimand or removal from office for misconduct, that required mailing has been accomplished, and may be considered as sufficient proof by trier of fact that statutory notice has been mailed to drawer.

June 29, 1995

The Honorable E.L. Turlington Jr.
Judge, General District Court of the City of Richmond

You ask whether the use of the word “may” in the mailing requirement of § 8.01-27.2 of the Code of Virginia1 limits the permissible methods of mailing to the use of (i) registered mail, (ii) certified mail, or (iii) regular mail with the sender retaining a U.S. Postal Certificate of Mailing. You further ask whether an attorney may satisfy the mailing requirement of § 8.01-27.2 by certifying at the bottom of the written notice to the drawer that the above notice was mailed, postage prepaid, to the addressee on the date indicated at the top of the letter.

You present a hypothetical situation involving an action brought under § 8.01-27.2 for the civil recovery from the giving of a bad check wherein an attorney for a plaintiff signs his name to a statement at the bottom of the written notice to the drawer, certifying that a copy of the letter was mailed, postage prepaid, to the addressee on the date indicated at the top of the letter.

It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.2 In such situations, the statute’s plain meaning and intent govern.

Section 8.01-27.2 provides that written notice that a check has been refused may be made to the drawer by “registered, certified, or regular mail with the sender retaining sufficient proof of mailing, which may be a U.S. Postal Certificate of Mailing.” Prior to a 1988 amendment that added the language permitting the notice to be sent by “regular mail with the sender retaining sufficient proof of mailing, which may be a U.S. Postal Certificate of Mailing,” the General Assembly limited the methods of delivery to registered or certified mail.3 Statutes using the word “may” are permissive rather than mandatory.4 Therefore, the plain meaning of the 1988 amendment to § 8.01-27.2 is that a U.S. Postal Certificate of Mailing is an example which the General Assembly considers sufficient proof of mailing when the plaintiff elects to use regular mail. The clear inference
is that items of proof other than a U.S. Postal Certificate of Mailing also will suffice, so
long as such items provide sufficient proof of mailing.

Accordingly, I am of the opinion that the use of the word “may” in the mailing
requirement of § 8.01-27.2 does not limit the permissible methods of mailing to the use
of (i) registered mail, (ii) certified mail, or (iii) regular mail with the sender retaining a
U.S. Postal Certificate of Mailing.

You next ask whether an attorney’s signature at the bottom of a written notice to
the drawer is sufficient proof of mailing when the attorney’s signature purports to certify
that the letter was mailed, postage prepaid, to the addressee on the date indicated at the
top of the letter.

The primary object of statutory construction and interpretation is to ascertain and
give effect to the legislative intent.5 “The purpose for which a statute is enacted is of pri-
mary 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.’”6
Furthermore, words and phrases must be considered in the context in which they are used
to arrive at a construction that will promote the object and purpose of the statute.7
Finally, it is a recognized rule of statutory construction that words in a statute are to be
given their usual, commonly understood meaning.8

The 1988 amendment to § 8.01-27.2 reduces the burden of proof of service of a
notice by a plaintiff who desires to bring an action under that statute, by permitting a
simplified third method of providing notice while maintaining some assurance that a
drawer will be given the opportunity to pay a dishonored check before being subject to
treble damages. To accomplish this, the General Assembly permitted the use of regular
mail, so long as the sender retains “sufficient proof of mailing.” The statute gives an
example of what constitutes sufficient proof of mailing by providing for the sender’s
retention of a U.S. Postal Certificate of Mailing. The General Assembly, by way of
example, favorably considered the U.S. Postal Certificate of Mailing to be equivalent to
a receipt for registered or certified mail.

The phrase in § 8.01-27.2, “with the sender retaining sufficient proof of mailing,”
however, has not been specifically defined by the General Assembly, other than by an
example. The term “sufficient” is generally defined as “[a]dequate, enough, as much as
may be necessary, equal or fit for the end proposed, and that which may be necessary
to accomplish an object.”9 The term “proof” is defined as “[t]he effect of evidence; the
establishment of a fact by evidence.”10 Pursuant to the rules of statutory construction dis-
cussed in the preceding paragraph, the meaning of this phrase is established by its rela-
tionship to associated words and phrases. Accordingly, it is my opinion that the determi-
nation whether proof of mailing presented by a plaintiff in an action under § 8.01-27.2
constitutes “sufficient proof of mailing” is a factual one to be made on a case-by-case
basis by the trier of fact.
Under the facts of the hypothetical situation you present, the certificate of mailing signed by an attorney for a plaintiff may constitute sufficient proof of a mailing. Since an attorney is an officer of the court, the court possesses the inherent power to supervise his conduct, both in and out of court, to the point of reprimanding or even removing the attorney from office for misconduct. The signature of the attorney on a certificate of mailing is a representation by the attorney, as an officer of the court, that the required mailing has been accomplished. Therefore, in the absence of any other proof of mailing that factually would be considered "sufficient proof" of such mailing, I am of the opinion that the signature of an attorney on a certificate of mailing may be considered as "sufficient proof" by the trier of fact that the statutory notice has been mailed to the drawer.

Section 8.01-27.2 provides: "In the event a check, draft or order, the payment of which has been refused by the drawee because of lack of funds in or credit with such drawee, is not paid in full within thirty days after receipt by the drawer of written notice by registered, certified, or regular mail with the sender retaining sufficient proof of mailing, which may be a U.S. Postal Certificate of Mailing, from the payee that the check, draft, or order has been returned unpaid, the payee may recover from the drawer in a civil action brought by the filing of a warrant in debt, the lesser of $250 or three times the amount of the check, draft or order. The amount recovered as authorized by this section shall be in addition to the amounts authorized for recovery under § 8.01-27.1. No action may be initiated under this section if any action has been initiated under § 18.2-181. The drawer shall be obligated to pay the cost of service and the cost of mailing, as applicable." (Emphasis added.)

6See Turner v. Commonwealth, supra note 5, 226 Va. at 460, 309 S.E.2d at 339 (meaning of words finds expression from purport of entire phrase of which it is a part); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.16, at 183 (5th ed. 1992) ("If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases."); 1993 Op. Va. Att'y Gen. 192, 195.
8BLACK'S LAW DICTIONARY (6th ed. 1990) 1433.
9Id. at 1215. "In its juridical sense [proof] is a term of wide import, and comprehends everything that may be adduced at a trial, within the legal rules, for the purpose of producing conviction in the mind of judge or jury, aside from mere argument; that is, everything that has a probative force intrinsically, and not merely as a deduction from, or combination of, original probative facts." Id.
10Richmond Ass'n of Cr. Men v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937); see also Norfolk Bar Ass'n v. Drewry, 161 Va. 833, 836, 172 S.E. 282, 283 (1934) (while attorneys are not officers in sense that judge is officer, they are court officers and may be disciplined).
CIVIL REMEDIES AND PROCEDURE: ACTIONS - ACTIONS ON CONTRACTS GENERALLY.

Holder of bad check is entitled to claim from drawer of check, in addition to face amount of check, three statutorily prescribed amounts, one of which is processing charge limited to $20. Contract, whether express or implied, contravening statutory $20 limit would be void.

September 12, 1995

The Honorable Glenn R. Croshaw
Member, House of Delegates

You ask whether the holder of a returned check legally may impose a processing charge in excess of twenty dollars on the drawer of the check.

You relate that numerous merchants impose a twenty-five-dollar processing charge for returned checks. You state that the merchants contend that posting in a conspicuous place in their business establishment a notice of the additional five-dollar charge creates an express contract between the parties that permits such additional charge.

When a statutory provision is clear and unambiguous, the plain meaning of the provision must be accepted.1 Legislative intent is determined from the plain meaning of the words used.2 Section 8.01-27.1(A) of the Code of Virginia3 clearly and unambiguously lists three separate amounts a bad check holder is entitled to claim from the drawer of the check including, but not limited to, a processing charge of twenty dollars.4 It is, therefore, my opinion that holders of bad checks may only impose a processing charge on the drawer of twenty dollars.

I am also of the opinion that the amount for the processing charge contained in § 8.01-27.1(A) is a statutorily imposed limit and not merely an authorized amount absent a contractual agreement for another amount. When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.5 The intention of the General Assembly that the amounts listed in § 8.01-27.1(A) be limited to such charges is clearly emphasized by subsection B of § 8.01-27.1,6 which authorizes any drawer to demand a statutory penalty from the holder of a bad check who charges amounts in excess of those authorized by subsection A. Any contract, whether express or implied, in contravention of these statutory limits would be void.7

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3Section 8.01-27.1(A) provides that, "[i]n any civil claim or action made or brought against the drawer of a check, draft or order, payment of which has been refused by the drawee depository because of lack of funds in or credit with such drawee depository, the holder or his agent shall be
entitled to claim, in addition to the face amount of the check (i) legal interest from the date of the check, (ii) the protest or bad check return fee, if any, charged to the holder by his bank or other depository, and (iii) a processing charge of twenty dollars.” (Emphasis added.)

4In addition to the amounts authorized under § 8.01-27.1(A), in certain circumstances, the payee on a bad check also may recover from the drawer “the lesser of $250 or three times the amount of the check, draft or order.” Section 8.01-27.2; see also 1985–1986 Op. Va. Att’y Gen. 22, 23. This recovery is allowed in a civil action brought by the filing of a warrant in debt should the drawer not make payment in full within thirty days after receiving written notice by registered, certified or regular mail that the check, draft or order has been returned unpaid. Section 8.01-27.2.


Section 8.01-27.1(B) states that “[a]ny holder of a check, draft or order, payment of which has been refused by the drawee for insufficient funds or credit, who charges the drawer amounts in excess of those authorized in subsection A on account of payment being so refused shall, upon demand, be liable to the drawer for the lesser of (i) twenty dollars plus the excess of the authorized amount or (ii) twice the amount charged in excess of the authorized amount.”


CIVIL REMEDIES AND PROCEDURE: EVIDENCE - MEDICAL EVIDENCE.

CRIMINAL PROCEDURE: TAXATION AND ALLOWANCE OF COSTS.

HEALTH: REGULATION OF MEDICAL CARE FACILITIES.

COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENSES OF OFFICE.

RULES OF SUPREME COURT OF VIRGINIA: CRIMINAL PRACTICE AND PROCEDURE - SUBPOENA.

Medical facility may charge for expenses of retrieving, copying and mailing items provided in response to subpoena issued in criminal case at request of Commonwealth’s attorney. Expenses associated with discreet individual criminal cases resulting from issuance of subpoena, and which are not incurred on continuing or predictable basis, properly may be considered expenses compensable by order of court, when authorized by statute and there is no designated source of payment other than state treasury from appropriations for criminal charges.

August 3, 1995

The Honorable William G. Petty
Commonwealth’s Attorney for the City of Lynchburg

You ask two questions regarding costs incurred by your office when the Commonwealth subpoenas medical records in a criminal case. You first ask whether a medical
facility may charge the Commonwealth for the expenses of retrieving, copying and mailing items specified in § 8.01-413 of the Code of Virginia, pursuant to a subpoena. If so, you also ask whether the court may authorize payment of such expenses pursuant to § 19.2-332.

You suggest that newly enacted § 32.1-127.1:02, when read in conjunction with § 8.01-413, creates for a health care provider a property right that may negate the provider’s obligation to produce subpoenaed medical records, unless or until the requesting party agrees to pay the reasonable charges described in § 8.01-413.1

The provisions of § 8.01-413 clearly apply in “any case” where the health care provider’s records are or would be admissible as evidence, and also apply to medical records that are subpoenaed under the Rules of Supreme Court of Virginia. In addition, the party requesting the subpoena for a health care provider’s records “shall be liable” for the reasonable costs of retrieving, copying and mailing the items produced. It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous. In those situations, the statute’s plain meaning and intent govern. The word “shall” used in a statute ordinarily, but not always, implies that its provisions are mandatory. It is clear that the General Assembly intended not only for § 8.01-413 to apply to subpoenas requested by an attorney or his client in anticipation, or in the course, of litigation requiring the production of medical records as evidence in all cases, including criminal cases, but also for the party requesting such a subpoena to pay the health care provider reasonable expenses for complying with that subpoena. Therefore, I am of the opinion that, pursuant to the provisions of § 8.01-413, a medical facility may charge for the expenses of retrieving, copying and mailing items provided in response to a subpoena issued in a criminal case at the request of the Commonwealth’s attorney.

The property right implied by § 32.1-127.1:02 has long been recognized under Virginia law. Section 32.1-127.1:02 does not substantively alter the position of physicians in Virginia regarding ownership of patient records. The newly enacted statute merely codifies those property rights and clarifies some procedural aspects related to disclosure and confidentiality.

Like any other person in possession of records that have been subpoenaed in a criminal case pursuant to Rule 3A:12(b), a health care provider must submit the pertinent documents in compliance with the subpoena and the Supreme Court Rules. Section 8.01-413 provides for reimbursement of costs incurred in producing patient records, but it does not expressly guarantee payment of such costs before delivery of the documents.

In criminal cases when payments have been allowed pursuant to § 19.2-332 (or its predecessor and now repealed § 19.1-315), there have been two requisites for such payment: (1) the required service must have been compensable under the laws of the Commonwealth; and (2) there must be no other designated source of payment other than the state treasury for appropriations for criminal charges. Expenses have been deemed
properly authorized under § 19.2-332 to pay the costs of transcripts, records, expert witnesses, exhumation of bodies, and similar expenses when the above two requisites existed.12 When payment under now repealed § 19.1-315 was sought by Commonwealth’s attorneys for toll telephone charges, registered mail and legal advertisement expenses, however, those costs were deemed to be office operating expenses otherwise provided for under Title 14.1.13

Section 14.1-65 specifies the manner of payment for certain items contained in the budgets of Commonwealth’s attorneys. That section does not contain any provision for payment of the reasonable costs of producing subpoenaed documents. Likewise, the Compensation Board’s Operating Manual does not contain a specific designation for expenses incurred in obtaining subpoenaed documents in its list of reimbursable office expenses.14 Because such expenses associated with discreet individual criminal cases normally result from issuance of a subpoena under the provisions of Rule 3A:12(b), and are not incurred on a continuing or predictable basis, it is my opinion that these expenses properly may be considered expenses compensable by order of the court under § 19.2-332.15

1Section 8.01-413(A) allows for the admission into evidence of authenticated copies of a health care provider’s patient records in any case where such records are admissible in their original form. Section 8.01-413(A) also requires that health care providers be reasonably compensated for their costs of producing requested or subpoenaed records under this section or the Rules of Supreme Court of Virginia:

“Any hospital, nursing facility, physician, or other health care provider whose records or papers ... are subpoenaed for production under this section or the Rules of the Supreme Court of Virginia may comply with the subpoena by a timely mailing to the clerk issuing the subpoena properly authenticated copies ... in lieu of the originals. The party requesting the subpoena shall be liable for the reasonable charges of the ... health care provider for the service of maintaining, retrieving, reviewing, preparing, copying and mailing the items produced.... Except for copies of X-ray photographs, however, such charges shall not exceed fifty cents for each page up to fifty pages and twenty-five cents a page thereafter for copies from paper and one dollar per page for copies from microfilm or other micrographic process, plus all postage and shipping costs and a search and handling fee not to exceed ten dollars.”

Section 8.01-413(B) provides procedures for producing documents requested by a patient or his attorney, and § 8.01-413(C) authorizes issuance of a subpoena if records are not timely produced to a requesting patient or his attorney. In criminal cases, the Commonwealth normally subpoenas documents material to the proceedings pursuant to Rule 3A:12(b) of the Rules of Supreme Court of Virginia.

2The 1995 Session of the General Assembly added § 32.1-127.1:02, relating to medical records. Ch. 754, 1995 Va. Acts Reg. Sess. 1303, 1303-04 (eff. July 1, 1995). Section 32.1-127.1:02(B) provides: “Medical records are the property of the health care provider maintaining them and shall be removed from the premises where they are maintained without approval of the owner only in accordance with court order or subpoena consistent with § 8.01-413, or in accordance with other provisions of state or federal law.”

3The provisions of § 8.01-413(A)-(C) are applicable, however, only “in anticipation of litigation or in the course of litigation.” Section 8.01-413(D).

4Section 8.01-413(A).


Rule 3A:12(d) allows the court to find a person in contempt for failure to produce records as ordered “without adequate excuse.” Willful disobedience to lawful process, including a subpoena, “is made subject to summary punishment for contempt by Code § 18.2-456(5).” Bellis v. Commonwealth, 241 Va. 257, 262, 402 S.E.2d 211, 214 (1991).

Such reimbursement is allowed only within the limits prescribed by the statute. See § 8.01-413(A)-(B).

Section 19.2-332 provides, in part: “Whenever in a criminal case an officer or other person renders any service required by law for which no specific compensation is provided, or whenever any other service has been rendered pursuant to the request or prior approval of the court, the court shall allow therefor such sum as it deems reasonable, ... and such allowance shall be paid out of the state treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service.”


Although the court may award compensation for services rendered in an amount it deems reasonable under § 8.01-413, the General Assembly has established the maximum amount of allowable charges for such expenses.

CIVIL REMEDIES AND PROCEDURE: UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT.

DOMESTIC RELATIONS: UNIFORM CHILD CUSTODY JURISDICTION ACT.

Uniform Enforcement of Foreign Judgments Act authorizes circuit court clerks to accept properly authenticated copies of nonmonetary foreign judgments, in addition to monetary decrees or awards.

April 14, 1995

The Honorable Edward Semonian
Clerk, Circuit Court of the City of Alexandria

You ask whether Virginia's adoption of the Uniform Enforcement of Foreign Judgments Act, §§ 8.01-465.1 through 8.01-465.5 of the Code of Virginia, authorizes clerks of the circuit courts of this Commonwealth to accept properly authenticated copies of nonmonetary foreign judgments in addition to monetary decrees or awards.¹

Before 1988, a foreign judgment could not be docketed in Virginia.² In 1988, however, the General Assembly enacted the Uniform Enforcement of Foreign Judgments Act, which "details the procedure for filing foreign judgments entitled to full faith and credit in the circuit courts of this Commonwealth."³

Section 8.01-465.1 defines "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." (Emphasis added.) Thus, the Uniform Enforcement of Foreign Judgments Act does not limit its application solely to monetary judgments or decrees, even though portions of the Act do incorporate the terms "judgment creditor" and "judgment debtor."⁴

A prior opinion of the Attorney General recognizes that the purpose of the Uniform Enforcement of Foreign Judgments Act "is to give holders of a foreign judgment the same rights and remedies as holders of domestic judgments and to expedite relief."⁵ The 1988 opinion also concludes that,

[O]nce docketed in a Virginia circuit court pursuant to the Act, a foreign judgment, in effect, becomes a judgment of that court. It may be enforced
in the same manner as a judgment of a Virginia court and is subject to the same defenses and procedures as any other Virginia judgment.\textsuperscript{[7]}

Given the policy considerations supporting the Uniform Enforcement of Foreign Judgments Act, as well as its all-encompassing language describing the judgments to which it applies, there is no reason to distinguish between monetary and nonmonetary foreign judgments for purposes of filing in the circuit courts of the Commonwealth, provided the foreign judgment is entitled to "full faith and credit" in Virginia.\textsuperscript{8}

It is my opinion, therefore, that the Uniform Enforcement of Foreign Judgments Act authorizes circuit court clerks to accept properly authenticated copies of nonmonetary foreign judgments, in addition to monetary decrees or awards.\textsuperscript{9}

\textsuperscript{1}By way of example, you ask about treatment of foreign custody decrees. I note that the General Assembly has enacted a statute that specifically deals with the treatment of foreign custody decrees by juvenile and domestic relations district courts in the Commonwealth. See Uniform Child Custody Jurisdiction Act, §§ 20-125 to 20-146. The Uniform Child Custody Jurisdiction Act contains similar language to the Uniform Enforcement of Foreign Judgments Act regarding the acceptance and domestication of foreign custody decrees. (Pursuant to § 20-138(A), "[a] certified copy of a custody decree of another state may be filed in the office of the clerk of any juvenile and domestic relations district court of this Commonwealth. The clerk shall treat the decree in the same manner as a custody decree of the juvenile and domestic relations [district] court of this Commonwealth. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this Commonwealth.") But see Osborne v. Osborne, 215 Va. 205, 207 S.E.2d 875 (1974) (refusal of Virginia Supreme Court to enforce sister state's custody decree in decision reached before adoption of Uniform Child Custody Jurisdiction Act in Virginia).


\textsuperscript{4}Whether a state must give "full faith and credit" to a foreign judgment may be unclear. For example, irrespective of the Uniform Child Custody Jurisdiction Act or the Uniform Enforcement of Foreign Judgments Act, a Virginia court may consider a modification of child custody based on changed circumstances, even if a sister state previously has entered a custody order. Lutes v. Alexander, 14 Va. App. 1075, 421 S.E.2d 857 (1992); see also Bennett v. Commonwealth, 236 Va. 448, 374 S.E.2d 303 (1988), cert. denied, 490 U.S. 1028 (1989) (concluding that Full Faith and Credit Clause of United States Constitution does not require automatic acceptance of sister state's decision as to status of couple's marriage if factors indicate sister state was not aware of "full circumstances" when rendering its decree—here, Virginia's trial court continued criminal proceeding so that applicable California court could reconsider its earlier judgment in light of "full circumstances").

\textsuperscript{5}See §§ 8.01-465.3 to 8.01-465.5.


\textsuperscript{8}Section 8.01-465.1; see Will of Horton, 91 Misc. 2d 885, 398 N.Y.S.2d 1013 (1977) (applying Uniform Enforcement of Foreign Judgments Act to adopt sister state's judgment in will dispute case); Light v. Light, 12 Ill. 2d 502, 147 N.E.2d 34 (1957) (applying same Act to enforce sister
state’s custody decree); see also Hupp v. Hupp, 239 Va. 494, 391 S.E.2d 329 (1990) (applying doctrine of full faith and credit when adopting Pennsylvania judgment regarding paternity).

Section 8.01-465.2 provides that “[a] copy of any foreign judgment authenticated in accordance with ... the statutes of this Commonwealth may be filed in the office of the clerk of any circuit court of any city or county of this Commonwealth upon payment of the [prescribed] fee ... The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court of any city or county of this Commonwealth. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a circuit court of any city or county of this Commonwealth and may be enforced or satisfied in like manner.”

CIVIL REMEDIES AND PROCEDURE: VENUE — PERSONAL JURISDICTION IN CERTAIN ACTIONS.

Nonresident defendants who enter into consumer credit installment contracts in North Carolina with North Carolina company, and not with Virginia company, have no contacts in Virginia. Valid service of process may not be effected through use of Virginia’s long-arm statute, because Virginia courts have no personal jurisdiction over such defendants. Fact that nonresident defendants’ only contact with Virginia occurs from their mailing installment payments to Virginia plaintiff company to whom North Carolina company subsequently transferred ownership of contracts is not sufficient to consider defendants as having established minimum contacts in Virginia, thus invoking benefits and protections of Virginia law. Defendants would not have expected being haled into any Virginia court when they entered into contracts in North Carolina. Venue for civil actions involving contract disputes with nonresident defendants who have minimum contacts in Virginia would lie in county or city where plaintiff(s) reside.

October 16, 1995

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

You ask several questions regarding service of process on party-defendants who are not residents of the Commonwealth and venue in cases involving nonresident defendants. You first ask whether service of process may be made on nonresident defendants by use of the long-arm statute, § 8.01-328.1 of the Code of Virginia, when the nonresident defendants have contracted with a foreign corporation that subsequently has assigned the contracts to a Virginia plaintiff company now suing for breach of the contracts. You next ask whether the validity of the service of such process is effected when the nonresident defendants have made payment by mail under the assigned contracts to the Virginia plaintiff company. Finally, you ask where venue for such cases would lie.
You relate that a Virginia company purchased consumer credit installment contracts from a company doing business in North Carolina. The installment sales contracts were made between the North Carolina company, through its door-to-door representatives, and North Carolina residents. The contracts provide for transfer of their ownership by the North Carolina company, and include "terms of assignment" with fill-in-the-blank spaces for naming the assignee. The North Carolina company assigned the contracts to the Virginia company. The Virginia company now seeks judgment in Virginia against the North Carolina residents for failure to make the installment payments. Service of process against the North Carolina residents is attempted through the long-arm statute. The North Carolina residents have no contact in the Commonwealth other than the contracts.

Before asserting jurisdiction over nonresidents under § 8.01-328.1, a court is required to engage in a two-part analysis. The court first must determine whether the statutory language purports to assert personal jurisdiction over the persons subject to process. Assuming that the statutory requirement has been satisfied, the court next must determine whether the statutory assertion of jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The exercise of in personam jurisdiction over a nonresident defendant must comply with the Due Process Clause of the Fourteenth Amendment. The nonresidents must have contacts in the Commonwealth to make it reasonable to require a defense in the Commonwealth, and to "not offend "traditional notions of fair play and substantial.""

In your first question, the nonresident defendants have no contact in the Commonwealth. It is, therefore, my opinion that a Virginia court may not obtain personal jurisdiction over the nonresident defendants. Consequently, valid service of process may not be effected by use of the long-arm statute.

Your second question adds the additional fact that the nonresident defendants mail payments to the Virginia company after assignment of the contracts.

I know of no formula for determining that which constitutes "minimum contacts" necessary to satisfy the requirements of the Due Process Clause. The Supreme Court of Virginia has held that "'[t]he application of that rule will vary with the quality and nature of the defendant's activity.'" "The circumstances of each case must be examined to determine whether the requisite contacts are present." The purpose of the long-arm statute is to assert jurisdiction over nonresidents engaged in purposeful activity in Virginia to the extent permissible under the Due Process Clause. In addition, the scope of the "transacting business" requirement of the long-arm statute specifically has been construed by a federal court "to be limited only by the bounds of due process." Therefore, a single transaction may be sufficient to confer jurisdiction on the Virginia courts.

A nonresident defendant is determined to be within the jurisdiction of the courts of the Commonwealth when the nonresident has performed "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the
forum State, thus invoking the benefits and protections of its laws.10 The nonresident defendants' conduct and connection with the Commonwealth must be such that the defendants reasonably should anticipate "being haled into court" in Virginia.11 The purpose of such an approach is to provide "a degree of predictability" so that "defendants [may] structure their primary conduct with some minimum assurance as to where that conduct" may subject them to suit.12

Under the facts you provide, the nonresident defendants entered into contracts in North Carolina with a North Carolina company and not with the Virginia company. Therefore, it is my opinion that at the time the nonresident defendants entered into the contracts, they did not act to invoke the benefits and protections of Virginia law. Since the contracts provided generally that they could be assigned, and did not specifically state that they would be assigned to a company in Virginia, at the time they were executed, I am of the opinion that the nonresident defendants would not reasonably have expected the possibility of being haled into a Virginia court when they executed the contracts.

Because "[c]ourts have come to seek fairness in these fact-bound situations by requiring some modicum of purposeful contact with the forum," the nonresident defendants' activities should be viewed in their entirety and should not be dissected into "small bits and fragments" of conduct.13 Accordingly, the court's analysis "should not be structured to manufacture minimum contacts from every amenable act."14 Due process requires a showing of "some deliberate effort by the defendant to do business in the forum State" to establish "minimum contacts."15 Therefore, it is my opinion that the fact that the nonresident defendants mailed installment payments to the Virginia company should not be dissected from the entirety of a course of action which, as presented, is otherwise devoid of any deliberate effort on the defendants' part to invoke the benefits and protection of Virginia law.

Finally, you ask where venue would lie for such civil matters involving nonresident defendants. Section 8.01-262(10) provides that, in actions concerning nonresident defendants, venue lies in the county or city where the plaintiffs reside.16

Accordingly, in cases in which it is determined that nonresident defendants have the requisite minimum contacts with the Commonwealth for a court to assert personal jurisdiction over those defendants, I am of the opinion that the permissible venue for hearing the dispute would be where the plaintiffs reside.

1Section 8.01-328.1(A) provides that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

"1. Transacting any business in this Commonwealth[.]"


4Id. (quoting Internat. Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citations omitted)).
COMMISSIONS, BOARDS AND INSTITUTIONS: ADMINISTRATIVE PROCESS ACT.

Terms “cost” and “value” as used respectively in adopted statutory amendment and proposed bill do not have same meaning. Adopted amendment requires Department of Planning and Budget to consider projected “costs” to businesses or entities of implementing or complying with proposed regulations; proposed bill considered impact on “value” of private property in achieving compliance with proposed regulation. While Department is required to conduct analysis of time, effort and expense imposed on businesses or other entities to comply with proposed regulation, without conducting analysis of impact of compliance with proposed regulation on value of property, Department, in its discretion, may include such in its economic impact analysis.

January 20, 1995

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

You ask whether a 1994 amendment to the Administrative Process Act accomplishes the objective of 1994 House Bill No. 1272, which you introduced and which was
carried over to the 1995 Session of the General Assembly. Your stated objective is to
require state agencies, before promulgating any regulation, to file a statement with the
Registrar of Regulations, in addition to other required information, addressing the regulation’s impact, if any, on the use and value of private property.

The 1994 Session of the General Assembly added a new subsection G to

Current § 9-6.14:7.1(G) provides, in part:

Before delivering any proposed regulation under consideration to the Registrar [of Regulations] as required in subsection H[3] below, the agency shall deliver a copy of that regulation to the Department of Planning and Budget. In addition to determining the public benefit, the Department of Planning and Budget in coordination with the agency, shall, within 45 days, prepare an economic impact analysis of the proposed regulation. The economic impact analysis shall include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply ... and the projected costs to affected businesses or entities to implement or comply with such regulations. [Emphasis added.]

As introduced on January 25, 1994, House Bill No. 1272 did not require the Department of Planning and Budget to perform an economic analysis of the impact of proposed regulations on private property. That bill proposed to amend former § 9-6.14:7.1(G), which was effective until January 1, 1995, to provide, in part:

Before promulgating any regulation under consideration, the agency shall deliver a copy of that regulation to the Registrar [of Regulations] together with a summary of the regulation and a separate and concise statement of ... (v) the merits of the proposed regulation, in writing, comparing the protection of the public health, safety and general welfare versus the regulation’s general impact on the use and value of private property[.]

It is apparent in comparing current § 9-6.14:7.1(G), which became effective January 1, 1995, with the proposed amendments in House Bill No. 1272 to former § 9-6.14:7.1(G), which was effective until January 1, 1995, that the relevant portions of subsection G are neither identical in wording nor identical in meaning. The Administrative Process Act requires the Department of Planning and Budget to take into consideration the projected “costs” of implementation of regulations, but the Act does not specifically contain any mention of “value.”

The terms “cost” and “value” do not have the same meaning. In ordinary usage, “cost” is defined as “the amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or for service rendered.” The
same source also defines “cost” as “loss, deprivation, or suffering as the necessary price of something gained or as the unavoidable result or penalty of an action.” Words used in a statute must be afforded their plain and ordinary meaning unless the context demands a different result. In the context of § 9-6.14:7.1(G), “costs” refer to the amount required to be expended to achieve compliance with the proposed regulations.

In ordinary usage, “value” is also defined as “the amount of a commodity, service, or medium of exchange that is the equivalent of something else” or “a fair return in goods, services, or money.” In the context of § 9-6.14:7.1(G), as proposed in House Bill No. 1272, “value” refers to the effect on the fair price of buying or selling of private property in achieving compliance with a proposed regulation.

It is my opinion that the Department of Planning and Budget could satisfy the specific requirements of § 9-6.14:7.1(G) by conducting an analysis of the time, effort and expense imposed on businesses or other entities to comply with a proposed regulation, without any analysis of the impact of compliance on the value of property. It is also my opinion, however, that “economic impact analysis” is sufficiently broad to permit the Department of Planning and Budget, in the exercise of discretion, to conduct an analysis of the impact of compliance with a proposed regulation on the value of private property.

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2Id. cl. 2, at 1561.
3As amended in Chapter 938, subsection H of § 9-6.14:7.1 previously was subsection G. See 1994 Va. Acts, supra, at 1559. Section 9-6.14:7.1(H) currently provides that, before its promulgation, a copy of any regulation shall be delivered to the Registrar of Regulations, stating, among other things, “the agency’s response to the economic impact analysis submitted by the Department of Planning and Budget pursuant to subsection G.”
4See § 9-6.14:7.1(G).
5WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 515 (1968).
6Id.
8WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, supra, at 2530.

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CONSERVATION: FLOOD PROTECTION AND DAM SAFETY - WATERSHED IMPROVEMENTS DISTRICTS.

Directors of soil and water conservation district decide, in exercise of their statutory discretion, whether referendum to establish watershed improvement district may be conducted by mailing ballots to property owners within proposed district; may permit each owner of land within proposed district one vote per person or one vote for each lot or parcel of land they own within district. Tax or service charge to be used for purposes
for which watershed improvement district was created may be imposed only when two-thirds of owners of at least two-thirds of land in district cast affirmative vote for such tax or service charge in referendum.

March 9, 1995

The Honorable Joyce K. Crouch
Member, House of Delegates

You ask several questions about the establishment of a watershed improvement district pursuant to the provisions of Article 3, Chapter 6 of Title 10.1, §§ 10.1-614 through 10.1-635 of the Code of Virginia.

You relate that a homeowners' association in Campbell County desires to establish a watershed improvement district. The association wishes to conduct an initial referendum to establish the watershed improvement district, and a subsequent referendum to permit the newly created district to borrow and to establish a tax or service charge on the property owners within the district. Not all property owners physically live within the district, and a few reside in other states.

Section 10.1-615(A) permits twenty-five owners of land lying within a soil and water conservation district, or a majority of property owners if there are fewer than fifty owners, to file a petition with the directors of the soil and water conservation district asking that a watershed improvement district be organized. Furthermore, § 10.1-615(A) sets forth six stipulations the petition shall contain. Within thirty days of receipt of such petition, the directors must give notice of a hearing to determine the practicability and feasibility of creating the watershed improvement district. After conducting a hearing, if the directors determine a need exists, they must define the boundaries of the district and consider the administrative feasibility of operating the district under the provisions of § 10.1-617.

To assist the directors in determining the administrative feasibility of operating such a district, a referendum shall be held on the creation of such proposed district pursuant to § 10.1-617. That section also provides that all owners of land lying within the boundaries of the proposed district are eligible to vote in the referendum. The form of the ballot to be used in such referendum appears in § 10.1-618. The directors may not find that operating such a district is administratively feasible unless there has been an affirmative vote by two-thirds of the votes cast, which also represents ownership of at least two-thirds of the land in the proposed district.

You first ask whether the referendum contemplated by § 10.1-617 must be held at a regular polling place, or may be conducted by use of ballots mailed to all property owners.
When statutory language is plain and unambiguous, the legislature is presumed to have intended what it plainly has expressed, and statutory construction is unnecessary. Under the provisions of § 10.1-617, the directors of the soil and water conservation district are to prescribe regulations necessary to govern the conduct of the referendum. Recognizing that such directors are popularly elected under the provisions of § 10.1-523, the General Assembly has not prescribed detailed procedures regarding the conduct of such referenda and for protecting landowners against potential abuse. Therefore, I am of the opinion that, in the discretion of the directors, the referendum does not necessarily have to be held at a regular polling place, and may be conducted by mailing ballots to all owners of property within the proposed district. Such exercise of discretion would be consistent with the provisions of § 10.1-619 requiring an affirmative vote representing two-thirds of the ownership of the land in the proposed district.

You next ask whether owners of more than one piece of property within the proposed district are entitled to more than one vote in a referendum held pursuant to § 10.1-617.

If statutory language is not ambiguous but has a usual and plain meaning, rules of construction do not apply and resort to legislative history is both unnecessary and improper. Instead, [the] legislative intent [is] determined from the plain meaning of the words used.

Section 10.1-617 provides that “[a]ll owners of land lying within the boundaries of the proposed watershed improvement district shall be eligible to vote in the referendum.” I can find no statutory definition of “owners of land” for purposes of applying the provisions of § 10.1-617, nor has there been any judicial interpretation of the term as used in that statute. In the absence of such statutory or judicial definition, the term should be given its plain and ordinary meaning. The term “owner” generally is defined as

The term “owner” is used to indicate a person in whom one or more interests are vested for his own benefit. The person in whom the interests are vested has “title” to the interests whether he holds them for his own benefit or for the benefit of another.

All owners of land within the proposed district are eligible to vote in the referendum required by § 10.1-617, and the directors of the soil and water conservation district may prescribe necessary regulations governing the conduct of the referendum. Therefore, I am of the opinion that the directors may, in the exercise of their statutory discretion, permit each owner of land within the proposed district either one vote per person, or one vote for each lot or parcel of land owned by them within the district.
Finally, you ask whether a tax to be used for the purposes for which the watershed improvement district was created may be levied with a two-thirds affirmative vote of only those voting or simply a two-thirds affirmative vote of the property owners in the district regardless of the number of property owners who actually vote.\footnote{Section 10.1-625.}

Words and phrases must be considered in the context in which they are used to arrive at a construction that will promote the object and purpose of the statute.\footnote{See id.} The language of § 10.1-625 permits imposition of a tax or service charge only when two-thirds of the owners of land voting in a referendum called and held according to the provisions of law have approved the tax or service charge. Accordingly, I am of the opinion that a tax or service charge may be imposed in a watershed improvement district only when two-thirds of the owners who own at least two-thirds of the land in the district vote in the referendum and approve such tax levy or service charge.

\footnote{Section 10.1-616.}
\footnote{See id.}
\footnote{Section 10.1-619.}
\footnote{Section 10.1-617 provides: "If the district directors determine that a need for the proposed watershed improvement district exists and after they define the boundaries of the proposed district, they shall consider the administrative feasibility of operating the proposed watershed improvement district. To assist the district directors in determining such question, a referendum shall be held upon the proposition of the creation of the proposed watershed improvement district. Due notice of the referendum shall be given by the district directors. All owners of land lying within the boundaries of the proposed watershed improvement district shall be eligible to vote in the referendum. The district directors may prescribe necessary regulations governing the conduct of the hearing and referendum."}
\footnote{Section 10.1-625 provides: “A watershed improvement district shall have all of the powers of the soil and water conservation district or districts in which the watershed improvement district is situated, and in addition shall have the authority to levy and collect a tax or service charge to be used for the purposes for which the watershed improvement district was created. No tax shall be levied nor service charge imposed under this article unless two-thirds of the owners of land, which two-thirds owners shall also represent ownership of at least two-thirds of the land area in such district, voting in a referendum called and held under § 24.1-165 approve the levy of a tax to be expended for the purposes of the watershed improvement district.”}
CONSERVATION: FLOOD PROTECTION AND DAM SAFETY - WATERSHED IMPROVEMENT DISTRICTS — SOIL AND WATER CONSERVATION.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

Watershed improvement district is public body whose contracts with nongovernmental contractors for purchase or lease of goods, or for purchase of services, insurance or construction are governed by Act. Whether alternative sources for goods, services or construction are practicably available only from one source is factual determination to be made by public body and court reviewing appeal protesting sole source award.

February 1, 1995

The Honorable Joyce K. Crouch
Member, House of Delegates

You ask whether a watershed improvement district formed pursuant to § 10.1-614 of the Code of Virginia may enter into contracts without having to comply with the Virginia Public Procurement Act, §§ 11-35 through 11-80 (the “Act”). Should the watershed improvement district be subject to the Act, you next ask whether it would be a proper exercise of discretion for the watershed improvement district to enter into a sole source contract pursuant to § 11-41(D) of the Act under the circumstances described in your letter.

You relate that a lake, known as Timberlake, has approximately 200 houses built around it, and that the lake is badly silted. The lake and the dam that form the lake are owned by the Timberlake Homeowners Association. The Association and residents desire to form a watershed improvement district pursuant to § 10.1-614 for the purpose of imposing taxes that will generate revenue to be used in dredging and repairing the lake. You also relate that the Association and residents desire to have such a district enter into a contract with the Association under which the Association would provide the necessary services on a reimbursement basis.

Article 3, Chapter 6 of Title 10.1, §§ 10.1-614 through 10.1-635, authorizes the establishment and specifies the powers of watershed improvement districts within soil and water conservation districts.

Except when other processes are authorized by law, the competitive process requirements in § 11-41(A) of the Act apply to "[a]ll public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction." (Emphasis added.) While the term “public contract” is not defined in the Act, this Office has interpreted “public contract" to mean a contract with a public body. This interpretation is consistent with § 11-35(B), which provides that the Act enunciates public policies pertaining to “governmental procurement from nongovernmental sources.”
Section 11-37 defines "public body" as "any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in" the Act. A watershed improvement district created pursuant to § 10.1-614 may exercise, among others, the sovereign powers of taxation and eminent domain and may enter into contracts. Accordingly, I am of the opinion that a watershed improvement district is a public body whose contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, are governed by the Act.

A 1973 opinion of the Attorney General concludes that a watershed improvement district is not subject to certain competitive bidding requirements. That opinion is no longer valid, as it was based on former § 11-17, which, by its terms, applied only to certain contracts to which "the State of Virginia, or any department, institution, agency or water, sewer or sanitation authority thereof is a party." The 1982 Session of the General Assembly repealed § 11-17. Unlike former § 11-17, the competitive process requirements of current law apply generally to public bodies and are not limited to state agencies and water, sewer and sanitation authorities.

The exception from competitive process requirements contained in § 11-41(D) requires a written finding "that there is only one source practicably available for that which is to be procured." You relate that the determination to enter into a sole source contract would be based on the composition of the Timberlake Homeowners Association and the Association's ownership of the lake and dam. You do not, however, indicate any reason such factors make alternative sources for the goods, services or construction in question practicably available only from the Association. In addition, such factual determinations must be made by the public body and a court reviewing an appeal under § 11-70(C). Accordingly, I am unable to address the reasonableness of the proposed factual determination.

1I understand your inquiry as relating to the applicability of the Act generally to watershed improvement districts. Should a contract be part of a legislatively authorized grant or assistance program, however, that specific grant or program would likely address the matter. Your letter does not indicate that any such program is involved.
2I do not express any opinion regarding other statutes or issues which may be raised by implication from the facts expressed in your letter, such as: (1) the appropriateness of forming a watershed improvement district; (2) the authority of any such district to undertake the activities described in your letter; and (3) compliance with the State and Local Government Conflict of Interests Act.
3I assume that Timberlake Homeowners Association is a private, nongovernmental entity.
5See generally Tit. 10.1, Ch. 5, Art. 3.
7Ch. 485, 1972 Va. Acts 552, 552.
Section 11-70(C) provides that “a potential bidder or offeror on a contract negotiated on a sole source ... basis in the manner provided in § 11-41, whose protest of an award or decision to award under § 11-66 is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes [or] regulations[.]”

CONSERVATION: VIRGINIA OUTDOORS FOUNDATION — OPEN-SPACE LAND ACT.

Virginia Outdoors Foundation is public body for purposes of exercising powers granted by Open-Space Land Act and is authorized to borrow money to finance its land acquisition activities, to accomplish intent of General Assembly of preserving Commonwealth's open-space and recreational areas.

January 24, 1995

The Honorable Harry J. Parrish
Member, House of Delegates

You ask whether the Virginia Outdoors Foundation (the “Foundation”) is a public body for the purpose of exercising the powers authorized in the Open-Space Land Act, Chapter 17 of Title 10.1, §§ 10.1-1700 through 10.1-1705 of the Code of Virginia. You also ask whether the Foundation has the authority to borrow money.

The Foundation is established under Chapter 18 of Title 10.1, §§ 10.1-1800 through 10.1-1804. The Foundation is a self-governing “body politic”1 and has many characteristics of a state agency. It is administered by a board of trustees appointed by the Governor.2 Section 10.1-1801(3) grants to the Foundation the authority to promulgate regulations in accordance with the Administrative Process Act. Section 9-6.14:4(A), a portion of the Administrative Process Act, defines “agency” as any “board or other unit of state government empowered by the basic laws to make regulations ....” The Foundation must submit an annual report to the Governor and the General Assembly.3 Gifts to the Foundation are deemed gifts to the Commonwealth, which are exempt from state and local taxes.4 The Foundation has perpetual succession until dissolved by the General Assembly, in which event its properties pass to the Commonwealth.5

The General Assembly established the Foundation “to promote the preservation of open-space lands and to encourage private gifts of money, securities, land or other property to preserve the natural, scenic, historic, scientific, open-space and recreational areas of the Commonwealth.”6 The purpose of the Open-Space Land Act is also to preserve open-space land in the Commonwealth.7 The definition of “public body” in that
Act is very broad and includes many public entities other than state agencies that carry out public functions. The Foundation was created to carry out a public function, and has the authority to acquire land for a public use. Therefore, I am of the opinion that the Foundation is a public body for purposes of the Open-Space Land Act and is authorized to exercise the powers granted by the Act.

You next inquire whether the Foundation has the authority to borrow money.

Section 10.1-1702(A)(1) of the Open-Space Land Act authorizes a public body, among other enumerated powers, “[t]o borrow funds and make expenditures.”

Section 10.1-1801 gives the Foundation very broad powers with regard to matters involving accumulation of real estate. Section 10.1-1801(5) authorizes the Foundation [t]o acquire by gift, devise, purchase, or otherwise, absolutely or in trust, and to hold and, unless otherwise restricted by the terms of the gift or devise, to encumber, convey or otherwise dispose of, any real property, or any estate or interest therein, as may be necessary and proper in carrying into effect the purposes of the Foundation[.]

The enabling statute clearly provides that the Foundation is intended to obtain interests in real estate to accomplish the intent of the General Assembly of preserving “the natural, scenic, historic, scientific, open-space and recreational areas of the Commonwealth.” To accomplish this intended result, the Foundation must be able to finance its acquisition activities as is customary in the purchase of real estate. In addition, the power authorized to public bodies to borrow funds to accomplish the purposes of the Open-Space Land Act under § 10.1-1702(A)(1) is supplementary to the powers conferred by any other provision of law.

I am, therefore, of the opinion that the Foundation is authorized under the provisions of §§ 10.1-1801 and 10.1-1702(A)(1) to borrow money to accomplish its purposes.

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1See § 10.1-1800.
2See id.
3Section 10.1-1802.
4Section 10.1-1803.
5Section 10.1-1801(1).
6Section 10.1-1800.
7See, e.g., § 10.1-1700 (defining “open-space land”).
8See id.
9Section 10.1-1800.
10See § 10.1-1705.
CONSTITUTION OF VIRGINIA: JUDICIARY — LOCAL GOVERNMENT.

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

RULES OF SUPREME COURT OF VIRGINIA: INTEGRATION OF THE STATE BAR - CANONS OF JUDICIAL CONDUCT FOR THE STATE OF VIRGINIA.

No constitutional provision or Virginia statute prohibits spouses from simultaneously serving as judge and clerk of circuit court in same jurisdiction.

March 8, 1995

The Honorable Kenneth R. Melvin
Member, House of Delegates

You ask whether an individual may seek election to and hold the office of circuit court clerk in the same judicial circuit and at the same time that the individual’s spouse is serving as a circuit court judge.

Article VI, § 7 of the Constitution of Virginia (1971) provides for the selection and qualification of circuit court judges. Article VI, § 11 sets forth activities that are incompatible with the office of circuit court judge:

- No justice or judge of a court of record shall, during his continuance in office, engage in the practice of law within or without the Commonwealth, or seek or accept any non-judicial elective office, or hold any other office of public trust, or engage in any other incompatible activity.

In addition, the Canons of Judicial Conduct for the Commonwealth establish further ethical standards that govern the behavior of judges. See generally VA. SUP. CT. R. pt. 6, § III. Several of these Canons may be relevant to your inquiry. Canon 2(A) states that “[a] judge ... should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 2(B) provides that “[a] judge should not allow his family ... to influence his judicial conduct or judgment.” Canon 7(A)(1)(b) prohibits a judge from “publicly endors[ing] a candidate for public office.” Canon 7(A)(1)(c) further prohibits a judge from making “a contribution to a political organization or candidate, attend[ing] political gatherings, or purchas[ing] tickets for political party dinners, or other functions.” Finally, “[a] judge shall not engage in any other political activity except in behalf of measures to improve the law, the legal system, or the administration of justice.” Canon 7(A)(3). While these Canons illustrate the difficulty in avoiding an actual or apparent impropriety that may occur when an individual seeks election to and holds the office of circuit court clerk in the same judicial circuit and at the same time that the individual’s spouse is serving as a circuit court judge, the Canons do not bar either spouse from holding the offices you describe.
Article VII, § 4 creates, among other constitutional offices for each county and city, the office of circuit court clerk. Article VII, § 6 contains a restriction on the holding of multiple constitutional offices and provides that "[u]nless two or more units exercise functions jointly as authorized in §§ 3 and 4 [of Article VII], no person shall at the same time hold more than one office mentioned in this Article." Section 15.1-50.4(A) of the Code of Virginia contains the parallel statutory provision to Article VII, § 6:

[N]o person holding the office of treasurer, sheriff, attorney for the Commonwealth, clerk of the court in the office of which deeds are recorded, commissioner of the revenue, supervisor, councilman, mayor, board chairman, or other member of the governing body of any county, city or town shall hold more than one such office at the same time.

That statute also contains the only exceptions to this prohibition, none of which is pertinent to your inquiry. Recognizing that such officials are popularly elected, the General Assembly has not enlarged on the prohibitions set out in the Constitution of Virginia and in § 15.1-50.4(A).

None of the constitutional or statutory prohibitions pertaining to the activities of circuit court judges or circuit court clerks extends to one person serving as a clerk in a particular judicial circuit and that person’s spouse serving concurrently as a circuit court judge in the same judicial circuit. It is my opinion, therefore, that there is no constitutional provision or Virginia statute that prohibits a wife from holding the office of circuit court clerk in the same jurisdiction and at the same time that her husband serves as a circuit court judge.

1Article VII, § 4 provides: "There shall be elected by the qualified voters of each county and city ... a clerk, who shall be clerk of the court in the office of which deeds are recorded ...." 2Prior opinions of the Attorney General conclude that spouses of public officers simultaneously may hold public office. See Op. Va. Att’y Gen.: 1991 at 4 (no constitutional provision or statute prohibits husband and wife from holding office as sheriff and circuit court clerk, respectively, at same time in same jurisdiction); 1985–1986 at 32 (appointment of spouse of city attorney as electoral board member is not prohibited); 1983–1984 at 146, 1977–1978 at 146 (electoral posts, such as electoral board members and officers of elections may be held by candidate’s parents and candidate’s spouse, respectively).

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

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

COSTS, FEES, SALARIES AND ALLOWANCES: FEES.
Criminal Procedure: Arrest.

Offices of sheriff and high constable are not incompatible. Norfolk city sheriff may serve simultaneously as Norfolk high constable. Fees collected by sheriff as high constable must be deposited in city treasury for use in operation of city government.

February 13, 1995

The Honorable Robert J. McCabe
Sheriff for the City of Norfolk

You ask whether the Norfolk city sheriff may serve simultaneously as high constable for the city. Should the Norfolk city sheriff be permitted to serve simultaneously as high constable, you also ask whether the fees collected as high constable may be deposited in the treasury of the city or must be paid to the state treasury.

Article VII, § 6 of the Constitution of Virginia (1971) and § 15.1-50.4 of the Code of Virginia prohibit the holding of dual offices by certain elected officials, including the office of sheriff. Neither Article VII nor § 15.1-50.4, however, prohibits a sheriff from serving as a high constable. The office of high constable is not listed in either provision.¹

Because the office of high constable is not mentioned in either Article VII or § 15.1-50.4, the bar to dual officeholding contained therein does not apply to a sheriff serving simultaneously as high constable.²

Absent any specific statutory or constitutional prohibition, the common law doctrine of compatibility of dual officeholding may preclude such officeholding if the two offices are inherently incompatible.³ In my opinion, however, the offices of sheriff and high constable are not incompatible. The duties of both offices coincide to some extent. Both the sheriff and high constable have a mandatory duty to serve processes and warrants lawfully directed to them.⁴ If the office of high constable did not exist in Norfolk, it would be incumbent on the sheriff to execute all processes, warrants, summonses and notices in civil cases before the general district court. Therefore, it is my opinion that neither Article VII nor § 15.1-50.4 prohibits a person from serving simultaneously as sheriff and as high constable.⁵

Under the provisions of § 14.1-105.1, any fees collected by a high constable “shall be deposited in the treasury of the city wherein such office is situated for use in the general operation of city government.”⁶ Should the Norfolk city sheriff be appointed to the position of Norfolk high constable, fees collected by the sheriff as high constable also must be deposited with the city treasurer.⁷ Since all fees collected by the high constable are authorized by § 14.1-105.1, the provisions of that section will control the disposition of those fees. Therefore, I am of the opinion that fees collected as high constable must be deposited in the treasury of the city.

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¹ Virginia Constitution, Article VII, § 6
² Virginia Code, § 15.1-50.4
³ Virginia Code, § 14.1-105.1
⁴ Virginia Code, § 14.1-105.1
⁵ Virginia Code, § 14.1-105.1
Article VII, § 6 provides that "[u]nless two or more units exercise functions jointly as authorized in §§ 3 and 4, no person shall at the same time hold more than one office mentioned in this Article." (Emphasis added.) Section 4 provides for the election of "a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue." Section 5 provides for the election of members of the governing bodies of counties, cities and towns.

Section 15.1-50.4 provides that "no person holding the office of treasurer, sheriff, attorney for the Commonwealth, clerk of the court in the office of which deeds are recorded, commissioner of the revenue, supervisor, councilman, mayor, board chairman, or other member of the governing body of any county, city or town shall hold more than one such office at the same time." (Emphasis added.)

See Op. Va. Att'y Gen.: 1992 at 58, 59 (because special policemen are not mentioned in Article VII, deputy sheriffs also may serve as special policemen); 1986-1987 at 73, 74 (because Article VII does not mention membership on local board of welfare, town councilman may serve on local welfare board); 1981-1982 at 296, 297 (because post of city manager is not mentioned in Article VII, city treasurer also may serve as acting city manager).


Whether serving as high constable and sheriff constitutes a conflict of interests is a question the Commonwealth's attorney must address. Section 2.1-639.18(B) of the State and Local Government Conflict of Interests Act requires the Commonwealth's attorney of the locality involved to respond to such inquires from local officers or employees.

Section 14.1-105.1 provides that "high constables shall execute all processes, warrants, summonses and notices in civil cases before the general district court ... to the exclusion of the sheriff .... Any fees, collected by the office of the high constable for such process, shall be deposited in the treasury of the city wherein such office is situated for use in the general operation of city government."

See also § 15.1-83.1(A) (with certain exceptions, all money received by sheriff must be deposited with city treasurer).

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

EDUCATION: LITERARY FUND — VIRGINIA PUBLIC SCHOOL AUTHORITY — PUBLIC SCHOOL FUNDS.

COUNTIES, CITIES AND TOWNS: INDUSTRIAL DEVELOPMENT AND BONDS — PUBLIC FINANCE ACT - BONDS ISSUED BY COUNTIES.

ELECTIONS: THE ELECTION - SPECIAL ELECTIONS.

Voter referendum is not required to fund school construction through county bonds sold to Virginia Public School Authority or to Literary Fund or through bonds issued by industrial development authority that leases school facilities to Warren County.
January 13, 1995

Mr. Douglas W. Napier
County Attorney for Warren County

You ask whether a voter referendum is required before Warren County may fund school construction through county bonds sold to the Virginia Public School Authority or through bonds sold to the Literary Fund. You ask also whether a voter referendum is required to fund construction of school facilities through bonds issued by an industrial development authority that leases the school facilities to the county.

A county may contract debt only as authorized by general law pursuant to Article VII, § 10(b) of the Constitution of Virginia (1971). Subject to certain exceptions in Article VII, § 10(b), the general law authorizing the debt must provide that the question of contracting the debt be submitted by referendum to the qualified voters of the county. One exception to the requirement for a referendum is "bonds issued, with the consent of the school board and the governing body of the county, by or on behalf of a county ... for capital projects for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other State agency prescribed by law."\(^1\) Section 15.1-227.39(B) of the Code of Virginia restates this constitutional provision.

Section 22.1-166 authorizes the Virginia Public School Authority (the “Authority”) to purchase local school bonds. Section 22.1-166 provides that, for purposes of Article VII, § 10(b), “the Authority shall be deemed a state agency authorized to purchase bonds issued with the consent of the school board and the governing body of the county ... for capital projects for school purposes.” It is clear from the language of Article VII, § 10(b) and § 22.1-166 that a voter referendum is not required for the county to issue bonds for school construction if the bonds are sold to the Authority.\(^2\)

Section 22.1-146 authorizes the State Board of Education to make loans from the Literary Fund (the “Fund”) to local school boards for the purpose of erecting school buildings. Section 22.1-161 provides that the bonds or notes evidencing such loans are a debt of the county “constituting the school division.” Prior opinions consistently recognize that voter approval is not required before a school board obtains a loan from the Fund and issues its bonds or notes to secure the loan.\(^3\)

Section 15.1-1379 authorizes an industrial development authority (an “IDA”) to issue bonds to pay the cost of “authority facilities,” as defined in § 15.1-1374(d). Included within this definition are “facilities for use by a county, a municipality, the Commonwealth and its agencies, or other governmental organizations.”\(^4\)

An IDA is a political subdivision separate from the county, city or town in which the IDA operates.\(^5\) Section 15.1-1380 provides that bonds issued by an IDA do not constitute a debt of the county. Accordingly, the debt restrictions imposed on a county by Article VII, § 10(b) have no application to bonds issued by an IDA.\(^6\)
Section 24.2-684 provides that “[n]o referendum shall be placed on the ballot unless specifically authorized by statute.” I am not aware of any statute that requires voter approval as a condition for an IDA to issue bonds or for a county or county school board to enter into a lease with an IDA.

You relate that the voters in Warren County rejected a referendum for the county to issue general obligations bonds to finance school construction in 1991. A rejection of such a referendum by the voters does not prevent the board of supervisors from now voting to finance the construction by a method that does not require voter approval.7

It is, therefore, my opinion that voter approval is not required to fund school construction through county bonds sold to the Authority, through bonds sold to the Fund, or through bonds issued by an IDA that leases the schools to the county.

1Art. VII, § 10(b).
4Section 15.1-1374(d)(ix).
6The lease payments from the county to the IDA would not constitute a debt of the county since the payments would be subject to appropriation by the governing body. See Op. Va. Att’y Gen.: 1985–1986 at 70, 71; id. at 86, 89.
7See 1974–1975 Op. Va. Att’y Gen., supra note 3 (may submit debt issue to voters before determining method of financing, but may not submit to voters once governing body determines to sell bonds to Authority or Fund).

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

Constitutional offices in City of South Boston will cease to exist, and city’s incumbent constitutional officers will not continue to hold office, when city reverts to town status on July 1, 1995.

January 18, 1995

The Honorable S.V. Saunders
Treasurer for the City of South Boston
You ask whether the constitutional officers currently holding office in the City of South Boston will continue in office when the city reverts to town status on July 1, 1995. You relate that the current four-year terms of the constitutional officers will end on December 31, 1997.

Article VII, § 4 of the Constitution of Virginia (1971) provides that “[t]here shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue.” There is no similar constitutional provision establishing constitutional officers for towns. A public office continues only so long as the law to which it owes its existence remains in force:

Section 4 gives constitutional status to an officer only so long as his county or city exists. If through boundary changes, consolidation, merger, or other changes permitted by the Constitution and statutes a county or city ceases to exist, then that locality’s constitutional offices also cease to exist. Section 4 does not operate to require that an incumbent officer serve out his term once his county or city is no longer in being.1

It is, therefore, my opinion that when the City of South Boston ceases to exist on July 1, 1995, its constitutional offices also will cease to exist. Under the facts you describe, therefore, the term of office of all of the city’s constitutional officers will end on July 1, 1995.


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


COUNTRIES, CITIES AND TOWNS.

Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth’s attorney for prosecution. Failure of business to obtain local business license is
unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress.

February 6, 1995

The Honorable Norma E. Mullins
Commissioner of the Revenue for the City of Manassas Park

You ask several questions regarding the duties of a commissioner of the revenue and the authority of the Manassas Park city council to specify the commissioner’s duties.

You first ask whether the city council may specify the duties of the commissioner of the revenue. You next ask whether the city council may create a procedure, by ordinance, for appealing decisions of the commissioner of the revenue. Finally, you ask what enforcement procedures are available when a business refuses to obtain a license as required by § 58.1-3700 of the Code of Virginia.

You relate that the Manassas Park city council seeks to adopt an ordinance relating to the duties of the commissioner of the revenue. The terms of the proposed ordinance establish, among other things, an administrative appeals procedure from decisions of the commissioner of the revenue. You relate that it is the expressed intention of the city council to provide taxpayers an opportunity for administrative appeal to city council from decisions made by the commissioner of the revenue, as an alternative to the taxpayers’ filing such an appeal with the circuit court.

Under Article VII, § 4 of the Constitution of Virginia (1971), the commissioner of the revenue is a constitutional officer whose duties “shall be prescribed by general law or special act” of the General Assembly. Absent specific legislation, local governing bodies have no authority to specify the duties of constitutional officers.¹

The duties of commissioners of the revenue are set out specifically in Article 1, Chapter 31 of Title 58.1, §§ 58.1-3100 through 58.1-3122.1, as well as generally in Titles 15.1 and 58.1. Article 5, Chapter 39 of Title 58.1, §§ 58.1-3980 through 58.1-3993, outlines the procedure for appealing any allegedly erroneous assessment of local taxes, either administratively to the commissioner of the revenue (§ 58.1-3980) or to the circuit court for the county or city in which the assessment was made (§ 58.1-3984).

Numerous prior opinions of the Attorney General conclude that local governing bodies have no authority to supervise or intervene in the management and control of a constitutional officer’s duties.² These opinions support the long-standing rule that constitutional officers are independent of their respective localities’ management and control.³
At its 1993 Session, the General Assembly repealed the previous charter, and enacted a new charter, for the City of Manassas Park. Under the 1993 charter, the city council has the power to specify duties of the commissioner of the revenue. I am of the opinion, however, that the city council may not specify duties that are inconsistent with the duties of a commissioner of the revenue as prescribed by the General Assembly.

The Commonwealth follows the Dillon rule of strict construction, under which local public bodies may exercise only those powers conferred expressly or by necessary implication. I am not aware of any authority that will allow local governing bodies to create procedures for appeals from the determinations of a commissioner of the revenue. The fact that the General Assembly has a detailed procedure in Article 5, Chapter 39 of Title 58.1 for taxpayers to appeal an assessment of local taxes is a further indication that the General Assembly did not intend to delegate this power to local governing bodies, nor may the power to provide a separate appeals procedure be necessarily implied from any power delegated to the city council by general laws or by the 1993 charter. Therefore, I am of the opinion that neither the charter nor any general law permits city council to implement a procedure for the appeal of assessments made by the commissioner of the revenue.

Among their other statutorily prescribed duties, commissioners of the revenue are required to assess local license taxes when the locality has adopted such a tax. Whether a business is engaged in manufacturing and thus is exempt from local license tax under § 58.1-3703(B)(4) is a factual determination to be made by the commissioner of the revenue. There are no specific procedures mandated in relation to the assessment of a local license tax. I am not aware of any authority, including the 1993 city charter, that would enable the city council to assume oversight of the factual determinations of the commissioner of the revenue.

Section 58.1-3700 makes it “unlawful to engage in [a] business, employment or profession without first obtaining the required license.” The Code for the City of Manassas Park provides that it shall be a misdemeanor to fail to obtain a local business license. Therefore, the commissioner of the revenue may refer businesses that refuse to obtain a license to the Commonwealth’s attorney for prosecution.

Local treasurers are responsible for collecting taxes and other revenues, including license taxes, which are payable into the local treasury. Therefore, treasurers may employ all statutory means at their disposal to enforce the collection of delinquent local license taxes. I am not aware of any statutory authority that would authorize any local tax official to close down a business for nonpayment of local taxes, although a similar result could possibly be accomplished through distress.

Therefore, I am of the opinion that failure to obtain a local business license is unlawful, and all statutory remedies are available to the office of the treasurer to collect delinquent local license taxes.

See Op. Va. Att'y Gen.: 1993 at 59, 66-67 (county administrator may not require constitutional officer to agree to management or performance audit); 1989 at 71, 73 (no authority for board of supervisors to approve or deny purchases or change equipment specifications determined by constitutional officer); 1986-1987 at 69 (commissioner of revenue has exclusive control over personnel policies of office); 1978-1979 at 237 (board of supervisors may not compel constitutional officer to assume additional duties not imposed by statute, although officer may agree to accept such duties voluntarily); id. at 289 (treasurer is not subject to control of board of supervisors in determining what tax collection methods to employ); 1976-1977 at 46 (county government may not investigate personnel practices of constitutional officer).

Under certain statutes, a local governing body may add additional duties to be performed by a constitutional officer, as long as those additional duties are not inconsistent with the office and its statutorily prescribed duties. See Op. Va. Att'y Gen.: 1993, supra, at 60-61 (§ 15.1-163(A) allows local governing body to require “such information as may be deemed advisable” from local government entities and local constitutional officers; under § 15.1-167, local constitutional officers are subject to annual independent financial audit); 1978-1979 at 289, 292 (county board of supervisors may, under § 15.1-706(d), increase number of duties to be performed so long as additional duties are consistent with office; board may not dictate methods of carrying out duties).


Section 3.13 of the charter for the City of Manassas Park provides: “By general election every four years, there shall be elected by the qualified voters of the City of Manassas Park a Commissioner of Revenue and a City Treasurer.... The City Treasurer and the Commissioner of Revenue shall have such powers and perform such duties and receive such compensation as are provided by the Constitution of Virginia, and, except as are otherwise provided in this charter, as are provided by the provisions of general laws for cities.” 1993 Va. Acts, supra, at 1386.

Section 3.15 provides: “The Commissioner of Revenue shall perform such duties not inconsistent with the laws of the Commonwealth in relation to the assessment of property and licenses as may be required by the Governing Body for the purpose of levying city taxes and licenses. The Commissioner of Revenue shall have power to administer such oaths as may be required by the Governing Body in the assessment of license taxes or other taxes of the City. The Commissioner of Revenue shall make such reports in regard to the assessments of both property and licenses, or either, as may be required by the Governing Body. The Commissioner of Revenue shall perform such other duties as may be required by the Governing Body.” Id. at 1387.

See § 58.1-3109.


See, e.g., Union Tanning Co. v. Commonwealth, 123 Va. 610, 632, 96 S.E. 780, 786 (1918) (assessing officers are to act on their own knowledge and opinions based on such information as they may have).


See § 58.1-3941.
CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

Act specifically provides for use of design-build or construction management contracts only in construction of adult regional detention facilities, thereby excluding any other facilities. City of Winchester and Clarke and Frederick Counties may not use design-build procedures to contract for construction of secure juvenile detention facility.

October 6, 1995

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

You ask whether § 11-41.2:1 of the Code of Virginia, a portion of the Virginia Public Procurement Act, which authorizes the City of Winchester and the Counties of Clarke and Frederick to use design-build procedures for the construction of an adult regional detention facility, also authorizes the three jurisdictions to use design-build procedures in the construction of a secure juvenile detention facility that the three jurisdictions plan to build as an addition to the existing adult detention facility.

You relate that the Clarke-Frederick-Winchester Regional Jail Board operates a 224-bed adult detention center and a 73-bed work release facility on a 22-acre parcel of land jointly owned by the three jurisdictions. Design-build procedures were used to construct a portion of that facility. In December 1992, the Regional Jail Board began the process of establishing a secure juvenile detention center in accordance with the regulations promulgated by the Board of Youth and Family Services. You advise that the Jail Board intends to utilize design-build procedures to construct the juvenile facility on the jointly held 22-acre parcel of land, as an addition to the existing detention facility.

Section 11-41.2:1 provides that “the City of Winchester and the Counties of Clarke and Frederick may enter into a contract for the construction of an adult regional detention facility.” That section specifically authorizes the contract “on a fixed price or not-to-exceed price design-build basis or construction management basis.” The authorization, however, is specifically limited to an adult detention facility for the three jurisdictions. Words used in a statute must be afforded their plain and ordinary meaning unless the context demands a different result.

Generally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. In addition, the mention of one thing in a statute implies the exclusion of another. The General Assembly specifically provides for the use of design-build or construction management contracts only in the construction of adult facilities. Therefore, facilities other than adult facilities are excluded.

I am of the opinion that § 11-41.2:1 does not authorize the City of Winchester and the Counties of Clarke and Frederick to use design-build procedures to contract for the construction of a secure juvenile detention facility.
The first paragraph of § 11-41.2:1 provides, in part: “Notwithstanding any other provisions of law to the contrary: ... (v) the City of Winchester and the Counties of Clarke and Frederick may enter into a contract for the construction of an adult regional detention facility ... on a fixed price or not-to-exceed price design-build basis or construction management basis in accordance with procedures consistent with those described in this chapter for procurement of nonprofessional services through competitive negotiation. Such governing bodies may authorize payment to no more than three responsive bidders who are not awarded the design-build contract if such governing bodies determine that such payment is necessary to promote competition. Such governing bodies shall not be required to award a design-build contract to the lowest bidder, but may consider price as one factor in evaluating the proposals received. Such governing bodies shall maintain adequate records to allow post-project evaluation by the Commonwealth.” (Emphasis added.)

Section 11-41.2:1(v) (emphasis added).


CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

Section 11-45(G) association may communicate quote on insurance products available through association to public body that has solicited and received bids for insurance; public body may not enter into contract based on quote. Public announcement of bids received by public body in response to invitation to bid may be repeated at later date to members of public who could have attended, but were not present to receive information at, bid opening. Association that fails to bid in response to public body’s invitation to bid may not inspect bid records before award of contract.

February 7, 1995

The Honorable R. Edward Houck
Member, Senate of Virginia

You ask two questions regarding communications between public bodies and associations such as those described in § 11-45(G), a portion of the Virginia Public Procurement Act, §§ 11-35 through 11-80 of the Code of Virginia.

You first ask whether an association as described in § 11-45(G) may supply the public body with a quote on insurance products available through the association if the public body already has solicited and received bids for the insurance in question.
I am not aware of any statute or rule of law under which a public body's issuance of an invitation to bid would prohibit such an association from communicating an insurance quote to the public body. The fact that the association may communicate this information to the public body, however, does not mean that the public body is authorized to enter into a contract based on the quote. Therefore, it is my opinion that an association, as described in § 11-45(G), may communicate to a public body a quote on insurance products available through that association.

In general, public contracts with nongovernmental contractors for the purchase of insurance are to be awarded after competitive sealed bidding or competitive negotiation. At least two alternative methods for the public procurement of insurance are authorized by law. Since a public body that has issued an invitation to bid or request for proposals remains free to cancel it at any time prior to award, alternative authorized procurement methods remain available to the public body if the requirements of those alternative methods are satisfied.

You ask me to assume the association meets the criteria specified in § 11-45(G), and that the association has procured the insurance through competitive principles. Because you do not provide any specific facts, I can express no opinion as to whether any contract the association may have with an insurer, involving ongoing formulation of quotes, satisfies the "competitive principles" requirement of § 11-45(G). Similarly, you do not request an opinion, and, therefore, none is expressed, as to whether a sufficient factual basis would exist to support the written determination required under § 11-45(G).

You next ask whether a public body that has solicited and received bids for insurance may share those bids with such an association for the purpose of obtaining a quote from the association.

The process of competitive sealed bidding requires a "[p]ublic opening and announcement of all bids received." I am not aware of any law that would prohibit a public body from repeating its public announcement at a later date to members of the public who could have attended, but were not present to receive the information at, the bid opening.

Section 11-52, however, specifically regulates the inspection of bid records. With certain exceptions, § 11-52(C) provides that bidders, "upon request, [may] inspect bid records within a reasonable time after the opening of all bids," but that "bid records shall be open to public inspection only after award of the contract." (Emphasis added.) Accordingly, it is my opinion that the association not bid in response to the public body's invitation to bid, the bid records are not available for inspection by the association prior to award of the contract.

Section 11-45(G) provides: "Any public body may enter into contracts without competitive sealed bidding or competitive negotiation for insurance if purchased through an association of
which it is a member if the association was formed and is maintained for the purpose of promoting the interest and welfare of and developing close relationships with similar public bodies, provided such association has procured the insurance by use of competitive principles and provided that the public body has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination.”

2See § 11-41(A).

3Sections 11-41 and 11-45 provide for certain methods of procurement and for certain exceptions to the requirement for competitive procurement. See §§ 11-41(C)(1), 11-45(G).

4Section 11-42(A) provides that “[a]n Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected.”

5This opinion is limited to the legal questions presented and is not intended to suggest any conclusion as to whether the public body’s short- and long-term goals are well-served by “shopping” the results of a competitive solicitation previously issued by the public body.

6Section 11-37 (defining “competitive sealed bidding”).

7Section 11-52 provides, in part:

A. Except as provided herein, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.1-340 et seq.).

*C * *

“C. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the public body decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.”


9If the association were a bidder, inspection may or may not be available depending on additional facts and further exceptions. For example, bid records are not open to inspection by bidders prior to award if the public body decides not to accept any of the bids and to reopen the contract, as provided in § 11-52(C).

COSTS, FEES, SALARIES AND ALLOWANCES: COSTS GENERALLY — FEES — SALARIES AND EXPENSES OF OFFICE - SHERIFFS AND SERGEANTS.

Fee paid sheriff for service of process is recoverable by prevailing party as part of court costs; no statutory requirement to include amount paid to private process server. General district court may determine, within its discretion, whether to include amount paid to private process server in court costs recoverable by prevailing party.

June 22, 1995

The Honorable J.R. Zepkin
Judge, General District Court, Ninth Judicial District
You ask whether a general district court is either required or permitted to include the charge for service of process by a private process server in the total costs that are recoverable by the prevailing party pursuant to § 14.1-178 of the Code of Virginia.1

The General Assembly amended §§ 14.1-69 and 14.1-105 at its 1995 Session so that, effective July 1, 1995, the sheriff's fee for service of all papers, except those returnable out of state, will be raised to a uniform rate of twelve dollars.2 The amendment also removes any distinction between the circuit and general district courts such that the new fees are to be charged in actions before the general district courts.3 To avoid the anticipated increase in the cost of bringing suit in general district court, some volume filers may use private process servers rather than the local sheriff to effect service of process.

In civil actions, the Supreme Court of Virginia has stated that "[t]he allowance of costs depends entirely upon statute, no costs being allowed in any case at common law."4 In another case, the Supreme Court also has held that taxable costs "should not be extended to every conceivable cost and expense incurred by a party engaged in litigation. The allowance of costs other than the specified costs allowed by statute is largely in the discretion of the trial court."5

Prior opinions of the Attorney General conclude that the fee paid to the sheriff for the service of papers is to be recoverable by the prevailing party as part of court costs.6 Pursuant to § 14.1-178, "[e]xcept when it is otherwise provided, the party for whom final judgment is given in an action or motion ... shall recover his costs against the opposite party." Section 14.1-198 provides that "[t]he clerk shall tax in the costs all taxes on process, and all fees of officers" that appear to be chargeable for the recovering party. Accordingly, I am of the opinion that the fee paid to the sheriff for service of process is to be recovered by the prevailing party in a trial.

It is a basic principle of statutory construction that words in a statute are to be given their common, ordinary and accepted meanings, unless a contrary legislative intent is manifest.7 Had the General Assembly intended to require that the fee paid to private process servers be recovered under § 14.1-198, it would have used the term "costs" in the first sentence rather than the term "taxes." Since the term "taxes" has a meaning different from the term "costs," it is my opinion that § 14.1-198 does not require the inclusion of the fee paid to a private process server. Therefore, I am of the opinion that a general district court will not be required to include the amount paid to the private process server in the court costs recoverable by the party prevailing in the trial court.

You also ask whether the court may include the amount paid to a private process server in the court costs recoverable by the prevailing party if it is not required to do so.

The second sentence of § 14.1-198 provides that the clerk "shall also tax ... every further sum which the court may deem reasonable and direct to be taxed ... for any other matter." The Supreme Court of Virginia, without reference to a particular statute,
affirmed the trial court’s decision to grant, “in addition to the regular taxable costs, a liberal allowance for surveys and expert witness fees.” Although there was no specific statutory authorization for including survey or expert witness fees in the amount recoverable as court costs, the Court affirmed the lower court’s assessment by concluding that “[t]he allowance of costs other than the specified costs allowed by statute is largely in the discretion of the trial court.”

Accordingly, it is my opinion that a general district court may determine in its discretion whether the costs of a private process server are to be included in the court costs recoverable by the prevailing party.

1Section 14.1-178 provides: “Except when it is otherwise provided, the party for whom final judgment is given in an action or motion, whether he be plaintiff or defendant, shall recover his costs against the opposite party; and when the action is against two or more and there is a judgment for, or discontinuance as to, some, but not all of the defendants, unless the court enter of record that there was reasonable cause for making defendants those for whom there is such judgment, or as to whom there is such discontinuance and shall order otherwise, they shall recover their costs.”

2Section 14.1-69 provides, in part: “Every sheriff, and every sheriff’s deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter in the circuit courts. Such fees and mileage allowances accruing in connection with any civil or criminal matter shall be collected by the clerk of the court in which the case is heard.” Ch. 51, 1995 Va. Acts Reg. Sess. 73, 73 (eff. July 1, 1995).

Section 14.1-105 provides that “[t]he fees shall be as follows:
“(1) For service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process when the body is not taken and making a return thereof, the sum of twelve dollars except that no fee shall be charged for service pursuant to § 9-6.14:13.
“(2) For summoning a witness or garnishee on an attachment, twelve dollars.
“(3) For serving on any person an attachment or other process under which the body is taken and making a return thereon, twelve dollars.
“(4)
“(5)
“(6) For serving any order of court not otherwise provided for, twelve dollars. Notwithstanding the provisions of this subsection, no fees shall be charged for protective orders issued pursuant to Chapter 11 (§ 16.1-226, et seq.) of Title 16.1.
“(7) For serving a writ of possession, twelve dollars.
“(8) For levying an execution or distress warrant or an attachment, twelve dollars.
“(9) For serving any papers returnable out of state, fifty dollars.
“Such fees shall be allowable for services provided by such officers in the circuit and district courts.” 1995 Va. Acts, supra, at 74.


8Ryan v. Davis, 201 Va. at 85, 109 S.E.2d at 414. The 1959 ruling in this case was reached before the General Assembly amended § 14.1-190 to require payment of expert witness fees by each party in whose behalf a witness testifies. See Ch. 671, 1966 Va. Acts 1055.
9201 Va. at 85, 109 S.E.2d at 414.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES.

Broad statutory language does not contemplate that locality may not use fees collected by circuit or district court clerk as part of costs assessed in civil, criminal and traffic cases for jail maintenance expenses unless jail also contains additional court-related facilities.

August 29, 1995

The Honorable Glen A. Tyler
Judge, Second Judicial Circuit

You ask whether a local governing body may disburse funds collected pursuant to § 14.1-133.2 of the Code of Virginia for the construction and maintenance of the local jail when the courthouse is an entirely separate building from the local jail.

Section 14.1-133.2 authorizes a county or city assessment not to exceed two dollars as part of the costs in civil, criminal and traffic cases in the district or circuit courts within the jurisdiction.1 The amounts collected are held by the local treasurer and disbursed “by the governing body for the construction, renovation, or maintenance of courthouse or jail and court-related facilities.”2

It is clear from the language of § 14.1-133.2 that the fees may be used for a structure consisting solely of “courthouse facilities”3 or one consisting of a “jail and court-related facilities.” It is not clear, however, whether the fees may be used for a structure consisting solely of a jail.4

One interpretation of § 14.1-133.2 is that “jail” and “court-related” are to be read together as defining the type of facility contemplated: a structure containing both a jail and court-related areas. An alternate interpretation is that “jail facilities” defines the type of structure contemplated, with the words “and court-related” merely extending the authorization to include any court-related facilities that may be housed in the same structure.
The primary goal of statutory construction is to determine the intent of the legislature, with the reading of a statute as a whole influencing the proper construction of ambiguous individual provisions.\(^5\) It is my opinion that § 14.1-133.2, read as a whole, authorizes a local governing body to use the funds generated from the fees to provide and maintain court-related facilities in general. It is further my opinion that a jail, regardless of whether it is connected to a courthouse or whether it contains other court facilities within its structure, is a court-related facility encompassed within § 14.1-133.2.

Section 14.1-133.2 authorizes imposition of the fee in civil actions and in "each criminal or traffic case in its district or circuit court in which the defendant is charged with a violation of any statute or ordinance." The authorized use of the funds extends from construction of facilities to defraying increases in the costs of heating or cooling the facilities.\(^6\) This language recognizes the broad range of obligations imposed on a locality in connection with the operation of a judicial system and indicates a legislative intent to grant localities a broad funding mechanism to assist in the operation of its system.

A jail is an essential component of a locality's judicial system. A jail is court related, because it provides a facility both for the confinement of individuals who allegedly have violated the criminal laws until the courts may determine the case and for the incarceration of those the court ultimately finds guilty. In my opinion, it would be inconsistent with the broad language of § 14.1-133.2 to conclude that a locality may not use money generated by the fees to fund a jail unless the jail also contains additional court-related facilities.\(^7\)

\(^1\)Section 14.1-133.2 provides:

"Any county or city, through its governing body, may assess a sum not in excess of two dollars as part of the costs in (i) each civil action filed in the district or circuit courts located within its boundaries and (ii) each criminal or traffic case in its district or circuit court in which the defendant is charged with a violation of any statute or ordinance. The total assessments authorized by any county or city in a civil action pursuant to this section and § 42.1-70 shall not exceed four dollars. If a town provides court facilities for a county, the governing body of the county shall return to the town a portion of the assessments collected based on the number of civil, criminal and traffic cases originating and heard in the town.

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

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

\(^2\)Section 14.1-133.2 (emphasis added).

\(^3\)The absence of the article "a" preceding "courthouse" indicates that the words "courthouse" and "facilities" are to be read together as a phrase.

\(^4\)Compare 1993 Op. Va. Att'y Gen. 50, 51 (fees collected under § 14.1-133.2 must be used for "courthouse or jail construction, renovation, maintenance or utility costs") with 1992 Op. Va. Att'y Gen. 42 (fees collected under § 14.1-133.2 "must be used by the recipient localities for
construction, renovation or maintenance of their courthouses"). Neither of these opinions expressly
considers the question you present.

1 See 1994 Op. Va. Att’y Gen. 109, 112. Other rules of statutory construction analyze the struc-
ture of the text and the relationship of words and phrases within the text to determine meaning. See
2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.14 (5th ed. 1992) (internal
structure of text aids in determining meaning); id. § 47.16 (words are to be analyzed in relationship
with associated words and phrases). These rules are of little assistance in this particular instance
since their application can support equally either of the two interpretations.

6 Section 14.1-133.2.

to promote statute’s purpose of generating funds for construction and maintenance of court facili-
ties). In light of the ambiguity in portions of § 14.1-133.2, should this conclusion be inconsistent
with the intent of the General Assembly, it may amend the statute to clarify its intent.

COSTS, FEES, SALARIES AND ALLOWANCES: FEES.

LIBRARIES: LAW LIBRARIES.

CIVIL REMEDIES AND PROCEDURE: VENUE.

RULES OF SUPREME COURT OF VIRGINIA: EQUITY PRACTICE AND
PROCEDURE - COMMENCEMENT OF SUITS IN EQUITY (THE BILL OF
COMPLAINT) — PRACTICE AND PROCEDURE IN ACTIONS AT LAW - THE
NOTICE OF MOTION FOR JUDGMENT.

Clerk of court of original jurisdiction shall collect fees assessed at commencement of civil
action or chancery cause; clerk of circuit court to which venue of action or suit is trans-
ferred may not charge additional filing fees. Circuit court receiving transferred case
retains right to assess costs, even though costs may have been assessed by transferor
court. Transferee clerk must assess costs against losing party upon final disposition of
case, as allowed by local ordinance.

May 19, 1995

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

You ask whether the fees prescribed by § 14.1-112(17) and (33)1 and by
§ 14.1-125.1,2 and costs prescribed in §§ 14.1-133.23 and 42.1-70,4 of the Code of
Virginia must be paid to the clerk of a circuit court upon a transfer of venue to such court
pursuant to § 8.01-265.5 You next ask, if such fees and costs must be paid, which party
must pay them. Finally, you ask whether a clerk may refuse to process a case until the
fees and costs are paid.
In Virginia, an action at law is commenced by the filing of a motion for judgment, and a suit in equity is commenced by filing a bill of complaint in the clerk’s office. A transfer of venue does not affect the commencement of the action or suit. Since the provisions of § 14.1-112(17) and (33) and of § 14.1-125.1 direct only the clerk of the court in which the action or suit is commenced to collect filing fees, the clerk of court to which a case has been transferred is not provided the statutory authority to assess additional filing fees. If the language of a statute is plain and unambiguous, the legislature should be assumed to have intended to mean what it plainly has expressed, and statutory construction is unnecessary. Accordingly, it is my opinion that fees assessed incident to the commencement of a civil action or chancery cause may be collected only by the clerk of the court in which the action originally is filed. Upon transfer of the case to a new venue under § 8.01-265, the clerk of the circuit court to which the action or suit has been transferred may not charge additional filing fees under § 14.1-112(17) or (33), or under § 14.1-125.1.

Statutes prescribing costs “are to be construed as remedial statutes and liberally and beneficially expounded for the sake of the remedy which they administer.” Section 8.01-266 provides for an award of costs incident to the transfer of a case to a different venue. Pursuant to that section, the circuit court transferring the case may award “an amount necessary to compensate a party for such inconvenience, expense, and delay as he may have been caused by the commencement of the suit in [an objectionable venue] or by ... a frivolous motion to transfer [venue].” The last sentence of § 8.01-266 provides that “[t]he awarding of such costs by the transferor court shall not preclude the assessment of costs by the clerk of the transferee court.” Consequently, although costs may have been assessed by a transferor court, the circuit court receiving the transferred case retains the right to assess costs.

The provisions of §§ 14.1-133.2 and 42.1-70 allow for the assessment of costs whenever a case is filed in the clerk’s office, provided that a local ordinance allows for assessment of such costs. “The term ‘costs’ has a well-defined legal meaning, and means those expenses incurred by parties in prosecuting or defending a suit, action or other proceeding at law or in equity, recognized and allowed by law, and taxed against the losing party.” The losing party, therefore, must pay the costs pursuant to §§ 14.1-133.2 and 42.1-70 following the disposition of a suit, action or other proceeding in the court that received the transferred case. It is my opinion, therefore, that when local ordinance permits, the clerk of the court receiving the transferred case shall assess costs pursuant to §§ 14.1-133.2 and 42.1-70 in the same manner in which costs normally are assessed.

1Section 14.1-112(17) mandates that the clerk of a circuit court “shall” collect certain fees “upon the filing of papers for the commencement of civil actions.” Subdivision (33) of that section provides that the clerk of a circuit court “shall” charge the plaintiff fifty dollars in all chancery causes “at the time of instituting the suit.”

2Section 14.1-125.1 mandates that, "upon commencement of an action, whether at law or in chancery," the clerk “shall” collect additional fees for certain nonprofit legal aid programs. Section 14.1-125.1(i).
Section 14.1-133.2 provides that, where local ordinance allows, an assessment for courthouse "construction, renovation, or maintenance" shall be made "as part of the costs" "collected by the clerk of the court in which the action is filed." Section 14.1-133.2 does not require that these costs be collected at the time the action is filed with the clerk.

Section 42.1-70 allows a locality to impose, by ordinance, an assessment for a law library "as part of the costs" in civil actions. This section provides that such assessment "shall be collected by the clerk of the court in which the action is filed." Section 42.1-70, however, does not direct that such costs be collected at the time of filing. "The assessment ... shall be in addition to all other costs prescribed by law ...." Id.

The first sentence of § 8.01-265 provides that "the court wherein an action is commenced may, upon motion by any defendant and for good cause shown ... (ii) transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth."


Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

Since I conclude that the clerk of the court to which the action or suit is transferred may not charge additional filing fees, I also must conclude that the clerk may not refuse to process a case that is transferred to his court until the fees are paid.


COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENSES OF OFFICE - SHERIFFS AND SERGEANTS — FEES - AMOUNTS OF FEES.

Commonwealth or locality that pays sheriff's salary is exempt from paying sheriff's fees for services rendered. Conclusion does not affect sheriff's fees and mileage allowances clerk of circuit or general district court is required to collect in civil and criminal matters.

October 16, 1995

The Honorable Douglas W. Brown
Treasurer for the City of Newport News

You ask whether § 14.1-69 of the Code of Virginia, as amended and enacted by the 1995 Session of the General Assembly, requires a locality to pay the sheriff's fees for service of process in cases filed in the general district court.

The General Assembly amended § 14.1-105 at its 1995 Session so that the sheriff's fee for service of all papers, except those returnable out of state, is raised to a uniform rate of "twelve dollars." Amendments to §§ 14.1-69 and 14.1-105 remove any distinction between the circuit and general district courts, and an amendment to § 14.1-69
removes any distinction between civil and criminal matters, so that the allowable fees also are to be charged in actions before the general district courts.4

When the General Assembly abolished the fee system as a method of compensating sheriffs in the 1942 Session,5 it made clear that sheriffs were to continue to collect the fees authorized by law for their services. The 1942 act contained two exceptions to the collection obligation imposed on sheriffs. One exception was fees for services rendered in the prosecution of criminal matters.6 These fees continued but “would be collected by the clerk of the court in which the prosecution is had” rather than by the sheriff.7

The second exception was fees for services the sheriff would be entitled to “receive from the Commonwealth or from the county or city for which he is elected or appointed,” absent the exception.8 The obvious intent of the General Assembly was to relieve any local government that paid a sheriff’s salary from also paying fees for the services the sheriff provided to the local government.9

The General Assembly has not removed these two exceptions to the sheriffs’ obligation to collect fees. Despite other amendments to § 14.1-69 and its predecessor statutes,10 the language providing the exception for fees payable by the Commonwealth or by the locality has remained unchanged since 1942. Section 14.1-69 continues to exclude fees the sheriff “would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed.” 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.”11

It is my opinion that § 14.1-69 clearly exempts the Commonwealth and the city or county the sheriff represents from the payment of sheriff’s fees.12 The 1995 amendments to § 14.1-69 requiring the clerk of the court to collect sheriffs’ fees in civil, as well as criminal, matters and in district, as well as circuit, courts do not affect this conclusion.

2The first two sentences of § 14.1-69 provide: “Every sheriff, and every sheriff’s deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter in the circuit courts. Such fees and mileage allowances accruing in connection with any civil or criminal matter shall be collected by the clerk of the court in which the case is heard.” (Emphasis added.)
Section 14.1-105 provides that “[t]he fees shall be as follows:
“(1) For service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process when the body is not taken and making a return thereof, the sum of twelve dollars except that no fee shall be charged for service pursuant to § 9-6.14:13.
“(2) For summoning a witness or garnishee on an attachment, twelve dollars.
“(3) For serving on any person an attachment or other process under which the body is taken and making a return thereon, twelve dollars.

“(4), (5) [Repealed.]

“(6) For serving any order of court not otherwise provided for, twelve dollars. Notwithstanding the provisions of this subsection, no fees shall be charged for protective orders issued pursuant to Chapter 11 (§ 16.1-226, et seq.) of Title 16.1.

“(7) For serving a writ of possession, twelve dollars.

“(8) For levying an execution or distress warrant or an attachment, twelve dollars.

“(9) For serving any papers returnable out of state, fifty dollars.

“Such fees shall be allowable for services provided by such officers in the circuit and district courts.”

4See id. at 73, 74.
6See id. § 1(b), at 612.
7Id.
8Id.

9Under the 1942 act, the salary of each sheriff was set by the Compensation Board and was funded two-thirds by the Commonwealth and one-third by the respective county or city represented by each sheriff. See id. §§ 2, 3, 6, at 612-15. Under present law, the Compensation Board sets and funds the salary of each sheriff. See Ch. 966, § 1-29, Item 82(A), 1995 Va. Acts Reg. Sess. 2014, 2055 (prescribing sheriffs’ salaries in appropriation act for 1994-1996 biennium).

10See § 3487(1)(b) (Michie 1942); § 14-82 (Michie 1949).

COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENSES OF OFFICE - SHERIFFS AND SERGEANTS — FEES - AMOUNTS OF FEES.

Fees and mileage allowances accruing to sheriff in connection with civil or criminal matter are collected by clerk of circuit or general district court in which case is heard.

October 4, 1995

The Honorable Gary W. Waters
Sheriff for the City of Portsmouth

the clerks of the circuit and general district courts, rather than the sheriffs, to collect the sheriff's service and process fees at the time the papers are filed in the clerk's office.\(^2\)

You relate that it has been suggested that the sheriff's fees specified in § 14.1-105 are to be collected by the sheriff, rather than by the clerks of the courts. For the purposes of this opinion, you request that I assume that a plaintiff requests a sheriff's office to serve all papers filed with the clerk of the court.

The General Assembly amended § 14.1-105 at its 1995 Session so that the sheriff's fee for service of all papers, except those returnable out of state, is raised to a uniform rate of “twelve dollars.”\(^3\) Amendments to §§ 14.1-69 and 14.1-105 remove any distinction between the circuit and general district courts, and an amendment to § 14.1-69 removes any distinction between civil and criminal matters, so that the allowable fees also are to be charged in actions before the general district courts.\(^4\)

A prior opinion of the Attorney General construes the provisions of former §§ 14.1-69 and 14.1-105 in relation to the office “responsible for the collection of fees for service of process and other services as set out in § 14.1-105.”\(^5\) Former § 14.1-69 provided, in part:

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Every sheriff, and every sheriff's deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter in the circuit courts. Such fees and mileage allowances accruing in connection with any such criminal matter shall be collected by the clerk of the circuit court in which the prosecution is had.\(^6\)
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The 1983 opinion concludes that “§ 14.1-69 requires sheriffs to collect the fees listed in §§ 14.1-105(1) through 14.1-105(9) for the services performed by them in the circuit courts.”\(^7\)

The General Assembly is presumed to have had knowledge of the Attorney General's interpretations of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view.\(^8\) Although the General Assembly initially may have acquiesced in the Attorney General's interpretation of former §§ 14.1-69 and 14.1-105, the 1995 amendment to § 14.1-69 now requires that “[s]uch fees and mileage allowances accruing in connection with any civil or criminal matter shall be collected by the clerk of the court in which the case is heard.”\(^9\) (Emphasis added.)

A rule of statutory construction provides that when new provisions are added to existing legislation by an amendatory act, a presumption normally arises that a change
Another general rule of statutory construction is that words in a statute are to be given their usual, commonly understood meaning. Finally, the use of the word "shall" in a statute generally connotes a mandatory act.

Therefore, I am of the opinion that when a civil or criminal matter is brought in either a circuit or general district court, all fees and mileage allowances accruing to the sheriff in connection with the matter are to be collected by the clerk of the court in which the case is heard.

2The first two sentences of § 14.1-69 provide: "Every sheriff, and every sheriff's deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed and fees and mileage allowances provided for services in connection with the prosecution of any criminal matter in the circuit courts. Such fees and mileage allowances accruing in connection with any civil or criminal matter shall be collected by the clerk of the court in which the case is heard." (Emphasis added.)

Section 14.1-105 provides that "[t]he fees shall be as follows:

(1) For service on any person, firm or corporation, a declaration in ejectment, order, notice, summons or any other civil process, except as herein otherwise provided, and for serving on any person, firm, or corporation any process when the body is not taken and making a return thereof, the sum of twelve dollars except that no fees shall be charged for service pursuant to § 9-6.14:13.

(2) For summoning a witness or garnishee on an attachment, twelve dollars.

(3) For serving on any person an attachment or other process under which the body is taken and making a return thereon, twelve dollars.

(4), (5) [Repealed.]

(6) For serving any order of court not otherwise provided for, twelve dollars. Notwithstanding the provisions of this subsection, no fees shall be charged for protective orders issued pursuant to Chapter 11 (§ 16.1-226, et seq.) of Title 16.1.

(7) For serving a writ of possession, twelve dollars.

(8) For levying an execution or distress warrant or an attachment, twelve dollars.

(9) For serving any papers returnable out of state, fifty dollars.

"Such fees shall be allowable for services provided by such officers in the circuit and district courts."

4See id. at 73, 74.
51983-1984 Op. Va. Att'y Gen. 327, 327. Deletion of the reference to sheriffs and criers in the fee schedule in the current sections may not be viewed as an attempt to change the present practice of sheriffs' collecting the fees for their services.
61995 Va. Acts, supra note 1, at 73.
71983-1984 Op. Va. Att'y Gen., supra note 5. Since the 1995 amendment to § 14.1-69 removes any distinction between the circuit and general district courts, the 1983 opinion arguably would apply also to fees charged for such services performed by sheriffs in matters in the general district courts had there been no other amendment to that section.
9See also 1995 Va. Acts, supra note 1, at 73.


COUNTIES, CITIES AND TOWNS: COUNTIES GENERALLY.

STATE WATERS, PORTS AND HARBORS: STATE WATER CONTROL LAW.

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

CONSERVATION: DEPARTMENT OF ENVIRONMENTAL QUALITY.

County has authority to adopt ordinance requiring groundwater monitoring of facility that may cause pollution of county’s waters. Ordinance must not be inconsistent with general laws of Commonwealth embodied in State Water Control Law. Locality may not, by ordinance, require facility to install groundwater monitoring wells when State Water Control Board’s VPA permit does not require groundwater monitoring, but may require facility to report measurements from well to county when permit requires groundwater monitoring.

May 19, 1995

Mr. Daniel M. Siegel
County Attorney for King and Queen County

You ask whether, pursuant to § 15.1-510 of the Code of Virginia, King and Queen County may adopt an ordinance requiring facilities that manufacture or store large amounts of chemicals to install groundwater monitoring wells, to take measurements from the wells, and to report the measurements to the county. The purpose of the ordinance would be to protect the waters of the county from pollution. A violation of the ordinance would be a misdemeanor punishable by fines of up to $1,000 a day and/or a jail sentence. The ordinance would apply to facilities presently operating and to future facilities.

Section 15.1-510 grants counties general police powers to regulate activities that may be harmful to the public health and safety, and provides:

Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this Commonwealth. Such power shall include, but shall not be limited to ... the adoption of
regulations for the prevention of the pollution of water in the county whereby it is rendered dangerous to the health or lives of persons residing in the county. [Emphasis added.]

The State Water Control Law, §§ 62.1-44.2 through 62.1-44.34:28, contains general laws enacted to safeguard the waters of the Commonwealth from pollution.1 The State Water Control Board is the regulatory agency charged with administering the State Water Control Law.2

It is my opinion that § 15.1-510 is sufficient authority for a county to adopt an ordinance requiring groundwater monitoring by a facility whose activities present a reasonable risk of pollution of the waters of the county.3 It is further my opinion that, by enacting the State Water Control Law, the General Assembly has not evidenced an intent to negate this authority and to occupy the entire field of safeguarding the waters of the Commonwealth from pollution.4

While the state and the county have concurrent jurisdiction in this area, the power of the State Water Control Board is paramount, and any local ordinance must not operate in a manner inconsistent with the general laws of the Commonwealth embodied in the State Water Control Law.5

Whether the enforcement of the proposed ordinance conflicts with the purpose of the State Water Control Law and the general policies adopted by the State Water Control Board depends on the facts presented in each case. In the facts you present, a manufacturer of pesticides, agricultural fertilizer chemicals and related products plans to locate a manufacturing and storage facility in an area of the county zoned for industrial use. The county has granted the manufacturer a rezoning permit. The site for the facility is near a stream which flows into the Mattaponi River. The State Water Control Board granted the manufacturer a Virginia Pollution Abatement ("VPA") Permit. The permit does not require groundwater monitoring.

VPA permits routinely are issued by the State Water Control Board for activities that are not expected to result in a point source discharge to state waters. The State Water Control Law, the Permit Regulation (VR 680-14-01),6 and the Board’s VPA Procedures Manual ("VPA Permit Manual") guide the Board’s VPA permit program. As part of this permit program, the Board and its staff consider the need for monitoring, including groundwater monitoring, in each permit. For example, the Board is required to specify the monitoring needs associated with permits it issues.7 Additionally, the VPA Permit Manual contains considerable discussion regarding the proper procedures for determining whether groundwater monitoring is appropriate in light of the activities that are subject to regulation.8

An ordinance that operates to impose requirements the State Water Control Board has considered and declined to impose in issuing a VPA permit would be in conflict with
§ 62.1-44.6.9 The effect would be to grant the local government an oversight role in the State Water Control Board’s decision-making process. Accordingly, it is my opinion that if the VPA permit issued in any particular instance does not require groundwater monitoring, a locality may not, by ordinance, require the facility to install groundwater monitoring wells. If the VPA permit does require groundwater monitoring, a locality may require the facility to report measurements from the wells to the county, in addition to any reports made to the State Water Control Board.10

1Section 62.1-44.2(2).
2See § 62.1-44.15 (powers and duties of State Water Control Board). In 1993, the State Water Control Board, along with other environmental protection agencies of the Commonwealth, were consolidated under the Department of Environmental Quality. See §§ 10.1-1182 to 10.1-1187.

Like the Virginia Waste Management Act, the State Water Control Law contains a provision that no state certificate to discharge wastes is considered complete until the governing body of the locality has provided notification that the location and operation of the facility is consistent with the locality’s land use and zoning ordinances enacted pursuant to Chapter 11 of Title 15.1. See § 62.1-44.15:3(A). Such a provision evidences the General Assembly’s intent to permit local involvement in the area. See Resource Conservation Mgmt., 238 Va. at 21-22, 380 S.E.2d at 883.

5Section 62.1-44.6 (administration of any supplemental laws pertaining to pollution of state waters shall be in accord with purpose of State Water Control Law and general policies adopted by State Water Control Board); see also § 1-13.17 (ordinances must not be inconsistent with laws of Commonwealth); King v. County of Arlington, 195 Va. 1084, 1091, 81 S.E.2d 587, 591 (1954) (ordinance may not operate to forbid what legislature expressly has licensed, authorized, or required); Op. Va. Att’y Gen.: 1983-1984, supra note 4; 1970-1971 at 5.
6See id. VR 680-14-01 § 2.5(G).
8The facts you present are distinguishable from those in Resource Conservation Management, supra note 4, in which the company challenged the validity of a county zoning ordinance prohibiting the operation of a private landfill. The Supreme Court of Virginia held that the local land use enabling statute, § 15.1-486, was broad enough to allow a county to prohibit a landfill and that the Waste Management Act expressly provides that the State may issue no landfill permit until the locality certifies that the location of the landfill is consistent with the locality’s land use ordinances. 238 Va. at 20, 22, 380 S.E.2d at 882, 883. The ordinance you propose is not a zoning ordinance and, thus, does not fit within § 62.1-44.15:3(A) (State Water Control Law provision that conditions state permit on compliance with locality’s land use ordinances).

Your facts also are distinguishable from those in Ticonderoga Farms v. County of Loudoun, 242 Va. 170, 409 S.E.2d 446 (1991). While the ordinance at issue in Ticonderoga Farms required a person operating a landfill to obtain a local permit in addition to the state permit, there was no
allegation that the requirements to obtain a local permit were in conflict with the requirements to obtain a state permit. *Id.*

10This conclusion is consistent also with the Virginia Supreme Court's holding in *Old Dominion Land Co. v. Warwick Co.*, 172 Va. 160, 168, 200 S.E. 619, 621-22 (1939), in which the Court found that the General Assembly had intended to retain the authority to regulate water pollution in certain waters.

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

ADMINISTRATION OF GOVERNMENT GENERALLY: DEPARTMENT OF GENERAL SERVICES - DIVISION OF RISK MANAGEMENT.

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

COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENSES OF OFFICE - ATTORNEYS FOR THE COMMONWEALTH, TREASURERS AND COMMISSIONERS OF REVENUE.

General Assembly intended to provide constitutional officers with representation in actions not covered by Division of Risk Management's tort liability insurance plan for constitutional officers; plan does not cover Commonwealth's attorneys against whom disciplinary complaint has been filed with Virginia State Bar arising from discharge of official duties. Circuit court may, upon application made and good cause shown, order employment of attorney and payment of costs and legal fees, as appropriate for representation of Commonwealth's attorney or assistant Commonwealth's attorney against whom such disciplinary complaint has been filed.

October 27, 1995

The Honorable Charles D. Griffith Jr.
Commonwealth's Attorney for the City of Norfolk

You ask whether § 15.1-66.4 of the *Code of Virginia* authorizes the appointment of an attorney, as well as payment of costs and legal fees, to represent a Commonwealth's attorney or assistant Commonwealth's attorney against whom a disciplinary complaint has been filed with the Virginia State Bar arising from the discharge of his official duties.

The 1977 Session of the General Assembly enacted § 15.1-66.4 to provide for representation by an attorney of any constitutional officer1 named as a defendant in a civil action arising out of the performance of his official duties.2 At its 1985 Session, the
General Assembly amended § 15.1-66.4 to provide for such legal representation when the defense of a constitutional officer, deputy or assistant is not provided under the insurance coverage of his office.³

The 1980 Session of the General Assembly enacted Article 5.1, Chapter 32 of Title 2.1, §§ 2.1-526.1 through 2.1-526.8,⁴ to create within the Department of General Services the Office of Risk Management, which is currently known as the Division of Risk Management⁵ (the “Division”). The 1986 Session of the General Assembly enacted § 2.1-526.8:1, relating to liability and other insurance plans administered by the Division for constitutional officers and political subdivisions.⁶ Section 2.1-526.8:1(A) directs the Division to establish

an insurance plan or plans subject to the approval of the Governor ... to provide protection against liability imposed by law for damages ... resulting from any claim made against any ... constitutional officer ... for acts or omissions of any nature while in an authorized governmental ... capacity and in the course and scope of employment or authorization.

The Division adopted a plan pursuant to § 2.1-526.8:1 to provide protection for constitutional officers enrolled in the plan against actions in tort that arise out of acts or omissions resulting from the performance of their official duties.⁷ Participation in the plan by any Commonwealth’s attorney as a constitutional officer is voluntary and must be approved by the Compensation Board and the Division.⁸

The legislature is presumed to be cognizant of statutes previously enacted.⁹ Statutes relating to the same subject "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete statutory arrangement."¹⁰

The General Assembly did not amend or repeal § 15.1-66.4 when it created § 2.1-526.8:1. The plan adopted by the Division pursuant to § 2.1-526.8:1 does not afford coverage to Commonwealth’s attorneys against whom a disciplinary complaint has been filed. A pending charge before the State Bar fits within the meaning of a “civil action,” as contemplated by § 15.1-66.4, because it is not a “criminal action.”¹¹

Based on the above, it is my opinion that because the General Assembly did not amend or repeal § 15.1-66.4 when it enacted § 2.1-526.8:1, it intended for § 15.1-66.4 to provide constitutional officers with representation in actions not covered by the Division’s plan for constitutional officers. It is further my opinion, therefore, that pursuant to § 15.1-66.4, upon application made and for good cause shown, the circuit court may, in its discretion, make such orders respecting the employment of an attorney, as well as payment of costs and legal fees, as may be appropriate for the representation of a Commonwealth’s attorney or an assistant Commonwealth’s attorney against whom
a disciplinary complaint has been filed with the Virginia State Bar arising from the discharge of his official duties.\textsuperscript{12}

\textsuperscript{1}Article VII, § 4 of the Constitution of Virginia (1971) specifically names "an attorney for the Commonwealth" among its list of constitutional officers.

\textsuperscript{2}See Ch. 554, 1977 Va. Acts 834, 834.

\textsuperscript{3}See Ch. 321, 1985 Va. Acts 396, 396. Section 15.1-66.4 provides:

"In the event that any ... attorney for the Commonwealth, ... or any deputy or assistant of any of such officer[], is made defendant in any civil action arising out of the performance of his official duties and does not have legal defense provided under the insurance coverage of his office, such officer, or deputy or assistant thereto, may make application to the circuit court of the county or city in which he serves to assign counsel for his defense in such action. The court may, upon good cause shown, make such orders respecting the employment of an attorney or attorneys, including the attorney for the Commonwealth, as may be appropriate, and fix his compensation. Reimbursement of any expenses incurred in the defense of such charge may also be allowed by the court. Such legal fees and expenses shall be paid from the treasury of the county or city, and reimbursement shall be made from the Compensation Board in the proportions set out in § 14.1-64." (Emphasis added.)

Section 14.1-64 provides that the Commonwealth must pay the expenses and other allowances of Commonwealth's attorneys "in counties and cities as fixed and determined by the Compensation Board."


\textsuperscript{5}See § 2.1-526.1.


\textsuperscript{7}School Board v. Patterson, 111 Va. 482, 69 S.E. 337 (1910); see also 1987-1988 Op. Va. Att'y Gen. 1, 2; id. at 461, 463.


\textsuperscript{9}See Blue v. Seventh District Committee, 220 Va. 1056, 1061, 265 S.E.2d 753, 756-75 (1980); Norfolk Bar Ass'n v. Drewry, 161 Va. 833, 172 S.E. 282 (1934) (both cases addressing purposes of disciplinary proceedings as being civil, and not criminal, in nature; such proceedings are for purpose of protecting public and not for purpose of punishment).

COUNTIES, CITIES AND TOWNS: GENERAL.

Fauquier County board of supervisors and school board may create legal entity by agreement for joint exercise of powers enjoyed by each political subdivision, i.e., for provision of administrative services to county and school board. Entity has only those powers delegated to it by participating political subdivisions. As instrumentality of Fauquier County and county school board, entity and its employees would be immune from liability for negligent acts or omissions to same degree that political subdivisions are immune.

June 19, 1995

The Honorable Joe T. May
Member, House of Delegates

You ask whether the Fauquier County board of supervisors and the Fauquier County school board have authority under § 15.1-21 of the Code of Virginia to create a legal entity for the joint exercise of power.

You relate that the Fauquier County board of supervisors and the Fauquier County school board propose to enter into an agreement to create a legal entity, to be called the Consolidated Services Administration (the "CSA"). You state that the purpose of the CSA will be to provide administrative services to Fauquier County and to the school board in the areas of personnel, finance, operations, maintenance and construction, facilities' design and engineering, and management information systems.

Section 15.1-21 authorizes political subdivisions to create entities pursuant to multijurisdictional agreements to exercise jointly any powers the political subdivisions individually otherwise enjoy. School boards are considered to be "political subdivisions" for the purposes of § 15.1-21. Additionally, § 15.1-21 authorizes political subdivisions to create a separate legal or administrative entity for the exercise of these powers. Such entity, whether or not separate from the participating localities, has no inherent powers; it has only those powers delegated to it by the participating political subdivisions.

In the 1991 Session, the General Assembly substantially rewrote § 15.1-21. The deletion of language regarding "separate legal" entities from former § 15.1-21(c)(2) and (d) does not, however, preclude the political subdivisions from creating a separate legal entity. The power to create a separate administration or joint board is derived from other powers expressly granted in § 15.1-21(A), (B) and (D)(1). It is my opinion, therefore, that the Fauquier County board of supervisors and the county school board may create a legal entity for the joint exercise of power they otherwise individually have.

You also ask whether such entity would enjoy sovereign immunity. The Supreme Court of Virginia traditionally has applied the doctrine of sovereign immunity to governmental entities and instrumentalities. Such immunity applies to both the Commonwealth and local governments. The Court also has applied the doctrine of sovereign immunity
to limit the liability of employees of local school boards in the exercise of discretionary and supervisory functions. Accordingly, counties and school boards may not be sued unless such a right and liability are conferred by law, nor may they waive their own immunity. The proposed CSA is an instrumentality of Fauquier County and the county school board. As such, the CSA would be entitled to immunity from suit to the same degree as the county and school board would be entitled. "If an individual works for an immune governmental entity then, in a proper case, that individual will be eligible for the protection afforded by the doctrine." 

It is, therefore, my opinion that the CSA created by the Fauquier County board of supervisors and the Fauquier County school board, like the local political subdivisions that created it, is immune from liability for negligent acts or omissions to the same degree that the political subdivisions themselves are immune.

Section 15.1-21 provides, in part:

"A. Any power, privilege or authority exercised or capable of exercise by any political subdivision of this Commonwealth may be exercised and enjoyed jointly with any other political subdivision of this Commonwealth having a similar power, privilege or authority except where an express statutory procedure is otherwise provided for the joint exercise.

"B. Any two or more political subdivisions may enter into agreements with one another for joint action pursuant to the provisions of this section. Action by ordinance of the governing bodies of the participating political subdivisions shall approve such agreement before the agreement may enter into force.

* * *

"D. The agreement, in addition to the items enumerated in subsection C hereof [denoting what the agreement shall specify], shall contain the following:

"1. Provision for an administrator or a joint board responsible for administering the undertaking. The precise organization, composition, term, powers and duties of any administrator or joint board shall be specified."


Former § 15.1-21(c)(2) and (d) provided:

"(c) Any such agreement shall specify the following:

* * *

"(2) The precise organization, composition and nature of any separate legal or administrative entity created thereby, together with the powers delegated thereto, provided such entity may be legally created.

* * *

"(d) In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall contain [provisions for administering, and for acquiring and disposing of property used in, such undertaking]."


See Tidewater Homebuilders v. City of Va. Beach, 241 Va. 114, 119, 400 S.E.2d 523, 526 (1991) ("It would be unrealistic, inefficient, and unnecessary to require the General Assembly..."
to define every aspect of each mechanism available” to accomplish intent of legislation. “Similarly, where a power is implied from a statutory grant, the reasonable selection rule requires that the exercise of the implied authority be reasonable and consistent with legislative intent.”; see also 1980–1981 Op. Va. Att'y Gen. 121 (authority of county to lend money is limited and does not include authority to lend money to town).


I am unaware of any waiver of sovereign immunity for the Fauquier County board of supervisors or the school board.

Messina, 228 Va. at 312, 321 S.E.2d at 663.

COUNTIES, CITIES AND TOWNS: GENERAL — COUNTIES GENERALLY.

Highland County may adopt ordinance requiring vendors to obtain permits to sell food, beverages or merchandise from streets or sidewalks during Highland County Maple Festival and establishing penalties for violating permit requirement. County may delegate authority to Chamber of Commerce to establish reasonable guidelines assuring that vendors' merchandise is of quality and nature that will not adversely affect reputation of Festival. County also may authorize Chamber to limit number of vendors who may participate in Festival; basis for determining which vendors may participate must be reasonably related to county’s purpose of holding Festival to promote and celebrate its historical or cultural significance. Highland County may not exclude all except local vendors from participating in Festival and may not authorize Chamber to do so, because their inclusion may have detrimental financial effect on local merchants and organizations. Authority for county to restrict traffic on designated streets does not extend to regulating sale of food and merchandise on adjacent privately owned lands during Festival.

October 31, 1995

Ms. Melissa Ann Dowd
County Attorney for Highland County

You ask whether, pursuant to § 15.1-28.6 of the Code of Virginia, the Highland County Board of Supervisors (the “Board”) may adopt an ordinance regulating the sale of food, beverages and merchandise from the streets, sidewalks and adjacent privately owned land during the Highland County Maple Festival (the “Festival”). The proposed ordinance would exclude the sale of any products not grown or produced in Highland County and would exclude also any food vendor who is not a local food service business or a Highland County nonprofit organization.
You state that the Festival, which generally is held the second and third weekends in March, celebrates the county's significance as the southernmost county in the United States in which maple syrup is produced in large quantities. For many years, the Highland County Chamber of Commerce has organized, sponsored and promoted the Festival. Festival visitors tour local maple sugar camps and observe the tapping of the maple trees and the processing of the sap. Local service organizations raise the majority of their annual funds from selling food and beverages and holding other recreational activities during the Festival. A large portion of these funds are used to provide scholarships for local students.

You state that vendors from outside Highland County ("outside vendors") have begun competing with local vendors at the Festival, and that some of these outside vendors offer products that are inferior or inappropriate to the theme of the Festival. Because sales by outside vendors affect the nature of the Festival and remove income from the community, the Board wishes to regulate the sale of food, beverages and merchandise during the Festival.

The Board, at the request of the Chamber of Commerce, proposes to regulate the Festival by adopting an ordinance requiring vendors to obtain permits to sell food, beverages or merchandise from the streets, sidewalks and adjacent privately owned lands during the Festival. A violation of the ordinance would constitute a misdemeanor. The Board then would enter into an agreement with the Chamber of Commerce, delegating authority to the Chamber to issue the permits in accordance with guidelines established by the Chamber and approved by the Board.

Section 15.1-28.6 authorizes a locality to "provide for the re-creation and portrayal of important historical or cultural events associated with or which have taken place within the political subdivision." The statute allows a locality to "enter into agreements with public or private nonprofit organizations to stage and promote such events" and to "permit street vending, the sale of food, beverages, and merchandise related to and compatible with the objectives of the public celebrations arranged for such events, or to delegate to such organizations the authority to do so." The statute also allows a locality to delegate to organizations promoting the event "the collection of license fees from vendors." Under the Dillon rule of strict construction, a locality has only those powers expressly granted by statute and those necessarily implied from the expressly granted powers. In construing the extent of the powers granted, the purpose for which the statute was enacted is of primary importance. The purpose of § 15.1-28.6 is to enable a locality to celebrate and promote its historical or cultural significance.

Section 15.1-28.6 is sufficient authority for Highland County to adopt an ordinance requiring vendors to obtain permits to sell food, beverages or merchandise from the streets or sidewalks during the Festival and establishing penalties for violation of the
permit requirement. Section 15.1-28.6 also expressly authorizes a county to enter into an agreement with a nonprofit organization, such as the Chamber of Commerce, delegating to the organization the authority to permit street vending "related to and compatible with the objectives of the public celebration." Establishing reasonable guidelines for assuring that the merchandise sold at the Festival is of a type consistent with the theme of the Festival and of a quality that will not adversely affect the reputation of the Festival is consistent with the language of § 15.1-28.6.

Considering the limited public space available for street vending, the county also may authorize the Chamber of Commerce to limit the number of vendors who may participate in the Festival and to determine which vendors who seek permits may participate. The basis for determining which vendors may participate, however, must be reasonably related to the purposes of § 15.1-28.6. The quality and nature of vendors’ products in light of the theme of the Festival are reasonably related to the purposes of § 15.1-28.6. Thus, a vendor whose products are inferior or inappropriate may be excluded.

Excluding all except local vendors on the basis that outside vendors compete for business with local vendors, however, does not, in my opinion, bear this reasonable relationship. I do not construe § 15.1-28.6 as sufficient authority for Highland County to exclude all except local vendors from participating in the Festival or to authorize the Chamber of Commerce to do so. Excluding certain vendors from participating in the Festival on the basis that their inclusion would have a detrimental financial effect on local merchants and local organizations may not, in my opinion, be necessarily implied from the powers expressly granted in, or from the purpose of, § 15.1-28.6.

You ask also whether, in addition to regulating the sale of food, beverages and merchandise on the streets and sidewalks during the Festival, Highland County may regulate such sales on adjacent privately owned land under the authority in § 15.1-28.6(5), allowing a county to “[r]estrict traffic on designated streets for the duration of the events.” You state that, because of the rural nature of Highland County, regulating the streets is useless unless the county also may “regulate” adjacent privately owned land.

I do not construe the authorization in § 15.1-28.6(5) for a county to restrict traffic on designated streets as sufficient authority for Highland County to regulate the sale of food and merchandise on adjacent privately owned lands during the Festival. You have provided no facts from which to conclude that, under the Dillon rule of strict construction, such authority may be necessarily implied from the express authority granted in § 15.1-28.6. Moreover, even if such general authority could be necessarily implied, the validity of any regulation would depend on the need for, and the nature of, the restriction under the particular facts.
Section 15.1-28.6 provides: “Every county, city and town may provide for the re-creation and portrayal of important historical or cultural events associated with or which have taken place within the political subdivision. Such counties, cities and towns may:

1. Enter into agreements with public or private nonprofit organizations to stage and promote such events;

2. Charge admission to such events, permit street vending, the sale of food, beverages, and merchandise related to and compatible with the objectives of the public celebration arranged for such events, or to delegate to such organizations the authority to do so;

3. Delegate to such organizations the collection of license fees from vendors;

4. Require a surety bond adequate to protect the public interest;

5. Restrict traffic on designated streets for the duration of the events; and

6. Make gifts by ordinance to such organizations from its treasury in furtherance of the re-creation and portrayal of such important historical or cultural events.”

Section 15.1-28.6(1).

Section 15.1-28.6(2).

Section 15.1-28.6(3).


In the absence of language in § 15.1-28.6 evidencing an intent to limit the application of the statute, I interpret “cultural” in the broad sense of relating to the “behavior patterns, arts, beliefs, institutions, and all other products of human work and thought characteristic of a community,” rather than in the more narrow sense of relating to “[i]ntellectual and artistic activity.” The American Heritage Dictionary 348 (2d c. ed. 1985) (defining “culture”).

Section 15.1-505 authorizes a county to “prescribe fines ... for violations of ordinances.”

Section 15.1-28.6(2).


I do not view the fact that local service organizations contribute funds for local scholarships as justification for such a broad restriction against outside vendors.

Because I conclude that § 15.1-28.6 does not authorize the exclusion of all except local vendors from participation in the Festival, it is unnecessary to consider whether such an exclusion would conflict with antitrust laws or be subject to constitutional challenge.

I am aware of no statute that would authorize a county to grant permits for vendors to use privately owned land without the landowner’s consent. While other statutes may authorize a county to regulate vendors on privately owned lands operating with the landowner’s consent, you have referenced no other statutory authority, and I confine my response to a construction of § 15.1-28.6.
Industrial development authority is not prohibited from issuing bonds to finance residential housing for § 501(c)(3) organization exempt from federal income taxation, so long as such organization is not organized and operated exclusively for religious purposes. Authority makes factual determination whether § 501(c)(3) organization is organized exclusively for religious purposes, and whether financing of such organization violates establishment of religion clause of U.S. Constitution and similar limitations within Virginia Constitution. Section 501(c)(3) organization affiliated with religious denomination that is not organized and operated exclusively for religious purposes, whose facility will be used to advance secular purpose, would not be disqualified from obtaining financing for facility through authority. Voter referendum is not required to authorize IDA to issue bonds to finance acquisition and improvement of low-income rental housing by such organization.

September 1, 1995

The Honorable Robert L. Calhoun
Member, Senate of Virginia

You ask whether an industrial development authority is authorized to issue bonds, the proceeds of which will be loaned to an organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code, to acquire and improve low-income rental housing.

You state that the organization is associated with a religious denomination, and its primary purpose is to provide housing to low- and moderate-income persons. You relate that at two previously held referenda, Arlington County voters rejected the question on each ballot concerning a statutorily required need for activating a redevelopment and housing authority under the provisions of Article 1, Chapter 1 of Title 36, §§ 36-1 through 36-10 of the Code of Virginia.

Industrial development authorities ("IDAs") are created under the Industrial Development and Revenue Bond Act, Chapter 33 of Title 15.1, consisting of §§ 15.1-1373 through 15.1-1392 (the "Act"). Section 15.1-1379(A) grants an IDA the authority to issue bonds "for any of its purposes, including the payment of all or any part of the cost of authority facilities."

The Act's purposes are set out in § 15.1-1375. The first paragraph of that section provides, in part:

It is the intent of the legislature by the passage of this chapter to authorize the creation of industrial development authorities by the several municipalities in this Commonwealth so that such authorities may ... make loans to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental, nonprofit and commercial enterprises and institutions of higher education to locate in or
remain in this Commonwealth ... and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity.\(^6\)

The fourth paragraph of § 15.1-1375 provides, in part:

It is the further intent of the legislature and shall be the policy of the Commonwealth to grant to industrial development authorities the powers contained herein with respect to facilities for use by organizations (other than institutions organized and operated exclusively for religious or educational purposes) which are described in § 501 (c) (3) of the Internal Revenue Code of 1954, as amended, and which are exempt from federal income taxation pursuant to § 501 (a) of the Internal Revenue Code of 1954, as amended, to the end that such authorities may protect or promote the safety, health, welfare, convenience, and prosperity of the inhabitants of the Commonwealth by assisting in the acquisition, construction, equipping, expansion, enlargement, improvement, financing, and refinancing of such facilities of the aforesaid entities and organization in order to provide operations, recreational, activity centers, and other facilities for the use of the inhabitants of the Commonwealth and for the promotion of their safety, health, welfare, convenience or prosperity.\(^6\)

The last paragraph of § 15.1-1375 also provides that the act is to be liberally construed in conformity with the intentions stated in that section.\(^7\)

In construing the scope of the Act, prior opinions of the Attorney General have considered the precise definitions in § 15.1-1374, the Act's general purposes in § 15.1-1375, and the legislature's liberal construction directive.\(^8\)

Section 15.1-1374(d)(viii) defines “authority facilities” to include “facilities” for use by a § 501(c)(3) organization, without specifying a particular type of facility. The only definitional requirements are that such organization not be organized exclusively for religious purposes and that the organization be exempt from federal income taxation under § 501(a).\(^9\)

The definition of “authority facilities” in § 15.1-1374(d)(viii) as including “facilities” used by a § 501(c)(3) organization was added in 1991.\(^10\) Before this amendment, the definition in § 15.1-1374(d)(iv) of “authority facilities” owned and operated by § 501(c)(3) organizations included only “athletic, health and recreational facilities ... and
operation centers, the primary purpose of which is to promote physical fitness, and to provide sports and water safety instruction.”

The 1991 amendment to § 15.1-1374 evidences a clear legislative intent to expand the types of facilities eligible for IDA assistance when the facility is to be owned or operated by a § 501(c)(3) organization. Moreover, the first paragraph of § 15.1-1375 expresses a general intent of the Act to induce “nonprofit” organizations “to locate in or remain in this Commonwealth,” to protect or promote the safety, health and welfare of its inhabitants. The fourth paragraph of § 15.1-1375 expresses the intent of the legislature that an IDA have the authority to assist § 501(c)(3) organizations in the acquisition and construction not only of “operations, recreational, [and] activity centers,” but also of “other facilities.”

Despite the absence of express language in the Act authorizing an IDA to finance residential housing for a § 501(c)(3) nonprofit organization, it is my opinion that an IDA has the authority to issue bonds for this purpose. My conclusion is consistent with the definitions in § 15.1-1374(d), the general purposes in § 15.1-1375, and the legislative intent that the Act be liberally construed.

Section 15.1-1374(d)(viii) does not prohibit an IDA from issuing bonds to pay the cost of a facility for use by a § 501(c)(3) organization associated with a religious denomination if the organization is not “organized and operated exclusively for religious purposes.” Whether a particular § 501(c)(3) organization qualifies under § 15.1-1374(d)(viii) is a factual determination that must be made by the IDA.

In addition, the IDA must determine whether the financing of the particular facility violates the Establishment Clause of the First Amendment to the Constitution of the United States, and Article I, § 16 and Article IV, § 16 of the Constitution of Virginia (1971).

A 1974 opinion of the Attorney General considers this issue in connection with an IDA financing of a church-affiliated hospital. The 1974 opinion applies the traditional three-part Establishment Clause test, and determines that the financing (1) has a clear secular purpose, (2) would not result in “excessive government entanglement with religion,” and (3) has a primary effect that neither advances nor inhibits religion. The operation of the primary effect test is defined by the Supreme Court of the United States in *Hunt v. McNair*, a case involving the issuance of revenue bonds to finance the construction of facilities of church-affiliated colleges. In determining whether the primary effect standard has been met, the 1974 opinion relies on the following statement in *Hunt*:

Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected.
Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.\(^8\)

The 1974 opinion notes that (1) none of the bond proceeds would be used exclusively for sectarian purposes, such as constructing a chapel; (2) the hospital would provide the services a hospital generally renders to patients; and (3) the staff, employees and patients are not required to profess any particular faith.\(^9\) The opinion concludes that the funds would not be used to further a primarily sectarian purpose.\(^20\)

I am, therefore, of the opinion that whether the financing of the particular facility is consistent with the United States and Virginia Constitutions is a factual determination for the IDA to make. If the IDA concludes that the organization is not organized and operated exclusively for religious purposes and, furthermore, that the facility will be used primarily to advance a secular purpose, the fact that the organization is associated with a religious denomination does not disqualify the organization from obtaining financing for the facility through an IDA.

You relate that at two previous referenda, the voters of Arlington County have failed to establish the statutorily required need to activate a redevelopment and housing authority,\(^21\) thereby rejecting activation of such an authority in the county. A rejection of the activation of such an authority by the voters does not affect the ability of an IDA to issue bonds, the proceeds of which will be used by a § 501(c)(3) organization to acquire and improve low-income rental housing. Voter referendum is not required to authorize an IDA to exercise a power statutorily granted.\(^22\)

\(^1\)The Internal Revenue Code provides an exemption for organizations "organized and operated exclusively for religious ... purposes." I.R.C. § 501(c)(3) (West Supp. 1995).

\(^2\)By letter dated December 29, 1994, you received an informal opinion on this matter. You now request an official opinion of the Attorney General on the same matter.

\(^3\)See § 36-4.1.


\(^5\)Id. at 8 (emphasis added).

\(^6\)Id. at 8-9 (emphasis added).

\(^7\)See id. at 9.

facility nor building used by county social services department is “enterprise” for purpose of IDA bond financing. Several opinions conclude that, because both §§ 15.1-1374 and 15.1-1375 refer specifically to the financing of medical facilities, an IDA may assist in the financing of a state-operated mental health clinic, doctors’ and dentists’ offices, and a community hospital. See, e.g., Op. Va. Att’y Gen.: 1978-1979 at 140; 1973-1974, supra, at 186; 1971-1972 at 222. The liberal construction directive, however, does not support a financing that is not included within either the definitional or the general purpose sections of the Act. See Op. Va. Att’y Gen.: 1979-1980 at 198 (IDA may not issue bonds to facilitate purchase of “homes for adults” unless homes function as medical facilities); 1971-1972 at 45 (race track neither “facility” nor “enterprise” for purpose of IDA bond financing of its construction).

Section 15.1-1374(d)(viii) defines “authority facilities” to include “facilities for use by an organization (other than an organization organized and operated exclusively for religious purposes) which is described in § 501(c)(3) of the Internal Revenue Code of 1986, as amended, and which is exempt from federal income taxation pursuant to § 501(a) of such Internal Revenue Code[.]”


1991 Va. Acts, supra note 4, at 8. It is clear that the purposes of an IDA are not confined only to commercial development. The first paragraph of § 15.1-1375 also provides that an IDA’s exercise of its powers “benefit[s] ... the inhabitants of the Commonwealth” in two ways: “either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity.” Id.

See Miller v. Ayres, 213 Va. 251, 191 S.E.2d 261 (1972) (compliance with Article I, § 16 is judged on essentially same criteria as applied under Establishment Clause of First Amendment to U.S. 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.”

Article I, § 16 of the Constitution of Virginia provides that “[t]he General Assembly shall not ... 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 support of any church or ministry[.]”

The first sentence of Article IV, § 16 provides that “[t]he General Assembly shall not make any appropriation of public funds ... 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.”

See 1973-1974 Op. Va. Att’y Gen. 179. When the 1974 opinion was issued, the Act did not contain the present language relating to facilities of § 501(c)(3) organizations. The current language, including the parenthetical exclusion of only those organizations operated “exclusively” for religious purposes, was added in 1984 to § 15.1-1374(d) and as part of the fourth paragraph of § 15.1-1375. Ch. 700, 1984 Va. Acts 1518, 1519, 1521. It is my view that the addition of this language does not eliminate the need for a determination on a case-by-case basis as to whether the financing of the particular facility is consistent both with the Establishment Clause of the First Amendment to the United States Constitution and with similar limitations within the Virginia Constitution.


See supra note 16.
20Id. at 182-83; see also 1979–1980 Op. Va. Att’y Gen. 107, 108 (county may advance HUD funds to nonprofit housing corporation controlled by church if corporation follows nonsectarian policies and practices in operation of housing). The 1974 opinion also concludes that neither Article I, § 16 nor Article IV, § 16 prohibits, in general, an IDA from providing revenue bond financing to an entity affiliated with a religious denomination. 1973–1974 Op. Va. Att’y Gen., supra note 15, at 183. I agree with that conclusion but note that, although the Act does not confer any "peculiar privileges or advantages" to any particular sect or denomination in contravention of Article I, § 16, any individual financing that violates the Establishment Clause of the United States Constitution also would violate Article IV, § 16 of the Virginia Constitution. See Miller v. Ayres, supra note 14.
21Section 36-4 provides, in part: "[A]ny authority not now activated shall not transact any business or exercise its powers hereunder until or unless the qualified voters of such city or county as the case may be shall by a majority vote of such qualified voters voting in an election held as provided in § 36-4.1, have indicated a need for an authority to function in such city or county."

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

Local ordinance or other official action providing generally for downzoning, or automatic reversion to prior zoning status, of property granted conditional zoning permit is invalid if authorized use does not begin within stated period of time.

December 14, 1995

The Honorable R. Creigh Deeds
Member, House of Delegates

You ask whether a county may, by ordinance or other means, provide that property rezoned under a conditional zoning permit will revert to its former zoning status if the authorized use does not begin within a stated period of time.

Sections 15.1-491.1 through 15.1-491.6 of the Code of Virginia provide for conditional zoning as such operates in most Virginia localities.1 Section 15.1-491.2(A) provides in general that, “[o]nce proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions.” Section 15.1-491.2(B) limits the authority of a locality to change the zoning on property granted a conditional zoning permit.2
Section 15.1-491.2(B) applies when a landowner granted a conditional zoning permit proffers "the dedication of real property of substantial value or construction of substantial public improvements." If the need for these proffers is not generated solely by the rezoning, the landowner's rights to develop and use the property in accordance with the authorized use are protected from any future zoning changes that "materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district."3 The rights of the landowner under the conditional zoning permit yield, however, to an appropriate showing of fraud or mistake or a zoning change that is necessitated by a "change in circumstances substantially affecting the public health, safety, or welfare."4

The provisions of § 15.1-491.2(B) are consistent with decisions of the Supreme Court of Virginia regarding the validity of "piecemeal downzoning," i.e., reducing the permitted intensity of development of a particular piece of property.5 Unless the locality can show fraud, mistake or changed circumstances substantially affecting the public health, safety, or welfare, downzoning a particular piece of property fails to satisfy the requirement that changes in zoning not be arbitrary, capricious or unreasonable. The Supreme Court of Virginia applies the following standard of review in determining the validity of a piecemeal downzoning ordinance:

When an aggrieved landowner makes a *prima facie* showing that since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare, the burden of going forward with evidence of such mistake, fraud, or changed circumstances shifts to the governing body. If the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained. If not, the ordinance is unreasonable and void.6

It is clear from the decisions of the Supreme Court and from the language of § 15.1-491.2(B) that the extent to which a piece of property is immune from subsequent changes downzoning the property will depend on the facts or evidence presented in each case.7 While a local governing body may return property granted a conditional zoning permit to its former zoning status, it may do so only after determining that the particular facts satisfy the requirements of § 15.1-491.2(B). Accordingly, it is my opinion that a local ordinance or other official action providing generally for the downzoning, or automatic reversion to a prior zoning status, of property granted a conditional zoning permit if the authorized use does not begin within a stated period of time would not be valid.

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1See also §§ 15.1-491(a), 15.1-491.2:1 (conditional zoning provisions applicable to certain localities); 1989 Op. Va. Att'y Gen. 92 (discussing types of conditional zoning authorized by Virginia's zoning enabling statutes).

2Section 15.1-491.2(B) provides that "in the event proffered conditions include a requirement for the dedication of real property of substantial value or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no
amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare."

In 1990, the General Assembly amended §§ 15.1-491, 15.1-491.2 and 15.1-491.2:1 to provide that landowners granted conditional zoning permits “prior to July 1, 1990,” shall comply with additional zoning ordinance requirements regarding notice and the implementation of proffers. See Ch. 868, § 15.1-491(a2), 1990 Va. Acts 1501, 1502; id. § 15.1-491.2(C), at 1504; id. § 15.1-491.2:1(C), at 1505. I assume for purposes of this opinion that the subject county ordinance is not restricted to property granted conditional zoning permits before July 1, 1990.

§ 15.1-491.2(B).


6Snell, supra, 214 Va. at 659, 202 S.E.2d at 893, quoted in Virginia Land, supra, 239 Va. at 418, 389 S.E.2d at 314.

7See Snell, supra note 5, 214 Va. at 660, 202 S.E.2d at 894 (whether “changed circumstance” justifies piecemeal downzoning should be objectively verifiable from evidence); 1991 Op. Va. Att’y Gen. 63, 65 (application of § 15.1-491.2(B) protections will depend on facts of each case).

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

TAXATION: STATE LOTTERY LAW.

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

State Lottery Law relates to licensing of agents and not to uses of land. Local governments are authorized to impose reasonable restrictions on sale of lottery tickets at specific sites to further legitimate land use goal. Ordinance prohibiting sale of lottery tickets on premises of retail store as condition for obtaining special use permit is neither in conflict with, nor preempted by, State Lottery Law.

December 15, 1995

Mr. Henry T. Tucker Jr.
Chairman, State Lottery Board
You ask whether, under its land use and zoning powers, a locality has the authority to prohibit the sale of lottery tickets as a condition in a special use permit granted a retail store.

Section 15.1-486 of the Code of Virginia grants any county or municipality the power to classify its territory into districts and to regulate the use of land and buildings within each district for the statutorily recognized purposes of promoting the health, safety and welfare of the general public. In addition to the uses permitted by right in each district, § 15.1-491(c) authorizes “the granting of special exceptions under suitable regulations and safeguards.”

The Supreme Court of Virginia adopts the view that the exercise of the local special use power constitutes a legislative act entitled to a presumption of validity. It is presumed that special use ordinances are reasonable, representing a local legislative determination that the use is sufficiently different from surrounding uses, by way of potential adverse impact on neighboring parcels or the public, so as to require the imposition of conditions to reduce such impact. An ordinance that, through special exception, permits a commercial use in a residential section but imposes restrictions on the extent of the commercial use is a reasonable means of preserving the noncommercial character of a residential section. Likewise, ordinances that restrict certain commercial uses because of the impact on traffic, either at a particular spot or at a particular time, constitute reasonable and legitimate land use restrictions.

The validity of any land use regulation depends ultimately on the particular facts of the matter. The restrictions the zoning ordinance imposes must bear a reasonable relationship to legitimate land use concerns and to problems generated by the use of the property. It is my opinion that certain facts could reasonably justify a locality’s decision to prohibit the sale of lottery tickets at a retail store as a condition to obtaining a special use permit.

Zoning ordinances adopted under the broad power granted in the enabling statutes must not, however, be inconsistent with state law. An ordinance is inconsistent with state law if state law preempts any local regulation in the area. A prior opinion of the Attorney General concludes, for example, that the domain of control over alcoholic beverages has been preempted by the Commonwealth, and that, under its zoning power, a locality may not prohibit a business licensed by the Virginia Alcoholic Beverage Control Board from selling alcoholic beverages on the premises. That prior opinion relies on express statutory provisions prohibiting localities from enacting ordinances regulating alcohol, on the comprehensive statutory scheme of state control over the sale of alcoholic beverages throughout the Commonwealth, and on the fact that such zoning ordinances would effectively allow the governing body to establish a “dry zone” without a local referendum.

In contrast, no provision in the State Lottery Law prohibits zoning ordinances restricting the sale of lottery tickets. Section 58.1-4007 authorizes the State Lottery
Board to adopt regulations on "the type or types of locations at which tickets or shares may be sold"\(^{13}\) and on "[t]he licensing of agents to sell tickets ... who will best serve the public convenience and promote the sale of tickets."\(^ {14}\) Section 58.1-4010(A) provides that "[n]otwithstanding any other provision of law, any person licensed as provided in this chapter is hereby authorized to act as a lottery sales agent."

These provisions of the State Lottery Law relate to the licensing of agents, and not to the uses of land. I do not construe these sections, either apart or collectively, as evidencing a legislative intent to remove from local governments the authority to impose reasonable restrictions on the sale of lottery tickets at specific sites if the purpose of the restriction is to further a legitimate land use goal. Neither do I view the prohibition of the sale of lottery tickets in a particular location under a locality's special use permit authority as unreasonably infringing on the ability of the State Lottery to conduct its business, as might a general ordinance prohibiting the sale of lottery tickets within an entire commercial district.\(^ {15}\)

It is my opinion, therefore, that an ordinance prohibiting the sale of lottery tickets on the premises of a retail store as a condition for obtaining a special use permit is neither in conflict with, nor preempted by, state law.

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\(^{1}\)See § 15.1-489 (general purpose of zoning ordinances); § 15.1-490 (matters for locality to consider in applying zoning ordinances).


\(^{4}\)See Cupp v. Board of Supervisors, 227 Va. at 596-98, 318 S.E.2d at 415-17.

\(^{5}\)See Fairfax County v. Southland Corp., 224 Va. at 523-24, 297 S.E.2d at 722-23; see also 1989 Op. Va. Att'y Gen. 137, 141 (regulation of impact on growth created by construction of water plant is matter traditionally regulated by land use controls, justifying imposition of reasonable conditions on services provided by sewage treatment plant to be constructed by local water and sanitation authority).

\(^{6}\)See Cupp v. Board of Supervisors, 227 Va. at 594, 318 S.E.2d at 414 (no authority to impose road improvements as condition for special use permit when shown that traffic problems are not generated by use of property).

\(^{7}\)See § 1-13.17.

\(^{8}\)See 1983–1984 Op. Va. Att'y Gen. 86, 87 (in addition to express statutory preemption provisions, locality may not legislate in area where state regulations are so comprehensive that State may be considered to occupy entire field).


\(^{10}\)See id.

\(^{11}\)Tit. 58.1, Ch. 40, §§ 58.1-4000 to 58.1-4028.


\(^{13}\)Section 58.1-4007(A)(7).

\(^{14}\)Section 58.1-4007(A)(10).
COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER - AUXILIARY POLICE FORCES IN COUNTIES, CITIES AND TOWNS.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.

COMMISSIONS, BOARDS AND INSTITUTIONS: DEPARTMENT OF CRIMINAL JUSTICE SERVICES; BOARD.

Auxiliary police officers possess powers and authority of full-time police officers only during time they are called into service to assist regular police officers of locality; such service is supplemental and exists under limited circumstances. When not in service, auxiliary police officers retain status as private citizens, and may not use police identification or weapons to exercise police powers and authority when observing crime in progress. Statutory restrictions applicable to auxiliary police officers who are not in service do not apply to auxiliary deputy sheriffs. Extent and scope of authority of such deputy sheriffs is within discretion of sheriff.

June 21, 1995

The Honorable Raymond R. Guest Jr.
Member, House of Delegates

You ask several questions regarding auxiliary police officers appointed pursuant to § 15.1-159.2 of the Code of Virginia.¹

You first ask whether auxiliary police officers possess police powers and authority twenty-four hours a day similar to full-time law-enforcement officers. Section 15.1-159.2(A) authorizes the governing body of a city, county or town “to establish, equip and maintain auxiliary police forces, the members of which when called into service shall have all the powers and authority and all the immunities of constables at common law.” A prior opinion of the Attorney General concludes that there is no distinction between the authority of a constable at common law and the authority of a full-time law-enforcement officer.² Consequently, there would be no distinction between the powers and authority of auxiliary and full-time police officers during the time period an auxiliary police officer who has been trained in accordance with the provisions of

¹See Op. Va. Att'y Gen.: 1974–1975 at 548; 1973–1974 at 421 (both opinions concluding that while city/city council may not, under general zoning ordinances, enact fire regulation inconsistent with Uniform Statewide Building Code, it may impose more stringent requirements by means of conditions attached to granting of special use permits); see also 1983–1984 Op. Va. Att’y Gen. 430 (although Uniform Statewide Building Code was amended subsequent to issuance of 1974 and 1973 opinions to expressly prohibit local regulation of buildings, locality still may impose conditions for special use permit if conditions deal with legitimate zoning issues, such as density or land use).

²See Op. Va. Att’y Gen.: 1974–1975 at 548; 1973–1974 at 421 (both opinions concluding that while city/city council may not, under general zoning ordinances, enact fire regulation inconsistent with Uniform Statewide Building Code, it may impose more stringent requirements by means of conditions attached to granting of special use permits); see also 1983–1984 Op. Va. Att’y Gen. 430 (although Uniform Statewide Building Code was amended subsequent to issuance of 1974 and 1973 opinions to expressly prohibit local regulation of buildings, locality still may impose conditions for special use permit if conditions deal with legitimate zoning issues, such as density or land use).
§ 15.1-159.2(B) is called into service to aid and assist the regular city, county or town police officers.³

A prior opinion of the Attorney General notes that auxiliary police officers may be called into service only in limited circumstances. The opinion concludes that an auxiliary police force may only complement an existing police force with general law-enforcement duties.⁴

Therefore, auxiliary police officers are distinguishable from full-time police officers in that auxiliary officers serve in a supplemental role when called into service under limited circumstances. Section 15.1-159.5(A) limits the calling into service of auxiliary police officers to three specific circumstances.⁵ The language of § 15.1-159.2(A) clearly contemplates that all police powers and authority of auxiliary police officers be limited to the specific periods when such officers are called into service. When the language of a statute is plain and unambiguous and its meaning is clear and definite, it must be given effect.⁶

Based on the clear language of §§ 15.1-159.2 and 15.1-159.5, therefore, it is my opinion that auxiliary police officers do not have statutory authority to exercise police powers and authority except when they are called into service. Consequently, when such officers are not actually in service, they retain their status as private citizens in regard to cooperating in law-enforcement activities.

You next ask whether auxiliary police officers may exercise police powers and authority when such an officer observes crime in progress but is not in service, and whether auxiliary police officers should carry police identification and weapons while not in service. Since an auxiliary police officer retains the status of private citizen while not in service, your inquiry regarding the authority of such an officer who observes a crime in progress is answered by a prior opinion of the Attorney General. That opinion concludes that, as a general proposition, a private citizen may only effect an arrest for felonies, or for affrays or breaches of the peace, committed in his presence.⁷ Pursuant to § 19.2-82, anyone arrested without a warrant must immediately be brought before a judicial officer. Another opinion notes that a private citizen may use deadly force to prevent the commission of a felony only in certain limited circumstances, and the use of such force must be reasonable and may be resorted to only in the case of the apprehension of the most serious felons.⁸ Therefore, I am of the opinion that the use of police identification or weapons by auxiliary police officers who are not in service would not be appropriate.

Finally, you ask whether any statutory restrictions applicable to auxiliary police officers not in service apply to auxiliary deputy sheriffs. The office of sheriff is a constitutional office created pursuant to Article VII, § 4 of the Constitution of Virginia (1971). Article VII, § 4 provides that "[t]he duties and compensation of such officers shall be prescribed by general law or special act." Among the general duties of the office of
sheriff is the enforcement of all criminal laws within that office’s jurisdiction, and the preservation of peace and order.9 The only reference by the General Assembly in the Virginia Code to auxiliary deputy sheriffs is found in § 9-180, concerning compliance with the minimum training standards promulgated by the Department of Criminal Justice Services. A prior opinion of the Attorney General concludes that there is no authority for a sheriff to appoint “special deputies” regardless of whether these individuals receive compensation.10

Consequently, all part-time deputies are deputies of the sheriff, and are not “special deputies.”11 A sheriff has exclusive control over the day-to-day operations of his office and the assignment of his personnel.12 Since there are no statutory restrictions on the powers and authority of auxiliary deputy sheriffs, the extent and scope of their authority is within the discretion of the sheriff. Therefore, I am of the opinion that the statutory restrictions applicable to auxiliary police officers who are not in service do not apply to auxiliary deputy sheriffs.

1Section 15.1-159.2(A) provides: “In cities, counties and towns in the Commonwealth, the governing bodies thereof, for the further preservation of the public peace, safety and good order of the community shall have the power to establish, equip and maintain auxiliary police forces, the members of which when called into service as hereinafter provided shall have all the powers and authority and all the immunities of constables at common law.” Section 15.1-159.2(B) authorizes members of an auxiliary police force to exercise all the powers of full-time law-enforcement officers if certain training requirements are satisfied.


3See also § 15.1-159.5(B): “Members of any auxiliary police force which has been trained in accordance with the provisions of § 15.1-159.2 B may be called into service by the Chief of Police of any jurisdiction to aid and assist regular police officers in the performance of their duties.”


5Section 15.1-159.5(A) provides: “The governing body of the county, city or town may call into service or provide for calling into service such auxiliary policemen as may be deemed necessary (i) in time of public emergency, (ii) at such times as there are insufficient numbers of regular policemen to preserve the peace, safety and good order of the community, or (iii) at any time for the purpose of training such auxiliary policemen. At all times when performing such service, the members of the auxiliary police force shall wear the uniform prescribed by the governing body.”

6Temple v. City of Petersburg, 182 Va. 418, 29 S.E.2d 357 (1944).


11Id.

Hampton ordinance does not comply with statutory requirement that stormwater service charge rates bear some relationship to factors that affect amount of stormwater runoff produced by various properties; should be amended to require rational connection between amounts charged to various categories of property and their respective runoff contributions. City council must determine whether citizens who have previously paid fees without making request for adjustment are now entitled to one, or have waived any right to refund.

January 9, 1995

The Honorable I. Vincent Behm Jr.
Member, House of Delegates

You ask whether the fee structure adopted by the City of Hampton in its ordinance imposing a stormwater management service charge under § 15.1-292.4 of the Code of Virginia complies with the requirement of that statute that such charges to property owners be based on their contributions to stormwater runoff.

When the language of a statute is clear and unambiguous, effect must be given to its plain and ordinary meaning.¹ Section 15.1-292.4(B) does not require a locality adopting a stormwater control service charge to impose any specific rate structure, nor does it specify any precise formula to be used in determining the charge for a particular property. In plain language, however, it does require the locality, in some manner, to base the charge assessed to owners or occupants of individual properties on those properties' contributions to stormwater runoff.

Because there is no definition of "runoff" in § 15.1-292.4, the General Assembly is presumed to have intended that term to have its ordinary meaning. In common usage, "runoff" means "the portion of the precipitation on the land that ultimately reaches streams; esp: the water from rain or melted snow that flows over the surface."²

The stormwater surface charge rates Hampton has adopted distinguish between properties on only one basis—whether the properties are used for residential or nonresidential purposes.³ While it may be true that residential properties frequently contribute less to runoff than do commercial or industrial properties, it is not the use of a property that determines how much stormwater runoff that property will generate. The primary determinants in calculating stormwater runoff from a property in a particular rainstorm during a given time period are (1) the total area and shape of the property, (2) the percentage of that total area that is covered by natural ground cover or by buildings, pavement or other impervious surfaces, (3) the type of soil, (4) the steepness of slopes...
on the property, and (5) the potential for ponding or storage of runoff on the site. The rates adopted in Hampton bear no relationship to any of these factors. Although § 15.1-292.4(B) does not require a locality to calculate the precise runoff from each property, it clearly does require that stormwater service charge rates have some relationship to these factors that determine the amount of runoff. In my opinion, the Hampton ordinance does not comply with that requirement, and should be amended.

The Hampton ordinance refers to the service charges as “interim” ones. Understandably, a locality adopting such service charges may need to impose an initial schedule of charges that categorizes properties in some manner that only approximates, on an average basis, their respective runoff contributions. Such an approach is consistent with the statutory requirement, at least for a reasonable period until data can be assembled to permit a more accurate calculation. Even for such an interim schedule of charges, however, it is my opinion that § 15.1-292.4(B) requires there to be some rational connection between the amounts charged to various categories of property and their respective runoff contributions. Thus, even such an interim schedule would require some rational connection to the factors affecting runoff, particularly the property area and the extent of impervious development on that property.

2Webster’s Ninth New Collegiate Dictionary 1032 (1990). Article 1.1, Chapter 6 of Title 10.1, §§ 10.1-603.1 through 10.1-603.15, governs the adoption and regulation of stormwater management programs, including those established by local ordinance. Section 10.1-603.2 contains a similar definition: “'Runoff' means that portion of precipitation that is discharged across the land surface or through conveyances to one or more waterways.”
3The Hampton city council has imposed “[interim flat-rate stormwater management fees” on all properties in the city according to the following monthly rate schedule: residential properties, $2.50; nonresidential properties, $12.50. HAMPTON, VA., CODE § 33.1-16(a) (1993).
4See generally VA. TRANSP. DEPT' DRAINAGE MANUAL § 1.2 (“Factors Affecting Runoff”) (adopted Jan. 1980, rev. Dec. 1986). The extent to which the soil is already saturated with moisture will affect the runoff produced at a particular time. Since this will vary continuously with weather conditions, however, it is not a factor that reasonably could be used in designing a rate structure for runoff fees. The steepness of slopes will also obviously be a less significant factor in a relatively flat locality like Hampton than it would be in a more hilly jurisdiction.
5It does not necessarily follow that Hampton must refund any service charge paid without protest under the current rate schedule. The Hampton ordinance itself includes a mechanism for property owners to request adjustment of incorrect fees. Hampton, Va., Ordinance 1121 (May 25, 1994) (adding City Code § 33.1-16(d)). Thus, whether citizens who have previously paid the fees without making a request for adjustment are now entitled to one, or have waived any right to a refund, is a matter appropriately determined by the city council.
COUNTIES, CITIES AND TOWNS: PUBLIC UTILITIES; FRANCHISES; ETC.

PUBLIC SERVICE COMPANIES: STATE OPERATION OF PUBLIC UTILITIES.

Statutory authority for localities to own and operate public utilities other than those specified is not broad enough to encompass communications system, which, in addition to providing cable television service, may provide other services that are not normally provided by local governments or are not clearly within meaning of term "public utility." Localities may not own and operate such system.

April 12, 1995

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether § 15.1-292 of the Code of Virginia, which empowers local governments to operate "public utilities," gives localities sufficient authority to own and operate what you describe as a "communications system." You define the type of "communications system" about which you ask as a network that presently provides cable television service, as defined in § 15.1-23.1 and in 47 U.S.C.A. § 522(6) (West Supp. 1994), and that, after obtaining any necessary federal or state regulatory approvals, can also provide other services such as telephone service (including interchange service), data transmission, and other information and on-line programming services.

No Attorney General has opined that a "communications system" as defined in your letter is a public utility for the purposes of § 15.1-292. Two prior opinions of the Attorney General conclude that, in limited situations, cities or towns may acquire and operate cable television systems. A 1991 opinion concludes that a city or town that grants a franchise to a cable system may include provisions in the franchise to enable the locality to acquire the system when the franchise is terminated. The earlier opinion relies on language in a particular city's charter as authority for that locality's ownership of a cable system. Neither opinion, however, relies on the conclusion that a cable system is a "public utility" under § 15.1-292(A).

Section 15.1-292(A) authorizes all localities to establish and to operate "waterworks, gas works, electric plants, public mass transportation systems, and other public utilities." (Emphasis added.) The issue presented by your question, therefore, is whether the use of the term "public utility" as used in that statute is broad enough to encompass not only a cable television system or traditional local exchange telephone service, but also other services, such as the telephone service (including interchange service), data transmission, and other information on-line programming services, that your letter defines as part of a "communications system."

The primary object of statutory construction is to ascertain and give effect to legislative intent. Section 15.1-292 does not define "public utility." In the absence of any
such definition, the term must be given its common, ordinary meaning. "Public utility" generally is defined as "[a] business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph service." A public utility also usually provides a regulated service.

Under the Dillon Rule of strict construction of local governmental powers, a locality may not engage in a particular activity unless the authority for it to do so is expressly granted in a state statute or necessarily implied from a power that is expressly granted. The inclusion of the phrase "other public utilities" in § 15.1-292(A) indicates a legislative intent to grant localities authority to own and operate types of utilities other than those specified in the statute. In my opinion, however, that general language does not necessarily imply the authority to own and operate the wide range of communications services you include in your definition of a "communications system," none of which has historically been provided by Virginia local governments, and some of which are clearly not within the common meaning of the term "public utility."

The General Assembly may, of course, determine that some or all of those services are appropriately provided by local governments. I am, however, unable to conclude that it has already made such a determination in statutory language adopted long before those services could have been contemplated. Accordingly, it is my opinion that § 15.1-292(A) does not authorize localities to own and operate communications systems as defined in your letter.

1The first sentence of § 15.1-292(A) provides: "The governing body of every county, city and town may acquire or otherwise obtain control of or establish, maintain, operate, extend and enlarge waterworks, gas works, electric plants, public mass transportation systems, and other public utilities within or without the limits of the county, city or town and may acquire within or without the limits of the county, city or town by purchase, condemnation or otherwise whatever land may be necessary for acquiring, locating, establishing, maintaining, operating, extending or enlarging waterworks, gas works, electric plants, and other public utilities or public transit or transportation systems, and the rights-of-way, rails, pipes, poles, conduits or wires connected therewith, or any of the fixtures or appurtenances thereof." [Emphasis added.]

2Section 15.1-23.1(A) defines "cable [television] service" as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection of such video programming or other programming service."

3This federal statute, part of the Cable Communications Policy Act of 1984, contains a definition of "cable service" that is substantially the same as the definition in § 15.1-23.1.

4I assume for purposes of this opinion that your question relates to the authority of localities to own and operate such a system to furnish the communications services in question to its citizens or citizens of a neighboring jurisdiction. Nothing in this opinion should be construed to address the authority of localities or local agencies to furnish for their own internal operating purposes any of the communications services you include in your definition.

51991 Op. Va. Att’y Gen. 61. This opinion relies on a combination of federal and state statutes. Section 15.1-23.1(B) authorizes a county, city or town to grant a franchise to a cable television
system. Section 15.1-307 authorizes a city or town to provide in the franchise for the municipality's acquisition of the "plant" and "property" of the franchisee. The fourth paragraph of § 15.1-307 further provides that the municipality may operate that "plant or property" where "authorized by law." The Communications Policy Act of 1984 allows any "franchising authority [to] hold any ownership interest in any cable system." 47 U.S.C.A. § 533(e)(1) (West 1991).


The only definition of "public utilities" found in the Code is contained in Chapter 17 of Title 56, which provides that for the purposes of state operation of public utilities when there is an imminent threat of curtailment, interruption or suspension of their operation, the term means "any person, partnership, association or corporation engaged in the business of furnishing electric power, water, light, heat, gas, transportation or communication, or any one or more of them, to the people of Virginia." Section 56-523. While Chapter 17 includes the word "communication" within the definition of "public utilities," this chapter does not apply to the facts contained in your letter because there is no imminent threat. Accordingly, analysis of your question shall be limited to authority under § 15.1-292.


Since I conclude that localities are not authorized by Virginia law to own and operate "communications systems," I do not reach the additional question contained in your letter regarding whether the Communications Policy Act of 1984 preempts and supersedes any inconsistent provision of Virginia law.

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

Town of Floyd deposits solid waste collected from its residents at county's transfer station and accesses county's solid waste management system at no charge. Floyd County ordinance imposing reduced monthly solid waste management and environmental services fee, to reflect collection services town provides to its residents, is enforceable within Town of Floyd.

February 1, 1995

The Honorable Virgil Goode Jr.
Member, Senate of Virginia

You ask whether Floyd County has the authority to impose a solid waste management and environmental services fee. You also ask whether the county ordinance imposing the fee is enforceable within the Town of Floyd.
You relate that Floyd County provides solid waste management services to county citizens, including citizens located in the Town of Floyd. In order to address issues of financing the closure of the existing landfill, groundwater monitoring of the closed landfill, the construction and operation of a solid waste transfer station, and the payment of transportation and disposal fees to the county’s disposal contractor, the Floyd County board of supervisors adopted the Floyd County Solid Waste Management and Environmental Service Fee Ordinance at a meeting held March 21, 1994. The ordinance was adopted as a means of financing “a portion of the costs incurred by Floyd County in connection with providing solid waste management and environmental services mandated by federal and State law.”

The ordinance imposes a monthly fee of $6 against the “owner, occupant, or tenant of each occupied residential lot or occupied residential parcel of real property” in the county for the “collection, transfer and disposal of solid waste, recycling services, and other solid waste management and environmental services provided by Floyd County.”

Further information provided this Office recites that the Town of Floyd provides solid waste collection services to its residents. The town deposits the collected solid waste at the county’s transfer station without paying a tipping fee, and the county pays the transport and disposal costs for the town’s solid waste deposited at the transfer station. Town residents also have access to Floyd County’s solid waste management system through use of the green box system, at no charge. The town makes no municipal contribution to the county’s costs for operation of the solid waste management system. The Floyd County ordinance reduces the monthly fee by one-third for “owners, occupants, and tenants of occupied residential lots, occupied parcels, or occupied dwelling units located within the incorporated boundaries of the Town of Floyd.” The reduction is intended to reflect the collection services the town provides to its residents.

You first ask whether Floyd County has the authority to impose a solid waste management and environmental services fee.

Section 15.1-11.5:3 of the Code of Virginia authorizes the county to “provide and operate ... solid waste management facilities ... for the collection, management, recycling and disposal of solid waste, recyclable materials, and other refuse of the ... jurisdiction,” and to “charge and collect compensation for such services.” Section 15.1-362.1(A) specifically authorizes “Floyd County, and any county with a population between 39,550 and 41,550, [to] levy a fee for the disposal of solid waste.” The fee may not exceed “the actual cost incurred by such county in procuring, developing, maintaining, and improving such landfill,” and in providing a reserve for capping and closing the landfill in the future.

The Floyd County ordinance imposes a fee for the collection, transfer and disposal of solid waste, recycling services and other solid waste management and environmental
services provided by the county. Therefore, it is my opinion that the provision of such services clearly falls within the authority granted to Floyd County by §§ 15.1-11.5:3 and 15.1-362.1. It is further my opinion that §§ 15.1-11.5:3 and 15.1-362.1 authorize Floyd County to levy an assessment for solid waste disposal.

Your next inquiry is whether the ordinance is enforceable within the Town of Floyd.

The town utilizes the county’s solid waste management system. Section 15.1-11.5:3 authorizes the county to provide and operate solid waste management facilities. Sections 15.1-11.5:3 and 15.1-362.1 authorize the county to levy an assessment for solid waste disposal. In order for a county to exercise the duty and authority to provide a solid waste management system, the corresponding ability to pay for the system must exist. It is, therefore, my opinion that the Floyd County ordinance imposing a solid waste management and environmental services fee is enforceable within the Town of Floyd.

1The Floyd County Solid Waste Management and Environmental Service Fee Ordinance is recorded in the Clerks Office of the Circuit Court of Floyd County in Deed Book 196, at 590.
2Ord., supra note 1, para. 5, at 3.
3Id. paras. 6, 7, at 3.
4Letter from Gregory J. Haley, Floyd County Attorney, Gentry, Locke, Rakes & Moore, Roanoke, Virginia, to James W. Hopper, Senior Assistant Attorney General and Chief of Opinions Section (Dec. 1, 1994).
5Ord., supra note 1, para. 9, at 6.
6Section 15.1-362.1(A).

COUNTIES, CITIES AND TOWNS: VIRGINIA COALFIELD AUTHORITY — VIRGINIA AREA DEVELOPMENT ACT.

Board of Virginia Coalfield Economic Development Authority decides whether Authority may provide grant from its Fund to be used as Tazewell County’s matching share of loan that Cumberland Plateau Planning District Commission plans to provide to private industry in county. Grant funds to be used by Authority are limited to those contributed by Tazewell County, unless required approval for use of funds contributed by any other county or city has been obtained. Monies repaid to Commission by recipient of Authority’s original grant of Tazewell County’s matching share may be used in county, or, in Authority’s determination whether particular grant is in best interest of county, to provide loan which may not again be available for county’s use.

May 19, 1995
The Honorable Clarence E. Phillips  
Member, House of Delegates

You ask whether the Virginia Coalfield Economic Development Authority may expend funds to be used as Tazewell County's matching share of a loan that the Cumberland Plateau Planning District Commission plans to provide to a private industry in the county.

The Cumberland Plateau Planning District Commission (the "Commission") operates pursuant to the Virginia Area Development Act, §§ 15.1-1400 through 15.1-1452 of the Code of Virginia, and serves Buchanan, Dickenson, Russell and Tazewell Counties. Among the powers granted a planning district commission is the power

[to make application for and to accept, disburse and administer, for itself or for member governmental subdivisions so requesting, loans and grants of money or materials or property at any time from any private or charitable source or the United States of America or the Commonwealth of Virginia, or any agency or instrumentality thereof.]

You relate that the Commission receives grants from the Economic Development Administration (the "EDA") of the United States Department of Commerce under the Revolving Loan Fund ("RLF") Program. You also relate that the Commission uses the funds to make loans to qualifying private businesses or industries to further economic development in the district, and that the Commission must administer the funds in accordance with EDA guidelines. The guidelines require that the locality in which the funds are to be used provide a matching share of 25 percent of the total loan.

Finally, you relate that the Commission has approved an RLF loan to a private industry in Tazewell County. The Tazewell County board of supervisors has requested the Virginia Coalfield Economic Development Authority to provide a grant of the county's matching share.

Chapter 40 of Title 15.1, §§ 15.1-1635 through 15.1-1650, creates the Virginia Coalfield Economic Development Authority (the "Authority") and details its powers.

The primary purpose of the Authority is to enhance the economic base for the seven county and one city coalfield region of Virginia (Lee, Wise, Scott, Buchanan, Russell, Tazewell and Dickenson Counties and the City of Norton).

The Authority shall provide financial support for the purchase of real estate, construction of buildings for sale or lease, installation of utilities, direct loans and grants to private for-profit basic employers, apply for matching funds from the state or federal government, or the private sector,
and any other support improvements it deems necessary, including flood control dams. All such loans and grants may be managed by the LENOWISCO and Cumberland Plateau Planning District Commissions in their respective service areas.\[131\]

The Authority maintains the Virginia Coalfield Economic Development Fund (the “Fund”), which is capitalized by mandatory contributions from each of the named jurisdictions and is administered by the Board of the Authority.\[4\]

Assuming the money will be used for one of the eligible purposes specified in § 15.1-1646, it is my opinion that the Authority may make the grant under the facts you present. Section 15.1-1646 empowers the Authority to make grants “to or for the benefit of private, for-profit enterprises [and] governmental or corporate instrumentalities in the coalfield region of Virginia (including any political subdivision of the Commonwealth ...).” (Emphasis added.) To assure that each participating locality receives, at least indirectly, the benefit of its mandated contributions to the Fund, § 15.1-1645 restricts the use of the moneys in the Fund to “the county or city from which the funds were received, unless the governing body of the county or city consents to their use in another county or city.”\[5\]

The grant will be used to provide a loan to a private industry in Tazewell County. Section 15.1-1637 authorizes financial support through loans and grants to private employers, and § 15.1-1646 expressly provides that a grant may be made either “to or for the benefit of” such enterprises. (Emphasis added.) Assuming the construction and operation of the facility will “enhance the [county’s] economic base,”\[6\] Tazewell County will receive the benefit of its contribution to the Fund. In fact, you state that the Tazewell County board of supervisors has requested the Authority to make the grant. The funds which may be used by the Authority for the grant, however, are limited to the funds contributed by Tazewell County, and may not be from funds contributed by any other county or city. If funds are used for the grant that previously were contributed by another county or city, § 15.1-1645 requires approval from the governing body of the county or city whose funds are being used for the grant.

You ask whether the grant could be viewed as a grant to the Commission, rather than to the industry or to the county, and, for that reason, be prohibited. It is my opinion that interpreting the facts you present in this technical manner would be contrary to the legislative intent expressed throughout Chapter 40 and to the clear legislative directive of § 15.1-1638. The language granting powers to the Authority in §§ 15.1-1637 and 15.1-1646 is broad, and, with the exception of § 15.1-1645, Chapter 40 places few prohibitions on the Authority in the exercise of its powers. Moreover, § 15.1-1648 provides that the chapter, “being necessary for the welfare of the Commonwealth and its inhabitants,” is to be liberally construed to effect its purposes.
While the Authority has the power to make a grant for the use of a private industry in Tazewell County, the decision whether to make the grant is within the discretion of the Board of the Authority. The Authority has the sole power to make expenditures from the Fund and to determine which eligible projects to support. The Board of the Authority is the appropriate body to consider all of the relevant facts, including how the Commission intends to use the funds and the benefit the county will receive from the grant, and to determine which expenditures best achieve the purposes of the Authority.

You ask also whether, as the recipient of the loan repays the loan to the Commission, the Commission must segregate the payments for future use only in Tazewell County. It is my opinion that, under the facts you present, § 15.1-1644 is satisfied if the Authority’s original grant of Tazewell County’s matching share is used in the county. This is not to say that, in determining whether the particular grant is in the best interest of the county, the Authority may not consider that the county’s moneys will be used to provide a loan which, unlike a direct loan by the Authority, may not again be available for use in the county.

1See § 15.1-1405(a1).
2Section 15.1-1404(b)(5).
3Section 15.1-1637.
4See §§ 15.1-1638, 15.1-1644.
6Section 15.1-1637.
7Section 15.1-1646.

You relate that the EDA guidelines provide that as loans are repaid into the Commission’s RLF account, the moneys are available for further lending by the Commission under the RLF Program.

COUNTRIES, CITIES AND TOWNS: VIRGINIA WATER AND SEWER AUTHORITIES ACT — COUNTIES GENERALLY — PUBLIC UTILITIES; FRANCHISES; ETC.

STATE WATERS, PORTS AND HARBORS: STATE WATER CONTROL LAW — REGULATION OF INDUSTRIAL ESTABLISHMENTS.

Fauquier County board of supervisors may enact ordinance, consistent with regulations of Fauquier Water and Sanitation Authority, State Water Control Board and Environmental Protection Agency, requiring pretreatment of wastewater by industrial users of Authority’s facilities. Ordinance may impose penalties required by federal and state law for violation of its provisions.

January 9, 1995
Mr. Paul S. McCulla  
County Attorney for Fauquier County

You ask whether § 15.1-510 of the Code of Virginia, or other statutes, authorize the Fauquier County board of supervisors to adopt an ordinance requiring certain industrial customers of the Fauquier Water and Sanitation Authority (the “Authority”) to pretreat their wastewater. If so, you ask whether that ordinance may impose a civil or criminal penalty in an amount not to exceed $1,000 per day on industries that violate the ordinance. You indicate that the Department of Environmental Quality has notified the Authority that it is in violation of federal and state water control regulations until such an ordinance is adopted.

Section 62.1-44.16(1) provides that the owner of an establishment that discharges industrial or other wastes into state waters shall first provide facilities approved by the State Water Control Board (the “Board”) to treat or control those wastes. The purpose of the pretreatment regulations adopted by the Environmental Protection Agency (“EPA”) and by the Board is to prevent the pollution of the natural waters of the nation and state. Section 15.1-510, consistent with the national and state policy of protecting the natural waters, expressly authorizes counties to adopt regulations “for the prevention of the pollution of water in the county.”

It is my opinion that, by establishing a water and sanitation authority to maintain and operate a water system, a county does not relinquish the power granted by § 15.1-510 to enact ordinances regulating the pollution of water in the county when such ordinances are not inconsistent with the regulations of the authority.

Section 15.1-292.2 also evidences a legislative intent that a governing body retains the power to regulate water and sewer services, despite the existence of a water and sewer authority with the same powers. Section 15.1-292.2 grants a governing body the power “to regulate sewage collection, treatment or disposal service and water service,” provided the exercise of the power does not “alter or amend” the powers or duties of a water and sewer authority and does not supersede or conflict with “duties or responsibilities of the State Water Control Board.” In the facts you present, the ordinance to be adopted by the governing body is not only consistent with the exercise of the powers of the Authority and the Board, but also is necessary to enable the Authority to perform its duties under federal and state law.

Section 15.1-1241(A), a portion of the Virginia Water and Sewer Authorities Act, §§ 15.1-1239 through 15.1-1270, enables the governing body of a political subdivision to create an authority, “which shall be a public body politic and corporate.” Section 15.1-1250(f) grants such water and sewer authorities the power to acquire or construct, and to operate and maintain, any water system. Section 15.1-1250(b) empowers authorities “[t]o adopt, amend or repeal ... regulations ... not inconsistent with the general laws of the Commonwealth.” Under § 15.1-1268, a water and sewer authority is subject to the
jurisdiction of the Board. The regulations adopted by the Board regarding a publicly owned treatment works ("POTW") pretreatment program include the federal requirement that the POTW be able to "seek or assess civil ... penalties of at least $1,000 per day per violation." A county ordinance incorporating the Authority's pretreatment regulations enables the Authority to comply with this requirement of federal and state law.

It must be presumed that, in enacting the various statutes defining the powers of a county, a water and sewer authority, and the Board, the General Assembly did not intend to establish a system that would operate to create conflict between local, state and federal law regarding water pollution controls. In my view, the statutes, read as a whole, indicate a legislative intent to avoid such conflict and to enable the establishment of consistency in the regulation of water pollution and control. The county's enactment of the ordinance you suggest creates consistency among the Authority's regulations, the county's ordinances, the Board's regulations and the EPA's regulations. It is my opinion that the Fauquier County board of supervisors has the authority to enact an ordinance, consistent with the regulations of the Authority, requiring the pretreatment of wastewater by industrial users of the facilities of the Authority.

Section 15.1-505 expressly authorizes a county to set a criminal fine for violation of an ordinance, provided the fine does not exceed the penalty under state law for a Class 1 misdemeanor. Under long-standing practice, Virginia localities frequently specify in ordinances prohibiting acts of a continuing nature that each day the violation continues will constitute a separate offense. A number of other remedial state statutes establish penalties for violations of environmental protection laws. Section 62.1-44.32 similarly makes each day of a violation a separate offense.

133 U.S.C.A. § 1317(B)(1) (West 1986) (requiring Administrator of EPA to promulgate "regulations establishing pretreatment standards for introduction of pollutants into treatment works ... which are publicly owned.")


See 1987-1988 Op. Va. Att'y Gen. 233, 234 (by establishing water and sewer authority, county does not delegate all of its statutorily granted power to provide utility service to authority; unless prohibited by Water and Sewer Authorities Act, locality retains power to meet needs of citizens when existing authority is unable to act). A county ordinance consistent with regulations of the county water and sanitation authority and enacted for the express purpose of complying with federal and state law pollution standards is factually distinct from a county ordinance attempting to control the general regulations or the general operations of the authority. See 1981-1982 Op. Va. Att'y Gen. 450 (once locality goes through detailed procedure for establishing water and sewer authority, authority has powers granted by statute and its articles of incorporation; locality may not then enact detailed ordinance setting out powers of water and sewer authority or prescribing rules for its operation).
Compare 1989 Op. Va. Att'y Gen. 137, 142 (governing body's limiting number of sewer connections water and sanitation authority may accept is inconsistent with authority's obligation to provide service if capacity is available).

40 C.F.R. § 403.8(f)(1)(vi)(A) (1993) (authorizing POTW "to seek or assess civil or criminal penalties in at least the amount of $1,000 a day for each violation by Industrial Users of Pretreatment Standards and Requirements").

7VR 680-14-01 § 7.6(F)(1)(g), supra note 2.

No provision of the Virginia Water and Sewer Authorities Act authorizes the assessment of civil or criminal penalties by an authority. It is generally held that, absent statutory authority, a political subdivision does not have the authority to impose such penalties. See 1987-1988 Op. Va. Att'y Gen. 211. Likewise, there is no statutory authority for a county to enact an ordinance prescribing penalties for a violation of the regulations of a water and sewer authority.

Pursuant to § 18.2-11(a), the maximum fine for a Class 1 misdemeanor is $2,500.


COURTS NOT OF RECORD: JURISDICTION AND PROCEDURE, CIVIL MATTERS — DISTRICT COURTS - FINANCING OF THE DISTRICT SYSTEM.

RULES OF SUPREME COURT OF VIRGINIA: GENERAL DISTRICT COURTS - IN GENERAL — THE SUPREME COURT — THE COURT OF APPEALS — APPEALS PURSUANT TO THE ADMINISTRATIVE PROCESS ACT — GENERAL RULES APPLICABLE TO ALL PROCEEDINGS.

Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected.

October 13, 1995

The Honorable John T. Frey
Clerk, Circuit Court of Fairfax County

You ask whether a notice of appeal, filed by a party appealing a decision ("appellant") of the general district court to the circuit court for a trial de novo, may be considered a pleading that would obligate the appellant to mail a copy of the notice to the other party ("appellee") or his attorney.¹

You present a hypothetical situation involving a party in a civil action who files the appropriate notice of appeal with the clerk of the general district court.² The general
district court clerk sets the *de novo* trial in accordance with a list of dates provided by the judges of the circuit court. The notice to the appellee required by § 16.1-112, however, is made by the circuit court clerk only after the case is transferred from the general district court. You relate that the transfer often is subject to delay and results in the appellee not receiving notice of the appeal until the scheduled *de novo* circuit court trial is imminent. For this reason, you ask whether the notice of appeal filed by the appellant may be considered to be a pleading, similar to a motion for a new trial, which would obligate the appellant to provide notice to the appellee when the notice of appeal is filed with the general district court clerk.³

In the case of *The Covington Virginian v. Woods*, the Supreme Court of Virginia stated that """"[w]hen the legislature prescribes the method for the exercise of the right of appeal or supervision, such method is exclusive, and neither court nor judge may modify these rules without express statutory authority, and then only to the extent specified.""""⁴ The Court further stated:

The procedure to effect an appeal from a trial justice court to a circuit or corporation court is different from that involved in an appeal to this court. In the trial justice court, the appellant is not required to give notice of his intention to appeal nor of the perfection of his appeal. No answer to the application for an appeal is allowed, the appeal being granted under the statute as a matter of right, upon compliance with statutory requirements.⁵

The “trial justice court” is the predecessor of the general district court.⁶ The provisions of the Code of 1942 considered by the Virginia Supreme Court in *The Covington Virginian v. Woods* case, which governed appeals from the “trial justice court,” are essentially the same as the statutory provisions presently governing appeals from the general district court.⁷ Therefore, the appellant is not required to give notice to the appellee when filing a notice of appeal.

The statutory provisions and Rules of Supreme Court of Virginia setting forth the procedures to be followed when appealing a case from a general district court do not change the result reached in *The Covington Virginina v. Woods* case. Section 16.1-106 provides that a party has “an appeal of right” to the circuit court, as long as the appeal is taken within ten days after a ruling of the general district court. Section 16.1-107 provides that an appeal is perfected once the appellant gives the requisite bond and pays the appropriate writ taxes. These statutory provisions do not place upon appellant an obligation to provide notice to the appellee as a condition of perfecting the appeal. The Supreme Court Rule specifying what constitutes the noting of an appeal from a general district court does not contain any language requiring the appellant to mail a copy of the notice of appeal to the appellee.⁸ By contrast, the Rules that stipulate the requirements for perfecting an appeal from the circuit court to either the Supreme Court of Virginia or the Court of Appeals of Virginia specifically require that the appellant provide notice to the appellee in conjunction with the filing of the notice of appeal.⁹ I note that the Rule
governing the appeal of an administrative decision to the circuit court, an appeal of right, expressly requires the appellant to provide notice to the appellee.\textsuperscript{10}

You specifically ask whether the notice of appeal may be deemed to be analogous to a motion for a new trial, to be considered a pleading requiring the appellant to mail a copy of the notice to the appellee. It is my opinion that it may not since the statutory provisions specifying the method by which an appeal to the circuit court is perfected do not obligate the appellant to notify the appellee, as do the Virginia Supreme Court Rules governing other types of appeals. When the requisite steps are taken by an appellant to perfect the appeal, the appellant has a right to a trial \textit{de novo} in the circuit court.

Finally, the method by which the appellee is to be given notice that a decision of the general district court is being appealed is governed by statute. Section 16.1-112 specifically provides that it is the clerk of the circuit court who, upon docketing the appeal, shall serve notice on the appellee that an appeal of the general district court decision has been perfected. Accordingly, I am of the opinion that the expressed intent of the General Assembly is that the circuit court clerk, and not the appellant, is responsible for notifying the appellee of the appeal.

\textsuperscript{1}The forms promulgated by the Committee on Districts Courts pursuant to § 16.1-69.51 are used statewide by a party to appeal a ruling of a district court: (1) Civil Appeal Notice, Form DC-475 11/92; (2) Notice of Appeal, Form DC-370 1/81 (used expressly for criminal appeals); and (3) Notice of Appeal, Form DC-580 1/89 (used for juvenile court appeals).

\textsuperscript{2}Statutory requirements for an appeal of a judgment in a civil action from a general district court to a circuit court are provided by §§ 16.1-106, 16.1-107 and 16.1-112.

The first sentence of § 16.1-106 states: "From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than fifty dollars, exclusive of interest, any attorney’s fees contracted for in the instrument, and costs, or when the case involves the constitutionality or validity of a statute of the Commonwealth, or of an ordinance or bylaw of a municipal corporation, or of the enforcement of rights and privileges conferred by the Virginia Freedom of Information Act (§ 2.1-340 et seq.), there shall be an appeal of right if taken within ten days after such order or judgment, to a court of record.”

Section 16.1-107 provides:

"No appeal shall be allowed unless and until the party applying for the same or someone for him shall give bond, in an amount and with sufficient surety approved by the judge or by his clerk if there is one, to abide by such judgment as may be rendered on appeal if such appeal is perfected, or if not so perfected, then to satisfy the judgment of the court in which it was rendered....

\textbf{[\textit{\textstar*} \textstar* \textstar*]} 

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

Section 16.1-112 provides:

"The judge or clerk of any court from which an appeal is taken under [Article 3, Chapter 6 of Title 16.1, relating to civil case procedure] shall promptly transmit to the clerk of the appellate
court the original warrant or warrants or other notices or pleadings with the judgment endorsed thereon, together with all pleadings, exhibits and other papers filed in the trial of the case, the required bond, and, if applicable, the money deposited to secure such bond and the writ tax and costs paid pursuant to § 16.1-107. Upon receipt of the foregoing by the clerk of the appellate court, the case shall then be docketed.

"When such case has been docketed, the clerk of such appellate court shall by writing to be served, as provided in §§ 8.01-288, 8.01-293, 8.01-296 and 8.01-325, or by certified mail, with certified delivery receipt requested, notify the appellee or his attorney that such an appeal has been docketed in his office; provided, that upon affidavit by the appellant or his agent in conformity with § 8.01-316 being filed with the clerk, the clerk shall post such notice at the front door of his courtroom and shall mail a copy thereof to the appellee at his last known address or place of abode or to his attorney; and he shall file a certificate of such posting and mailing with the papers in the case. No such appeal shall be heard unless it appears that the appellee or his attorney has had such notice, or that such certificate has been filed, ten days before the date fixed for trial, or has in person or by attorney waived such notice."

"All pleadings not otherwise required to be served and requests for subpoena duces tecum shall be served on each counsel of record by delivering or mailing a copy to him on or before the day of filing." VA. SUP. CT. R. 1:12.

¹82 Va. 538, 543, 29 S.E.2d 406, 409 (1944) (citations omitted).
²Id. at 545, 295 S.E.2d at 409.
⁵See VA. SUP. CT. R. 7A:13.
⁶See id. R. 5:9(a), 5A:6(a).
⁷See id. R. 2A:2.

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

CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES.

RULES OF SUPREME COURT OF VIRGINIA: CRIMINAL PRACTICE AND PROCEDURE - APPEALS.

General district court may determine and set new bail, including imposition of new conditions or denial of bail, after defendant has been convicted and sentenced to jail, before case is transferred to circuit court for de novo hearing. District court's decision to deny, or increase conditions for, bail after conviction does not infringe on defendant's constitutional rights or any statutory right of appeal or retrial.

February 3, 1995
You ask whether a general district court may impose conditions on a defendant’s release from custody pending an appeal after conviction and imposition of a jail sentence. Specifically, you ask whether the district court may impose more severe conditions of bail after conviction than it had imposed before trial. You also ask whether such conditions violate the defendant’s constitutional rights or any statutory right to an appeal *de novo*.

Pursuant to §16.1-135, one who has been convicted of an offense in the general district court and has noted an appeal is entitled to credit for any bond posted before trial. In addition, any new bond required for release pending the appeal in the circuit court “shall be given before the judge ... of the district court.” In interpreting the predecessor to §16.1-135, the Supreme Court of Virginia has held that the authority of the general district court after conviction is limited to granting bail and carrying into execution its judgment.

Section 16.1-132 grants an absolute right of appeal to the circuit court from any nonfelony conviction in the general district court if the appeal is noted within ten days of conviction. Section 16.1-136 requires the circuit court to hear the case *de novo* and entitles the accused to a jury trial. After the ten-day period specified in §16.1-132 lapses, however, the general district court loses jurisdiction over the case. Therefore, the general district court may set post-conviction bail only when application is made before the transfer of the case to the circuit court.

Section 16.1-135 also provides that the new bond required after conviction must be given in accordance with §19.2-123, which grants considerable discretion to the general district court in determining conditions for release, including bond, restrictions on behavior during the period of release, and “any other condition” the court finds reasonably necessary to assure both the defendant’s appearance at trial and his good behavior pending trial. Section 19.2-124 grants a defendant the right to appeal any order denying bail, or setting excessive or unreasonable terms of bail under §19.2-123. Such an order may be appealed successively, to the next higher court, and ultimately to the Supreme Court of Virginia. These statutes, when read in conjunction with the new bond language of §16.1-135, suggest that the district court may determine the defendant’s bond after conviction.

The Supreme Court of Virginia also has interpreted §19.2-319 to authorize a circuit court to take into consideration many factors, including the fact that a defendant has been convicted, in granting or denying bail pending appeal. Section 19.2-13(B)(i) expressly allows for an increase in bail bond once an accused has been convicted. Thus, in the analogous situation of post-conviction bail pending appeal to the circuit court, the
general district court has the discretion to consider these same factors in determining bail, including the fact that the defendant has been convicted.

In my opinion, therefore, a general district court may determine and set new bail, including either the imposition of new conditions or the denial of bail, after the defendant has been convicted and sentenced to jail, before the case is transferred to circuit court for a *de novo* hearing.

Section 16.1-132 confers the right of retrial before a jury after conviction in the general district court and appeal to the circuit court. The right is an absolute one, and may not be conditioned on any factor except the filing of a timely notice of appeal.

In a recent case, the Court of Appeals of Virginia held that the circuit court committed error in dismissing a case on the basis that the defendant had failed to file a timely appeal bond in the general district court, and concluded that the right to a *de novo* trial could not be conditioned on the filing of a bond.

The Supreme Court of Virginia has held that the defendant's motion before the general district court to suspend his jail sentence did not act as a waiver of, or bar to, his right to retrial in the circuit court. Payment of a fine or commencement of a jail sentence does not impair the right of appeal to the circuit court. The analogous situation in which a defendant either is denied bail and must begin serving his sentence or is required to meet certain conditions for bail, such as posting a bond, does not act as a bar to trial *de novo* in the circuit court. The result of the defendant's failure to comply with any conditions imposed by the general district court will be incarceration, rather than denial of the trial *de novo* guaranteed by § 16.1-132.

In my opinion, therefore, the decision by a general district court to deny bail or increase the conditions for bail after conviction does not infringe on a defendant's constitutional rights or any statutory right of appeal or retrial.

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5. Section 19.2-123(A)(2)-(4).
9. See *Dickerson, etc. v. Commonwealth*, 162 Va. 787, 794, 173 S.E. 543, 546 (1934) (plea of guilty in lower court is no bar to retrial); *see also Gravely v. Deeds*, 185 Va. 662, 665, 40 S.E.2d
175, 176-77 (1946) (payment of fines and commencement of jail sentence is not waiver of new trial).


11Dickerson, etc. v. Commonwealth, supra note 6, 162 Va. at 789, 792, 173 S.E.2d at 544, 545.

12VA. SUP. CT. R. 3A:19.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Juvenile previously tried and convicted in circuit court as adult, who again is charged with commission of offense classified as felony, does not have to be housed entirely separate and apart from adult inmates. Juvenile who remains within jurisdiction of juvenile court and whose disruptive behavior necessitates removal from juvenile detention facility to adult facility must be physically separated from adults in jails and other detention facilities.

March 8, 1995

The Honorable W. Alvin Hudson
Sheriff for the City of Roanoke

You ask whether a juvenile previously tried and convicted in a circuit court as an adult pursuant to the provisions of §§ 16.1-269.1 through 16.1-269.6 may be housed with adults in a local jail or another detention facility following arrest on new criminal charges. You also ask whether the provisions of § 16.1-249(E) require that a juvenile who remains within the jurisdiction of the juvenile court, but whose disruptive behavior necessitates removal from a juvenile facility, be physically separated from adults in jails and other detention facilities.

It is clear from the 1994 amendments to §§ 16.1-269.6(C) and 16.1-271 that the General Assembly intends for a juvenile who, after July 1, 1994, has committed a criminal offense that has been transferred to the circuit court and has been convicted as an adult no longer may enjoy any benefit of the juvenile justice system when that juvenile thereafter commits another criminal offense.¹ Such a juvenile must be tried as an adult. The General Assembly intends that after probable cause is found against a juvenile as an adult, such juvenile should be housed in jail as opposed to a juvenile detention facility.² Section 16.1-269.6(B) requires the removal of the juvenile from a juvenile detention facility to an appropriate local correctional facility. Prior opinions of the Attorney General conclude that the General Assembly intended that a juvenile tried and sentenced by a circuit court as an adult should be treated as an adult offender for all purposes.³
I am, therefore, of the opinion that juveniles who previously have been tried and convicted as adults, and who again are charged with commission of offenses classified as felonies, do not have to be housed entirely separate and apart from adult inmates.

Your second inquiry involves juveniles who remain within the jurisdiction of the juvenile court, but whose behavior requires removal from the juvenile detention facility. Such a juvenile clearly is different from those who previously have been tried and convicted in the circuit court as an adult. The juvenile who remains within the jurisdiction of the juvenile court may only be housed in an adult facility entirely separate and apart from the adults in that facility under the provisions of § 16.1-249(E)(i).

In addition, regulations promulgated pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, which apply to states receiving funds under the Act, do not permit casual contact with adult inmates or authorize routine transport of such juveniles through areas where adult prisoners are located, and do not permit adult prisoners to serve meals to, or exchange clothing for, such juveniles. To continue receiving such funds, the Commonwealth must comply with these regulations.

Therefore, I remain of the opinion that the juvenile who remains within the jurisdiction of the juvenile court and whose disruptive behavior necessitates removal from the juvenile detention facility to the adult facility must be physically separated from adults in jails and other detention facilities.


Section 16.1-269.6(C) provides: "[U]pon conviction of the juvenile following transfer and trial as an adult, the circuit court shall issue an order terminating the juvenile court’s jurisdiction over that juvenile with respect to any future criminal acts alleged to have been committed by such juvenile and with respect to any pending allegations of delinquency which have not been disposed of by the juvenile court at the time of the criminal conviction. Upon receipt of the order terminating the juvenile court’s jurisdiction over the juvenile, the clerk of the juvenile court shall forward any pending petitions of delinquency which have not been disposed of by the juvenile court at the time of the criminal conviction. Upon receipt of the order terminating the juvenile court’s jurisdiction over the juvenile, the clerk of the juvenile court shall forward any pending petitions of delinquency for proceedings in the appropriate general district court." (Emphasis added.)

Section 16.1-271 provides: "The trial or treatment of a juvenile as an adult pursuant to the provisions of this chapter shall preclude the juvenile court from taking jurisdiction of such juvenile for subsequent offenses committed by that juvenile.

Any juvenile who is tried and convicted in a circuit court as an adult under the provisions of this article shall be considered and treated as an adult in any criminal proceeding resulting from any alleged future criminal acts and any pending allegations of delinquency which have not been disposed of by the juvenile court at the time of the criminal conviction.

All procedures and dispositions applicable to adults charged with such a criminal offense shall apply in such cases, including, but not limited to, arrest; probable cause determination by a magistrate or grand jury; the use of a warrant, summons, or capias instead of a petition to initiate the
case; adult bail; preliminary hearing and right to counsel provisions; trial in a court having juris-
diction over adults; and trial and sentencing as an adult. The provisions of this article regarding
a transfer hearing shall not be applicable to such juveniles." (Emphasis added.)

1See § 16.1-269.1(A)(2).


A prior opinion of the Attorney General concludes "that the phrase 'entirely separate and
removed from adults,' as used in § 16.1-249B(i) [now § 16.1-249(E)(i)] requires that juveniles be
physically separated from adults in jails or other detention facilities so there can be no normal
217, 219; see id. at 211 (juvenile committed to county detention facility by juvenile court and
subsequently certified for trial as adult may not be housed in general inmate population after indict-
ment in circuit court).


COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS

FACILITIES FOR DETENTION AND OTHER RESIDENTIAL CARE - DISPOSITION
- JURISDICTION AND VENUE.

Juvenile court has no authority to manage operation, or to delegate management to court
services units or juvenile probation officers, of shelter care home. Subsequent to court's
placement of juvenile in shelter care facility, services and programs facility provides to
juvenile are determined by entity operating facility, subject only to constraints placed on
facility by State Board of Youth and Family Services regulations and by applicable
statutory law.

October 10, 1995

Mr. John R. Roberts
County Attorney for Loudoun County

You ask whether a juvenile and domestic relations district court ("juvenile court")
has the authority to specify or limit the services provided by a local shelter care facility
to children placed in shelter care by that court. You also ask whether a juvenile court
may delegate to juvenile probation officers and other court services unit staff the authority and discretion to specify or limit the services provided by the shelter care facility to
children placed in shelter care by the juvenile court.

You relate that in 1980, the Loudoun County Board of Supervisors identified
emergency shelter care as a high priority need of the local departments of social services,
juvenile probation, and mental health and youth services. Subsequently, the supervisors
established the Loudoun County Youth Shelter,1 which serves children placed there by
the local juvenile court and children referred by the county's social services and mental
health departments and by private families. You state that when the local juvenile court places a child in the shelter, a typical order may provide, among other things, that the facility provide shelter, food and emergency medical treatment. The order also may provide that leave from, and other services provided by, the shelter must be approved in advance by the juvenile probation officer assigned to the case or, in the absence of such officer, by a staff member of the court services unit.

The juvenile courts have exclusive original jurisdiction over juveniles charged with criminal offenses. In all juvenile court proceedings, the welfare of the child is the paramount concern. "The jurisdiction, practice, and procedure of the juvenile ... courts are entirely statutory ...."4

In § 16.1-278(A) of the Code of Virginia,5 the General Assembly has granted the juvenile court limited discretionary authority to order services for all children and families within the jurisdiction of the court, whether or not those children are detained or placed in shelter care under the provisions of §§ 16.1-248.1 and 16.1-249. Section 16.1-278(A) provides the juvenile court with limited discretionary authority to order any state, county or municipal officer, employee or agency to render only those services that are "provided for by state or federal law or an ordinance of any city, county or town." Furthermore, that authority is limited by the jurisdictional boundaries of the court.6 A prior opinion of the Attorney General notes that "[a]ny such order must be consistent with law, including regulations promulgated by the State Board [of Corrections] pursuant to § 16.1-311."7

Section 16.1-310 requires the Department of Youth and Family Services "to devise, develop and promulgate a statewide plan for the establishment and maintenance of suitable local and regional detention homes, group homes and other residential care facilities for children in need of services, delinquent or alleged delinquent youth, reasonably accessible to each court."

Section 16.1-311(A) requires the State Board of Youth and Family Services to prescribe minimum standards for supervision and care of children detained in "detention homes, group homes or other residential care facilities for children in need of services, delinquent or alleged delinquent youth."8 Section 16.1-311(A) also grants authority to the State Board of Youth and Family Services to limit the number of juveniles to be detained or housed in a given facility within its jurisdiction, and to prohibit the detention or housing of children in any place of residence that does not meet such minimum standards. Section 16.1-311(B) requires that "[o]rders of the State Board of Youth and Family Services shall be enforced by circuit courts as is provided for the enforcement of orders of the State Board of Corrections under § 53.1-70."

It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.9 In those situations, the statute's plain meaning and intent govern. Pursuant to the clear language of § 16.1-278(A), the juvenile court judge may
order governmental personnel, agencies or institutions to render only such services as may be provided by law or ordinance. The use of the word “only” in § 16.1-278(A) clearly limits a juvenile court judge’s authority to order only those services to be rendered as are provided by law or ordinance. The mention of one thing in a statute implies the exclusion of another. “‘When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.’” The General Assembly’s grant of express authority to the State Board of Youth and Family Services to set management standards for shelter care facilities implies that the juvenile court is without authority to vary those standards.

The clear language of § 16.1-311(A) gives the State Board of Youth and Family Services the exclusive authority to prescribe minimum standards for the management of shelter care facilities. Under well-recognized principles of statutory construction the specific grant of authority to the Board contained in § 16.1-311(A) must be read as one of the limitations placed by General Assembly on the authority granted the juvenile court in § 16.1-278.

It is my opinion that, under the provisions of § 16.1-278(A), the General Assembly does not authorize the juvenile court either to manage the operation of a shelter care home directly or to delegate that management to court services units or juvenile probation officers. I am of the opinion that once the juvenile court authorizes placement of a juvenile in a shelter care facility, the services and programs that facility provides to the juvenile are determined by the entity operating the facility, subject only to the constraints placed on the facility by regulations adopted by the State Board of Youth and Family Services and by applicable statutory law.

1The State Board of Corrections approved the youth shelter pursuant to the provisions of Article 13, Chapter 11 of Title 16.1, VA. CODE ANN. §§ 16.1-310 to 16.1-322.
2Section 16.1-228 contains the following definitions:
   “‘Delinquent act’ means (i) an act designated a crime under the law of this Commonwealth ....
   “‘Delinquent child’ means a child who has committed a delinquent act or an adult who has committed a delinquent act prior to his eighteenth birthday, except where the jurisdiction of the juvenile court has been terminated under the provisions of § 16.1-269.6.”

Section 16.1-241 conveys on each juvenile court “exclusive original jurisdiction ... over all cases, matters and proceedings involving:
   “A. The custody, visitation, support, control or disposition of a child:
   “1. Who is alleged to be abused, neglected, in need of services, in need of supervision, a status offender, or delinquent, except where the jurisdiction of the juvenile court has been terminated under the provisions of § 16.1-269.6[.]”
5Section 16.1-278(A) provides:
   “The judge may order, after notice and opportunity to be heard, any state, county or municipal officer or employee or any governmental agency or other governmental institution to render only
such information, assistance, services and cooperation as may be provided for by state or federal law or an ordinance of any city, county or town.

“The officer, employee, agency or institution may appeal such order to the circuit court in accordance with § 16.1-296. The circuit court shall advance such appeals on its docket and may stay the order of the juvenile court during the pendency of the appeal. The circuit court may affirm or reverse the order of the juvenile court. Upon reversal, the circuit court may remand the case to the juvenile court for an alternative disposition.”

8Section 16.1-311(A) provides, in part: “The State Board of Youth and Family Services is authorized and directed to prescribe the necessary positions required in the operation of detention homes, group homes or other residential care facilities for children in need of services, delinquent or alleged delinquent youth. The State Board is also authorized and directed to prescribe minimum standards for construction and equipment of detention homes or other facilities and for feeding, clothing, medical attention, supervision and care of children detained therein. It may by its order limit the number of juveniles to be detained or housed in detention homes, group homes or other residential care facilities and may prohibit the detention or housing of children in any place of residence which does not meet such minimum standards and designate some other place of detention or housing for children who would otherwise be held therein.”

12See Pine v. Commonwealth, 121 Va. 812, 821, 93 S.E. 652, 654 (1917); 1991 Op. Va. Att’y Gen. 91, 93, and opinion cited therein (statute limiting thing to be done in particular manner, or by prescribed person or tribunal, implies that it shall not be done otherwise, or by different person or tribunal).

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRUGS.

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

Entry of judgment pursuant to conviction for drug offense(s) automatically results in six-month license forfeiture from date of judgment; general district court imposes such license forfeiture at time of entry of disposition order. DMV Commissioner’s revocation of defendant’s driver’s license for six months, after receiving notice of conviction of drug offense or deferral of proceedings, is not formal prerequisite for such revocation.

February 10, 1995

The Honorable Joseph C. Gwaltney
Judge, Arlington County General District Court
You ask whether the license forfeiture mandated by § 18.2-259.1 of the *Code of Virginia* is to be imposed by virtue of the entry of the disposition order by the general district court, or by order of the Commissioner of the Department of Motor Vehicles ("DMV") upon receipt of the disposition order.

Article 1, Chapter 7 of Title 18.2, §§ 18.2-247 through 18.2-264 ("Article 1"), establishes various drug offenses. Section 18.2-259.1(A) provides that a judgment of conviction under Article 1 "of itself" operates to deprive the person so convicted of the privilege to drive a motor vehicle for six months from the date of judgment. Thus, under the plain terms of the statute, the entry of a judgment of conviction under Article 1 results in license forfeiture. A license forfeiture mandated by the provisions of § 18.2-259.1(A) is self-operative.

Section 18.2-259.1(B) mandates the court in which the defendant is convicted to order surrender of the driver's license and to notify DMV of the conviction "and of the license forfeiture to be imposed." Furthermore, § 46.2-390.1(A) requires the DMV Commissioner, "[e]xcept as otherwise ordered pursuant to § 18.2-259.1," to revoke a driver's license for six months after the date of conviction or deferral of further proceedings under § 18.2-251 after receiving notice of such conviction or deferral.

The purpose of a license revocation "is not to punish the offender but to remove from the highways an operator who is a potential danger to other users." A defendant must, however, have adequate notice of his current driving status. A defendant's actual notice of, for example, the suspension of his license, is, however, sufficient to support a conviction for operating a motor vehicle on a suspended permit. Furthermore, adequate legal notice may be given in a number of ways, as for example, actual notice or notice given pursuant to statutes which is deemed to be prima facie evidence of such actual notice.

Section 18.2-259.1(B) effectively provides a defendant actual notice of license forfeiture by requiring surrender of the driver's license. The Commissioner's revocation of a driver's license for six months, after receiving notice of a conviction under Article 1 or deferral of proceedings under § 18.2-251, is not a formal prerequisite for such revocation. Therefore, consistent with the express language in § 18.2-259.1(A) and decisions of the appellate courts in Virginia, it is my opinion that the entry of judgment pursuant to a conviction for offenses committed in violation of Article 1 automatically results in a six-month license forfeiture from the date of such judgment. It is further my opinion that § 18.2-259.1(B) authorizes the general district court to impose such license forfeiture, at the time of entry of the disposition order.

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1Section 18.2-259.1(A) provides, in part: "In addition to any other sanction or penalty imposed for a violation of this article, the (i) judgment of conviction under this article or (ii) placement on probation following deferral of further proceedings under § 18.2-251 for any such offense shall of itself operate to deprive the person so convicted or placed on probation after deferral of
proceedings under § 18.2-251 of the privilege to drive or operate a motor vehicle ... in the
Commonwealth for a period of six months from the date of such judgment. Such license forfeiture
shall be in addition to and shall run consecutively with any other license suspension, revocation
or forfeiture in effect or imposed upon the person so convicted or placed on probation.”


Section 18.2-259.1(B) provides that “[t]he court trying the case shall order any person so
convicted or placed on probation to surrender his driver’s license to be disposed of in accordance
with the provisions of § 46.2-398 and shall notify the Department of Motor Vehicles of any such
conviction entered and of the license forfeiture to be imposed.”

Section 46.2-390.1(A) provides: “Except as otherwise ordered pursuant to § 18.2-259.1, the
Commissioner shall forthwith revoke, and not thereafter reissue for six months from the later of
(i) the date of conviction or deferral of proceedings under § 18.2-251 or (ii) the next date of eligi-
bility to be licensed, the driver’s license ... of any resident ... on receiving notification of (i) his
conviction, (ii) his having been found guilty in the case of a juvenile or (iii) the deferral of further
proceedings against him under § 18.2-251 for any violation of any provisions of Article 1 .... Such
license revocation shall be in addition to and shall run consecutively with any other license suspen-
sion, revocation or forfeiture in effect against such person.”


6See, e.g., Bibb v. Commonwealth, 212 Va. 249, 183 S.E.2d 732 (1971) (defendant’s convic-
tion for driving on suspended license was reversed because Commonwealth’s evidence expressly
showed that he had not received notice of suspension); Reed v. Commonwealth, 15 Va. App. 467,
424 S.E.2d 718 (1992) (conviction for driving in violation of habitual offender adjudication was
reversed because evidence failed to prove defendant knew about adjudication); Plummer v.
license was reversed because of insufficient proof that defendant was aware of suspension).


See Plummer v. Commonwealth, supra note 6, 13 Va. App. at 15, 408 S.E.2d at 766;
Pitchford v. Commonwealth, supra note 7, 2 Va. App. at 381, 344 S.E.2d at 926.

Section 18.2-259.1(A) makes clear that if, for example, a defendant also is convicted under
§ 18.2-271 of driving while intoxicated, any resulting license revocation runs consecutively with
the license forfeiture imposed under § 18.2-259.1(A).

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND
SAFETY - OTHER ILLEGAL WEAPONS.

Total maximum fee for obtaining concealed weapon permit is not to exceed $50. Ten-
dollar fee charged by circuit court clerk for processing application or issuing permit is
mandatory; assessment of State Police fee for cost of processing application and local law-
enforcement agency(-ies) fee for cost of investigating applicant is optional, but may not
exceed $5 and $35, respectively.

October 13, 1995

The Honorable Virgil H. Goode Jr.
Member, Senate of Virginia
You ask whether fifty dollars is the maximum fee that an applicant must pay to obtain a concealed weapon permit under the provisions of § 18.2-308 of the Code of Virginia.¹

Section 18.2-308(K) establishes three separate fees to be charged for the issuance of a concealed weapon permit: (1) fees of the circuit court clerk for processing the application or issuing the permit; (2) fees of the local law-enforcement agencies for investigating the applicant; and (3) fees of the State Police for processing the application. The language of § 18.2-308(K) is clear and unambiguous in connection with the fees of the clerk and the State Police.³

Section 18.2-308(K) provides that the clerk of the circuit court “shall charge a fee of ten dollars” for processing an application or issuing a permit. (Emphasis added.) The use of “shall” indicates that the fee is mandatory.³ The amount of the clerk’s fee is set at ten dollars. “The State Police may charge a fee not to exceed five dollars” to cover their costs in processing the application.⁴ The assessment of this fee is discretionary, as indicated by use of the word “may.”⁵ While the amount of the fee may vary, depending on the costs the State Police incur in processing the application, it may not exceed five dollars.

Section 18.2-308(K) also provides that “[t]he local law-enforcement agencies may charge a fee not to exceed thirty-five dollars” to cover the cost of investigating the applicant. (Emphasis added.) It is clear from this language that, like the State Police fee, a local law-enforcement agency fee is optional, and that, while the amount may vary in accordance with the costs incurred, it may not exceed the established maximum. It is not clear from the language of subsection K whether the General Assembly contemplated that, if more than one local law-enforcement agency were to investigate the same applicant, each agency may charge a separate fee of up to thirty-five dollars.

The primary goal in construing an ambiguous statute is to discern and give effect to legislative intent.⁶ The reading of a statute as a whole influences the proper construction of ambiguous individual provisions.⁷

It is my opinion that a reading of § 18.2-308(K) as a whole indicates a legislative intent to establish a maximum fee for obtaining a concealed weapon permit. In one instance, the General Assembly established a set amount. In two instances, the General Assembly used the language “not to exceed,” followed by a set amount.⁸ The language setting the maximum fee for the State Police and for the local law-enforcement agencies is substantially the same. Had the General Assembly intended that each law-enforcement agency that investigates an applicant could charge up to thirty-five dollars, it could have used language indicative of an intent to treat law-enforcement agency fees differently from the other fees. There is, however, no language in § 18.2-308(K) supporting a conclusion that the General Assembly intended to authorize local law-enforcement agencies to impose fees without being bound by the total maximum fee restriction placed on clerks of court and the State Police.⁹
It is my opinion that § 18.2-308(K) indicates a legislative intent that the total a local law-enforcement agency may charge for investigating an applicant for a concealed weapon permit may not exceed thirty-five dollars. Allowing multiple law-enforcement agencies investigating the same applicant to each charge a fee of thirty-five dollars would be inconsistent with this intent. It is, therefore, my opinion that the total maximum fee for obtaining a concealed weapon permit is not to exceed fifty dollars.

3The use of the word “shall” in a statute generally indicates that the procedure is mandatory, while “may” indicates that it is permissive. See Op. Va. Att’y Gen.: 1994 at 64, 68; id. at 71, 72; 1986-1987 at 300, 300, and opinions cited therein.
4Section 18.2-308(K) (emphasis added).
7See id.
8Section 18.2-308(K).
9The General Assembly’s use of the plural “law-enforcement agencies” in § 18.2-308(K), as opposed to the singular “clerk” and “State Police,” does not establish an intent to authorize multiple fees for law-enforcement agencies. This choice of language recognizes that, in contrast to a clerk of court or the State Police, various law-enforcement agencies operate within Virginia localities, and more than one such agency may be involved in the investigation of an applicant. This conclusion is supported by the use of the singular descriptive “an” in the sentence in § 18.2-308(K), “[t]he local law-enforcement agencies may charge a fee not to exceed thirty-five dollars to cover the cost of conducting an investigation.” (Emphasis added.)
10This is not to say that more than one local agency may not be involved in the investigation. The maximum fee for the investigation, however, may not exceed thirty-five dollars.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - OTHER ILLEGAL WEAPONS.

ALCOHOLIC BEVERAGE CONTROL ACT: ADMINISTRATION OF LICENSES.

General Assembly intended concealed handgun permit holder to carry handgun only in area where possession is not specifically prohibited. Prohibition against carrying concealed handgun applies to any individual other than owner/sponsor or employees of business/event issued either on-, or on- and off-, premises license by ABC Board to sell or serve alcoholic beverages. Concealed handgun permit holder may carry concealed
The Honorable Kenneth W. Stolle
Member, Senate of Virginia

You ask whether an individual issued a concealed handgun permit under the provisions of § 18.2-308 of the Code of Virginia may carry a concealed handgun into a place of business or a special event that is licensed by the Virginia Alcoholic Beverage Control Board to sell alcoholic beverages.

A concealed handgun permit allows the holder to carry a handgun in an area not otherwise prohibited. The granting of a concealed handgun permit merely exempts an individual from the general prohibition. In § 18.2-308(J2), the General Assembly clearly has provided that “[n]o person shall carry a concealed handgun into any place of business or special event” that has been granted a license by the Virginia Alcoholic Beverage Control Board to sell or serve alcoholic beverages on premises. (Emphasis added.) “[W]here a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.” In addition, the use of the word “shall” in a statute generally implies that its terms are intended by the General Assembly to be mandatory, rather than permissive or directive. The only exception to the prohibition contained in § 18.2-308(J2) is that business owners and event sponsors, or their employees, who have been granted a license to sell or serve alcoholic beverages on premises, may carry a concealed handgun “while on duty at such place of business or at such special event if such person has a concealed handgun permit.”

 “[M]ention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.” The clear intent of the General Assembly is to permit concealed handgun permit holders to carry handguns only in areas where it has not specifically prohibited the carrying of handguns. Consequently, it is my opinion that even with a concealed handgun permit, it is unlawful for any individual other than a business owner or event sponsor, or their employees, to carry a concealed handgun into any place of business or special event licensed by the Virginia Alcoholic Beverage Control Board under Title 4.1 to sell or serve alcoholic beverages on premises.

In Title 4.1, however, the General Assembly has authorized not only the granting of “on-premises” and “off-premises” licenses by the Virginia Alcoholic Beverage Control Board, but also “on- and off-” premises sales of wine and beer by the licensees. It has not specifically defined the terms “off premises” and “on premises.” The provisions pertaining to retail “off-premises” licenses authorize the licensee to sell wine and beer in closed containers for off-premises consumption. The provisions pertaining to “on-
"premises" licenses clearly authorize the licensee to sell or serve alcoholic beverages for consumption only on the premises of the licensee.8

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."9 Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.10 Instead, they should be harmonized with other existing statutes where possible to produce a consistently logical result that gives effect to the legislative intent.11 "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."12

The plain language of § 18.2-308(J2) prohibits the carrying of a concealed handgun into any place of business or special event that has been granted a license by the Virginia Alcoholic Beverage Control Board to sell or serve alcoholic beverages on premises. The establishments issued on- and off-premises licenses are accorded all the privileges conferred upon on-premises licensees13; therefore, the prohibition would apply on these premises as well. It is, therefore, my opinion that the prohibition against carrying concealed handguns applies to any place of business or special event that has either an "on-premises" license or an "on- and off-premises" license to sell or serve alcoholic beverages. The holder of a concealed handgun permit may, however, carry a concealed handgun into a business that is licensed only to sell or serve alcoholic beverages in closed containers for consumption off premises, unless otherwise prohibited by law or prohibited to do so by the owner pursuant to the provisions of § 18.2-308(O).

2Section 18.2-308(O) provides that "[t]he granting of a concealed handgun permit shall not thereby authorize the possession of any handgun or other weapon on property or in places where such possession is otherwise prohibited by law or is prohibited by the owner of private property."
3Section 18.2-308(J2) provides: "No person shall carry a concealed handgun into any place of business or special event for which a license to sell or serve alcoholic beverages on premises has been granted by the Virginia Alcoholic Beverage Control Board under Title 4.1 of the Code of Virginia; provided nothing herein shall prohibit any owner or event sponsor or his employees from carrying a concealed handgun while on duty at such place of business or at such special event if such person has a concealed handgun permit."
4Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).
7Section 4.1-207(4) (wine); § 4.1-208(6) (beer); § 4.1-209(2)-(5), (7) (wine and beer).
8Section 4.1-206(3) (alcoholic beverages); § 4.1-208(5) (beer); § 4.1-209(1), (6) (wine and beer).
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - OTHER ILLEGAL WEAPONS.

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

CIVIL REMEDIES AND PROCEDURE: INJUNCTIONS.

COURTS OF RECORD: THE COURT OF APPEALS.

Clerk of Court of Appeals must charge $10 for filing of petition to review circuit court order denying concealed weapon permit.

December 4, 1995

The Honorable Richard R. James
Clerk, Court of Appeals of Virginia

You ask whether the Court of Appeals of Virginia must charge a fee for filing a petition for review of a circuit court's denial of an application for a permit to carry a concealed weapon under the provisions of § 18.2-308(L) of the Code of Virginia. If so, you inquire as to the appropriate fee to be charged by the Clerk.

You note that a petition for review under § 18.2-308(L) is not a matter within the original jurisdiction of the Court of Appeals. You relate that you find the provisions of § 18.2-308(L) pertaining to petitions for review to be similar to the provisions of § 8.01-626 pertaining to petitions for review of circuit court decisions on injunctions. You also note, however, that § 17-116.05:1(A)(ii) provides that an aggrieved party may petition the Court of Appeals for appeal from "any final decision of a circuit court on an application for a concealed weapons permit." Therefore, you conclude that the apparent intent of the General Assembly is that the filing of a petition for review pursuant to § 18.2-308(L) as a method of challenging a circuit court's denial of a concealed weapons permit is distinguishable from appellate review of circuit court decisions in other matters. Finally, you relate that the General Assembly has not specifically provided for a fee to be charged for the filing of a petition for review in the provisions establishing the fees that the Court of Appeals may charge.
Section 14.1-120.1(6) provides that the Clerk of the Court of Appeals shall charge for all other services not specifically mentioned in subdivisions 1 through 5 of § 14.1-120.1 "the same fee that would be charged by a clerk of a circuit court in similar cases." The General Assembly requires that a fee of ten dollars be assessed by the clerk of the circuit court "for the processing of an application or issuing of a permit" to carry a concealed weapon. The use of "shall" indicates that such a fee is mandatory. It is a well-settled rule of statutory construction 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." It is equally well-settled that "[a statute] which is plain needs no interpretation."

In 1986, the General Assembly enacted the provision in § 18.2-308(D) relating to petitioning the Court of Appeals for review of the decision of a circuit court denying a concealed weapons permit. Six years later, the 1992 Session of the General Assembly enacted § 14.1-120.1, relating to fees to be charged by the Clerk of the Court of Appeals. The General Assembly is presumed to know what statutes previously have been enacted.

Therefore, it is my opinion that a fee must be charged by the Clerk of the Court of Appeals for filing a petition for review pursuant to § 18.2-308(L). I am of the further opinion that the appropriate fee for the Clerk to charge for the filing of a petition for review is ten dollars.

1Section 18.2-308(L) provides: "Any person denied a permit to carry a concealed weapon under the provisions of this section may, within thirty days of the final decision, present a petition for review to the Court of Appeals or any judge thereof. The petition shall be accompanied by a copy of the original papers filed in the circuit court, including a copy of the order of the circuit court denying the permit. Subject to the provisions of § 17-116.07 B, the decision of the Court of Appeals or judge shall be final. Notwithstanding any other provision of law, if the decision to deny the permit is reversed upon appeal, taxable costs incurred by the person shall be paid by the Commonwealth."

2Section 8.01-626 provides:

"Wherein a circuit court (i) grants an injunction or (ii) refuses an injunction or (iii) having granted an injunction, dissolves or refuses to enlarge it, an aggrieved party may, within fifteen days of the court's order, present a petition for review to a justice of the Supreme Court; however, if the issue concerning the injunction arose in a case over which the Court of Appeals would have appellate jurisdiction under § 17-116.05 or § 17-116.05:1, the petition for review shall be initially presented to a judge of the Court of Appeals within fifteen days of the court's order. The petition shall be accompanied by a copy of the proceedings, including the original papers and the court's order respecting the injunction. The justice or judge may take such action thereon as he considers appropriate under the circumstances of the case.

"When a judge of the Court of Appeals has initially acted upon a petition for review of an order of a circuit court respecting an injunction, a party aggrieved by such action of the judge of the Court of Appeals may, within fifteen days of the order of the judge of the Court of Appeals, present a petition for review of such order to a justice of the Supreme Court if the case would otherwise be appealable to the Supreme Court in accordance with § 17-116.07. The petition shall be accompanied by a copy of the proceedings before the circuit court, including the original papers
and the circuit court's order respecting the injunction, and a copy of the order of the judge of the Court of Appeals from which review is sought. The justice may take such action thereon as he considers appropriate under the circumstances of the case."

Section 17-116.05:1(A) provides: "Any aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed, (ii) any final decision of a circuit court on an application for a concealed weapons permit pursuant to subsection D of § 18.2-308 or (iii) any final order of a circuit court involving involuntary treatment of prisoners pursuant to § 53.1-40.1. The Commonwealth or any county, city or town may petition the Court of Appeals for an appeal pursuant to this subsection in any case in which such party previously could have petitioned the Supreme Court for a writ of error under § 19.2-317. The Commonwealth may also petition the Court of Appeals for an appeal in a criminal case pursuant to § 19.2-398."

Section 14.1-120.1 provides that "[t]he Clerk of the Court of Appeals shall charge the following fees:

1. For filing a notice of appeal or initiating any matter under the original jurisdiction of the court, twenty-five dollars payable by check or money order to the Clerk of the Court of Appeals.

2. For making and certifying a copy of any record or document in the Clerk's office, ten cents per 100 words or twenty-five cents per page.

3. For verifying and certifying any record or document not actually copied by the Clerk, one-half of the fee for copying and certifying, which shall not, however, be applied to the certification of a copy of the record in the Court which has already been printed.

4. For authentication of any record, document or paper under the seal of the Court, fifty cents.

5. For copying and certifying any document or paper of less than 250 words, twenty-five cents.

6. For all other services not specifically mentioned above, the same fee that would be charged by a clerk of a circuit court in similar cases."

Section 18.2-308(K) provides, in part, that "[t]he clerk shall charge a fee of ten dollars for the processing of an application or issuing of a permit, including his costs associated with the consultation with law-enforcement agencies."

The use of the word "shall" in a statute generally indicates that the procedure is mandatory, while "may" indicates that it is permissive. See Op. Va. Att'y Gen.: 1994 at 64, 68; 1986–1987 at 300, 300, and opinions cited therein.


CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - OTHER ILLEGAL WEAPONS.

COURTS OF RECORD: THE COURT OF APPEALS.
Circuit court may exercise discretion in determining whether to require proof from applicant of demonstrated competence with handgun before issuing permit; court shall not disregard documented evidence that permit applicant has satisfactorily completed approved method for demonstrating competence with handgun. Court may not limit or restrict concealed weapon permit to specific handgun with particular serial number. Decision whether to permit the Commonwealth's attorney to appear and be heard at ore tenus hearing rests within sound discretion of circuit court. Commonwealth's attorney is not authorized to petition Court of Appeals for review of final decision of circuit court either granting or opposing application for permit. Sworn written statement submitted to court by sheriff, chief of police or Commonwealth's attorney must contain specific facts upon which opinion regarding applicant's unlawful or negligent use of weapon is based. Individual who carries handgun into areas expressly prohibited may be charged with statutorily prescribed misdemeanor or felony violation.

October 20, 1995

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

You ask several questions regarding interpretation of § 18.2-308 of the Code of Virginia, the statutory provision pertaining to carrying and using concealed weapons, which was amended and reenacted by the 1995 Session of the General Assembly.

You first ask whether completion of a hunter safety course approved by the Department of Game and Inland Fisheries must be considered by a court as sufficient proof of "demonstrated competence with a handgun," as required by § 18.2-308(G)(1), to obtain a permit to carry a concealed weapon.

"Unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must,’ then ‘may’ should be given its ordinary meaning—permission, importing discretion." By use of the word "may" in the first sentence of § 18.2-308(G)—"[t]he court may further require proof that the applicant has demonstrated competence with a handgun"—the General Assembly intended that the court exercise discretion in deciding whether to require evidence from an applicant of demonstrated competence with a handgun before issuing a permit. Furthermore, by use of the word "may" in the second half of that sentence—"and the applicant may demonstrate such competence" by completing one of the six enumerated firearms training or safety courses, or by providing evidence either of previous firearms experience or of previously having held a license to carry a firearm—the General Assembly intended that the applicant have the discretion to choose an approved method of demonstrating to the court the competence required for issuance of the permit.

The use of the word "shall" in a statute, however, generally implies that its terms are intended by the General Assembly to be mandatory, rather than permissive or directive. The General Assembly has mandated that a photocopy of a certificate of
completion, an affidavit or "a copy of any document which shows completion of the course or class or evidences participation in firearms competition shall constitute evidence of qualification under ... subsection [G]." Once such a document is produced before a court with the application for a permit, the General Assembly has determined that the individual has demonstrated sufficient evidence of competence with a handgun.

"[W]here a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Therefore, it is my opinion that the General Assembly intended for the court to exercise discretion in determining whether it will require proof from an applicant of demonstrated competence with a handgun. The use of the word "shall" in the last paragraph of § 18.2-308(G), however, indicates that the General Assembly will not permit the court to disregard the statutorily defined evidence of completion of one of the courses of instruction listed in subsection G. It is also my opinion, therefore, that when an applicant provides a photocopy of a certificate of completion, an affidavit or a copy of any document that shows completion of the hunter safety course as evidence of qualification, the court must accept such documentation of the applicant's having satisfactorily demonstrated competence with a handgun.

You next ask whether a circuit court may restrict an individual granted a permit to carry only a specific handgun with a particular serial number. Section 18.2-308(H) specifies the information that must be included on the concealed handgun permit, and the General Assembly has not required or authorized information concerning the specific handgun an individual may carry to be included on the permit. The individual must carry the permit "at all times during which he is carrying a concealed handgun." Additionally, "handgun" is defined as "any pistol or revolver." The General Assembly has not limited or restricted the definition to any specific handgun that an individual is authorized to carry.

A 1981 opinion of the Attorney General concludes that § 18.2-308 permits the court to place restrictions on a permit to carry a concealed handgun. Before the 1995 amendment to § 18.2-308(D), the General Assembly allowed the court to grant a permit in its discretion upon a finding of a demonstrated need. Following the 1995 amendment to § 18.2-308(D), however, the General Assembly removed the court's discretion by requiring that "[t]he court, after consulting the law-enforcement authorities of the county or city and receiving a report from the Central Criminal Records Exchange, shall issue the permit within forty-five days of receipt of the completed application unless it appears that the applicant is disqualified." A rule of statutory construction requires the presumption that, in amending § 18.2-308(D), the General Assembly had full knowledge of the existing law and the construction placed upon it by the Attorney General, and intended to change the then existing law. In addition, when a statute creates a specific grant of authority, the
authority exists only to the extent specifically granted in the statute. The mention of one thing in a statute implies the exclusion of another. Pursuant to the plain language of § 18.2-308(D), I am of the opinion that the court may not limit or restrict the concealed weapon permit to a particular handgun with a particular serial number.

You next ask whether § 18.2-308(I) permits a Commonwealth's attorney to argue at an ore tenus hearing in the circuit court or in the Court of Appeals either as an appellee when a permit is denied or as an appellant when a permit is granted. In the absence of a statutory definition, words in statutes are to be given their ordinary meaning within the statutory context. "Ore tenus" means "by word of mouth; orally." By the clear language of § 18.2-308(I), the General Assembly provides an opportunity to be heard in the circuit court only to persons who apply for, and are denied, a new permit, after having previously held a concealed weapon permit. The General Assembly has not provided a similar opportunity for a Commonwealth's attorney to be heard by the court at an ore tenus hearing. A statute specifying the method by which something shall be done indicates a legislative intent that it not be done otherwise. Section 18.2-308(I) does not expressly authorize a Commonwealth's attorney to appear at an ore tenus hearing afforded to the unsuccessful applicant. As a general rule, however, the conduct of a trial or hearing is left to the sound discretion of the trial court. Consequently, I am of the opinion that the decision to permit a Commonwealth's attorney to appear and be heard at an ore tenus hearing rests with the sound discretion of the circuit court.

Section 18.2-308(L) grants the unsuccessful applicant the right to petition the Court of Appeals of Virginia for review of the circuit court's denial of an application. The General Assembly has not provided a Commonwealth's attorney the right to petition the Court of Appeals for review of the granting of an application. Had the General Assembly intended to permit a Commonwealth's attorney to appeal the circuit court decision to grant a concealed weapon permit application, it could have done so in plain language. The General Assembly has permitted a Commonwealth's attorney to oppose the application for a permit in only two specific ways: § 18.2-308(D) provides that the court may consult with the Commonwealth's attorney as a law-enforcement authority of the locality, and § 18.2-308(E)(13) provides that the Commonwealth's attorney may submit a sworn written statement for the court's consideration before issuing a permit. The General Assembly has not provided any other procedure for a Commonwealth's attorney to oppose the application for a permit. Therefore, I am of the opinion that there is no statutory authority for a Commonwealth's attorney to petition the Court of Appeals for review of a final decision of the circuit court granting an application for a permit. I am also of the opinion that there is no statutory authority for a Commonwealth's attorney to oppose the petition for review filed by the unsuccessful applicant with the Court of Appeals under the provisions of § 18.2-308(L).

You next ask whether the sworn written statement by the sheriff, chief of police or Commonwealth's attorney must contain specific facts regarding an individual whose application is under consideration by the court. Section 18.2-308(E)(13) requires that the
sworn statement of the sheriff, chief of police or Commonwealth's attorney "shall be based upon personal knowledge or upon the sworn written statement of a competent person having personal knowledge." Words and phrases must be considered in the context in which they are used to arrive at a construction that will promote the object and purpose of the statute. 23 The General Assembly has granted an unsuccessful applicant the right to be heard ore tenus by the circuit court under § 18.2-308(I), and the right to petition the Court of Appeals for review of that court's decision denying an application under § 18.2-308(L). The hearing and appeal procedures comply with a fundamental requisite of due process of law by providing an unsuccessful applicant the opportunity to be heard on his application. 24 Following the ore tenus hearing, the final order of the court must include the court's findings of fact and conclusions of law. The personal knowledge requirement imposed by § 18.2-308(E)(13) necessarily requires that, to comply with fundamental due process requirements, facts on which any opinion of the sheriff, chief of police or Commonwealth's attorney ultimately is based must be included in the sworn statement alleging that the applicant "is likely to use a weapon unlawfully or negligently to endanger others." Therefore, I am of the opinion that any sworn written statement by the sheriff, chief of police or Commonwealth's attorney must contain specific facts upon which an opinion regarding the applicant is based.

Finally, you ask whether, pursuant to § 18.2-308(J2), the carrying of a concealed handgun into an event or establishment with an on-premises ABC license constitutes a misdemeanor or a felony. 25 Section 18.2-308(A) specifies that carrying a concealed weapon is a Class 1 misdemeanor for the first violation, a Class 6 felony for a second violation, and a Class 5 felony for a third or subsequent violation. The granting of a concealed handgun permit merely exempts an individual from the general prohibition. 26 A concealed handgun permit allows the holder to carry the handgun in an area not otherwise prohibited.

"[A] penal statute is to be strictly construed against the state and in favor of the liberty of a citizen." 27 "Such statutes cannot be extended by implication or construction, or be made to embrace cases which are not within their letter and spirit." 28 While penal statutes must be strictly construed, the intention of the General Assembly must govern in the construction of penal statutes, and those statutes are not to be so strictly construed as to defeat the obvious intention of the General Assembly. 29 The clear intent of the General Assembly is to permit concealed handgun permit holders to carry handguns in areas only where the General Assembly has not prohibited the carrying of handguns. Consequently, when an individual carries a handgun into areas expressly prohibited in § 18.2-308(J2), I am of the opinion that the individual may be charged with a Class 1 misdemeanor for the first violation, a Class 6 felony for a second violation, or a Class 5 felony for a third or subsequent violation under the provisions of § 18.2-308(A).

2Section 18.2-308(G) provides:
"The court may further require proof that the applicant has demonstrated competence with a handgun and the applicant may demonstrate such competence by one of the following:

1. Completing any hunter education or hunter safety course approved by the Department of Game and Inland Fisheries or a similar agency of another state;
2. Completing any National Rifle Association firearms safety or training course;
3. Completing any firearms safety or training course or class available to the general public offered by a law-enforcement agency, junior college, college or private or public institution or organization or firearms training school utilizing instructors certified by the National Rifle Association or the Department of Criminal Justice Services;
4. Completing any law-enforcement firearms safety or training course or class offered for security guards, investigators, special deputies, or any division or subdivision of law enforcement or security enforcement;
5. Presenting evidence of equivalent experience with a firearm through participation in organized shooting competition or military service;
6. Obtaining or previously having held a license to carry a firearm in this Commonwealth or a locality thereof, unless such license has been revoked for cause;
7. Completing any firearms training or safety course or class conducted by a state-certified firearms training or safety course or class conducted by a state-certified or National Rifle Association-certified firearms instructor; or
8. Completing any other firearms training which the court deems adequate.

A photocopy of a certificate of completion of any of the courses or classes; an affidavit from the instructor, school, club, organization, or group that conducted or taught such course or class attesting to the completion of the course or class by the applicant; or a copy of any document which shows completion of the course or class or evidences participation in firearms competition shall constitute evidence of qualification under this subsection." (Emphasis added.)


Section 18.2-308(G) (emphasis added).


Section 18.2-308(G) (emphasis added).

Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).


Section 18.2-308(H) provides that "[t]he permit to carry a concealed handgun shall specify the name, address, date of birth, gender, social security number, height, weight, color of hair, color of eyes, and signature of the permittee; the signature of the judge issuing the permit, or of the clerk of court who has been authorized to sign such permits by the issuing judge; the date of issuance; and the expiration date. The person issued the permit shall have such permit on his person at all times during which he is carrying a concealed handgun and must display the permit and a photo-identification issued by a government agency of the Commonwealth or by the United States Department of Defense or United States State Department (passport) upon demand by a law-enforcement officer."

Section 18.2-308(H) (emphasis added).

Section 18.2-308(M) (emphasis added). For purposes of § 18.2-308, "‘handgun’ means any pistol, revolver or other firearm, except a machine gun, originally designed, made and intended to fire a projectile by means of an explosion from one or more barrels when held in one hand."

Section 18.2-308(M).


Id.

Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).
Section 18.2-308(I) provides, in part: "If the circuit court denies the permit, the specific reasons for the denial shall be stated in the order of the court denying the permit. Upon denial of the application and request of the applicant made within ten days, the court shall place the matter on the docket for an ore tenus hearing. The applicant may be represented by counsel, but counsel shall not be appointed. The final order of the court shall include the court's findings of fact and conclusions of law."


Section 18.2-308(J2) provides that "[n]o person shall carry a concealed handgun into any place of business or special event for which a license to sell or serve alcoholic beverages on premises has been granted by the Virginia Alcoholic Beverage Control Board under Title 4.1 of the Code of Virginia; provided nothing herein shall prohibit any owner or event sponsor or his employees from carrying a concealed handgun while on duty at such place of business or at such special event if such person has a concealed handgun permit."

Section 18.2-308(O) provides that "[t]he granting of a concealed handgun permit shall not thereby authorize the possession of any handgun or other weapon on property or in places where such possession is otherwise prohibited by law or is prohibited by the owner of private property."


See generally M.J. Statutes § 67 (1994).
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - OTHER ILLEGAL WEAPONS.

CRIMINAL PROCEDURE: PROCEEDINGS ON QUESTION OF INSANITY.

RULES OF SUPREME COURT OF VIRGINIA: PRETRIAL PROCEDURES, DEPOSITIONS AND PRODUCTION AT TRIAL - PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

CIVIL REMEDIES AND PROCEDURE: GENERAL PROVISIONS AS TO CIVIL CASES.

General Assembly has not authorized circuit court to require additional information for determining advisability of granting concealed handgun permit to applicant for reasons not enumerated in statute. Circuit court is prohibited from prescribing rule that is inconsistent with any statutory provision, or that has effect of abridging substantive right of persons appearing before such court. Court lacks authority to add exclusion to grant concealed handgun permit based on applicant's refusal to submit to psychosocial assessment or on results of such assessment. Court has no authority to require permit applicants to submit to psychosocial assessments.

September 28, 1995

The Honorable Barnes Lee Kidd
Member, House of Delegates

You ask whether the circuit court may require that a psychosocial assessment accompany an application for a permit to carry a concealed handgun under the provisions of § 18.2-308 of the Code of Virginia.¹

You relate that the circuit court has issued a notice requiring a psychosocial assessment from all applicants. The notice requires a certified psychiatrist or psychologist to either make or supervise the assessment. No application is considered complete until this assessment has been administered.

Section 18.2-308(D) specifies the procedure for obtaining a concealed handgun permit in Virginia. The General Assembly substantially amended this section in the 1995 Session.² Former § 18.2-308(D) required the circuit court to determine that "the applicant is of good character, ... is physically and mentally competent to carry such weapon and is not prohibited by law from receiving, possessing, or transporting such weapon" before issuing such a permit.³ The statute allowed the court to grant a permit in its discretion upon a finding of a demonstrated need.⁴

The last sentence of § 18.2-308(D) now provides:
The court, after consulting the law-enforcement authorities of the county or city and receiving a report from the Central Criminal Records Exchange, shall issue the permit within forty-five days of receipt of the completed application unless it appears that the applicant is disqualified, except that any permit issued prior to July 1, 1996, shall be issued within ninety days of receipt of the completed application.

Section 18.2-308(E) is a new provision that lists the following individuals, among others, who shall be deemed disqualified by the General Assembly from obtaining a permit:

1. Individuals who were ineligible to possess a firearm pursuant to § 18.2-308.1:2 (persons adjudicated legally incompetent or mentally incapacitated), and whose competency or capacity was restored less than five years before the date of application;

2. Individuals who were ineligible to possess a firearm under § 18.2-308.1:3 (persons involuntarily committed), and who were released from commitment less than five years before the date of application;

3. Individuals who addicted to, or are unlawful users or distributors of, marijuana or any controlled substance; and

4. Individuals who, in the opinion of the sheriff, chief of police, or Commonwealth's attorney, are likely to use a weapon unlawfully or negligently to endanger others.

A rule of statutory construction requires the presumption that, in amending § 18.2-308(D), the General Assembly had full knowledge of the existing law and the construction placed upon it by courts, and intended to change the then existing law. Furthermore, when new provisions are added to existing legislation by an amendatory act, such as the addition of subsection E to § 18.2-308, a presumption normally arises that a change in the law was intended. Therefore, in its 1995 Session, the General Assembly intended to change the law regarding the issuance of concealed handgun permits in Virginia.

When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. The mention of one thing in a statute implies the exclusion of another. Pursuant to the clear language of § 18.2-308(D), the decision of the circuit court must be based only on information required on the application form prescribed by the Supreme Court, on information received from local law-enforcement officials, on any sworn statements submitted by local law-enforcement officials, and on information contained in the report from the Central Criminal Records Exchange. The General Assembly’s 1995 amendments to § 18.2-308 do not authorize the circuit court
to require additional information for determining the advisability of granting an applicant a permit for reasons not enumerated in the statute.\textsuperscript{13}

Furthermore, the circuit court is prohibited from prescribing a rule that is inconsistent with any statutory provision, or which has the effect of abridging the substantive right of persons before such court.\textsuperscript{14} Exemptions to statutory licensing and permit requirements must be strictly construed.\textsuperscript{15} In addition, it is a recognized principle of statutory construction that when a statute specifies how something is to be done, it evinces the intent of the General Assembly that it not be done another way.\textsuperscript{16} Therefore, a circuit court lacks the statutory authority to add to § 18.2-308(E) an exclusion to grant a permit either based on an applicant's refusal to submit to a psychosocial assessment or based on the results of such assessment.

I am unaware of any authority, whether by statute, rule or precedent, that authorizes the court to \textit{sua sponte} order individuals to undergo psychosocial assessments. Even in situations when the court is authorized by statute to order an individual to undergo a mental evaluation, it may do so only when an individual's mental condition is in controversy and/or there is good cause for doing so under the particular facts of an individual case.\textsuperscript{18}

I am, therefore, of the opinion that a circuit court is without authority to require applicants for concealed handgun permits to submit to psychosocial assessments.

\textsuperscript{3}Id.
\textsuperscript{5}Section 18.2-308(E)(3).
\textsuperscript{6}Section 18.2-308(E)(4).
\textsuperscript{7}Section 18.2-308(E)(8).
\textsuperscript{8}Section 18.2-308(E)(13).
\textsuperscript{9}See \textit{Richmond v. Sutherland}, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).
\textsuperscript{12}See also § 18.2-308(E)(13).
\textsuperscript{13}See 1973-1974 Op. Va. Att'y Gen. 201, 203 (former § 19.1-319 (recodified § 19.2-335) contains no authorization for circuit court judge to make factual determination whether attorney's fee certified by lower court judge is reasonable or warranted and then to reduce or delete such fee).
\textsuperscript{14}Section 8.01-4; \textit{see also Davis v. Sexton}, 211 Va. 410, 177 S.E.2d 524 (1970) (absent statutory authority, circuit court judge could not forbid judge of court not of record from practicing law in his court); 1977-1978 Op. Va. Att'y Gen. 243, 244 (absent statutory authority, judge is without authority to require magistrate to pay cost for reissuance of warrant due to clerical errors).
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - BINGO AND RAFFLES.

Activity constitutes illegal gambling when elements of prize, chance and consideration are present together. All three elements combine in "essay" contest to be conducted as raffle. Because prize in contest will not be awarded by random drawing, as is required of raffle, activity constitutes illegal gambling.

March 24, 1995

The Honorable John Latané Lewis III
Commonwealth's Attorney for Powhatan County

You ask whether an individual homeowner who is not associated with any religious, charitable, community or educational organization (the "homeowner") lawfully may conduct what you label an "essay" contest in which a prize, consisting of the individual's home, funds for redecorating the home, and an automobile, is awarded to the winning entry.¹

You relate that the homeowner has expressed an intent to conduct a raffle² in the form of an "essay" contest. The prize to be won will be valued at $280,000, and consists of land and buildings, including the homeowner's house, a sum of money denominated "redecorating funds" for the house, and a 1995 automobile. Five thousand chances will be sold at a cost of $50 each for entry into the contest. Should fewer than 5,000 entries be received, the "essay" contest will be canceled and the money returned to the purchasers of the chances.
You also relate that the contest requires each entrant to submit an essay on the subject “Home Ownership Is Important to Me Because ...” with the purchase of the chance. Entries are to be identified by number rather than by name, and a panel of judges will select the winning essay. The judges will be provided three predetermined statements required in each essay to narrow the total number of essays qualified for consideration as a potential winner. You relate that only the judges will be given the three predetermined statements. Entries that do not contain at least one of the statements automatically will be eliminated from consideration, and those that do not contain at least two of the predetermined statements will be eliminated next from consideration. You relate that the final group of essays to be judged must contain all three predetermined statements, or consist of 25 essays containing the most number of the three predetermined statements, whichever is greater. A winner will be selected by the panel of judges from the final group of 25 essays.3

The Supreme Court of Virginia has held, and prior opinions of the Attorney General consistently conclude, that an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together.4

The elements of prize and consideration clearly are present in the proposed activity you describe. The prize consists of real estate with improvements, money and an automobile. The consideration consists of the $50 “entry fee” that must accompany each essay, which represents a total fee of $250,000 for 5,000 entries, without which the contest will be canceled.

Prior opinions of the Attorney General have considered whether chance or skill was the predominant element in determining the winner of a particular game.5 In the situation you describe, although the prize winner will be selected based on an evaluation of the content of an essay, eligibility of entrants for placement in the final pool of candidates whose essays will be evaluated on the basis of content is determined by whether one or more predetermined statements appear in the essay. Whether any essay will contain one or more of the predetermined statements is entirely fortuitous. Therefore, I conclude that the element of chance, rather than skill, is the predominant factor in the proposed activity you describe. Accordingly, unless the activity is explicitly authorized by § 18.2-340.14 of the Code of Virginia,6 I am of the opinion that it constitutes illegal gambling.

Section 18.2-340.1(3) defines the term “raffle” as “a lottery in which the prize is won by (i) a random drawing of the name or prearranged number of one or more persons purchasing chances[.]” “The term ‘lottery’ is a generic term and embraces all schemes for distribution of prizes by chance for consideration.”7 Prior opinions of the Attorney General conclude that although a raffle is the simplest form of lottery, the term “raffle” contemplates the purchase of chances by one or more persons for the opportunity to win a prize determined by a random drawing from some container in which all the chances purchased have been placed.8 The winning ticket and the prize must be chosen or
awarded by the random drawing in order for an event to be considered a raffle. Section 18.2-340.14 requires that the statutory definition of “raffle” must be strictly construed.

In the arrangement you describe, it is clear that the prize will not be awarded by the random drawing of any of the essays or its number. Rather, the final pool of essays eligible for consideration will be reduced by comparing the essays submitted with a set of predetermined statements. Essays that do not contain the predetermined statements will be eliminated completely from the pool for final consideration. Once the pool has been reduced to the essays containing all three of the predetermined statements, or to 25 essays containing the most predetermined statements, the prize will be awarded based on an evaluation of the content of the remaining essays. A random drawing does not take place in any portion of the process for selecting the prize winner. Because the statutory definition of “raffle” must be strictly construed and requires that a drawing take place, I am of the opinion that the essay contest you describe does not constitute a raffle within the meaning of § 18.2-340.14.

Based on the above, I am of the opinion that the proposed activity you describe would constitute illegal gambling.

1Section 18.2-325(1) of the Code of Virginia defines “illegal gambling” as “the making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this Commonwealth.”

2Section 18.2-340.1(3) defines “raffle” as “a lottery in which the prize is won by (i) a random drawing of the name or prearranged number of one or more persons purchasing chances or (ii) a random contest in which the winning name or preassigned number of one or more persons purchasing chances is determined by a race involving inanimate objects floating on a body of water, commonly referred to as a ‘duck race.”

3For purposes of this opinion, I assume that the panel’s selection will be based on its evaluation of the content of the essays, rather than by random chance.


5Op. Va. Att’y Gen.: 1987-1988 at 284 (coin-operated machine that contains crane with claws manipulated by player to pick up stuffed toy animal resting at bottom of machine beneath crane is not “gambling device” because skill, rather than chance, primarily determines whether player is able to win prize); 1975-1976 at 207 (bass fishing contest does not constitute illegal lottery because skill, rather than chance, primarily determines winner of contest).

6Section 18.2-340.14 states that “[Article 1.1, Chapter 8 of Title 18.2] permits organizations to conduct raffles, bingo and instant bingo games. All games not explicitly authorized by this article are prohibited.”

Section 18.2-340.1(1) defines “organization” as any of the following:
“(a) A voluntary fire department or rescue squad or auxiliary unit thereof which has been recognized by an ordinance or resolution of the political subdivision where the voluntary fire department or rescue squad is located as being a part of the safety program of such political subdivision.

“(b) An organization operated exclusively for religious, charitable, community or educational purposes; an association of war veterans or auxiliary units thereof organized in the United States; or a fraternal association operating under the lodge system.”


¹¹Your facts do not address what will happen if no essay contains any of the predetermined statements.

¹²See supra note 6.

¹³See supra note 2.

¹⁴You do not assert and I do not address whether the proposed activity constitutes a bingo or instant bingo game.

¹⁵Because I conclude that the activity does not constitute a “raffle,” I do not address whether it would be lawful if conducted by a qualified organization within the meaning of § 18.2-340.1(1). See supra note 6.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY - OBSCENITY AND RELATED OFFENSES.

ADMINISTRATION OF GOVERNMENT GENERALLY: ATTORNEY GENERAL AND DEPARTMENT OF LAW (CRIMINAL CASES).

1995 statutory amendment will hold on-line communications entities or other cable networks culpable only when there is prior knowledge of transmission of computer-generated reproduction of sexually explicit digital image involving person under 18. Such entities have no affirmative legal duty to review such material in advance; are responsible only for actual knowledge of contents of materials they transmit.

April 21, 1995

The Honorable Robert L. Calhoun
Member, Senate of Virginia

You ask whether Senate Bill No. 1067, passed and enrolled by the 1995 Session of the General Assembly,¹ would subject “on-line” communications entities or cable networks to potential criminal sanctions even if the role of these entities is simply that of a carrier of data or information.²
You relate that you are concerned that the employees of on-line communications and cable entities may be liable under the criminal sanctions imposed by Senate Bill No. 1067, even though such entities and their employees may be only passive carriers of the offending information, and take no part in its actual production or use. On March 27, 1995, the Governor notified the Senate of a proposed amendment to be added to the last line of § 18.2-374.1(B)(4) in Senate Bill No. 1067:

provided, however, that subsections B.3 and B.4 shall not apply to a computer network (as defined in § 18.2-152.2), cable service, a common carrier network operated by a public service company, a video dialtone network or wireless or direct-to-home satellite communications access provider that does not knowingly (i) make, create, or solicit, and (ii) initiate the transmission of such material.

You also relate that due to your concerns that the Governor's amendment might undermine the substantive offense of prohibiting the transmission of child pornography, you requested that the House of Delegates reject the amendment.

On-line communications entities and cable networks are not analogous to the United States Postal Service as mere carriers of items of mail. Such entities and networks are more akin to booksellers. This is because materials often are displayed on computer bulletin boards and, therefore, are not simply mailed or transmitted from one user to another.

Section 18.2-374.1(B)(4) does not use the word "knowingly"; however, an electronic or on-line network that transmits material nevertheless would be culpable only if it knew of the contents of that material. Indeed, the Supreme Court of Virginia has read a scienter requirement into similar provisions of § 18.2-374.1, even when that requirement was not expressly stated therein.

Senate Bill No. 1067 does not charge "on-line" communications entities or any other type of business entity providing electronic transmission of information with constructive knowledge of the content of the material transmitted across their lines. Such entities, like booksellers, are responsible only for their actual knowledge of the contents of the materials they transmit. Indeed, an obscenity statute of any sort without a scienter requirement would be an unconstitutional restriction on free speech protected under the First Amendment to the Constitution of the United States.

A bookseller does not have an affirmative legal duty to review the materials it sells in advance, despite the fact that books often sit on the shelves of booksellers for an extended period of time. Similarly, "on-line" communications entities and other cable communications networks would have no affirmative legal duty to review in advance material that is transmitted across their lines. Indeed, the scienter requirement means that
"'only those who are in some manner aware of the character of the material they attempt to distribute should be punished.'"\(^9\)

Accordingly, it is my opinion that Senate Bill No. 1067, amending subsections A, B(3) and (4) of § 18.2-374.1, achieves the intended purpose. "On-line" communications entities and other such cable entities will not be held culpable under § 18.2-374.1 absent prior knowledge of the content of the material that is being transmitted. Such entities, furthermore, have no affirmative legal duty to review such material in advance.\(^10\)

\(^1\)Senate Bill No. 1067 was approved May 5, 1995, subsequent to the date this opinion was rendered. See Ch. 839, 1995 Va. Acts Reg. Sess. 1774, 1775.

\(^2\)In its current form, § 18.2-374.1 prohibits the production, publication, sale and financing of, as well as possession with the intent to distribute, sexually explicit items involving "a person less than eighteen years of age." The current statute applies to pictures, photographs, drawings, sculptures and motion picture films or similar visual representations. Section 18.2-374.1(A). Senate Bill No. 1067 would amend subsection A to add "digital image" to the list of sexually explicit visual material, subsection B(3) to add "computer-generated reproduction" as a means by which such material is produced, and subsection B(4) to bar the electronic transmittal of such images. Senate Bill No. Senate Bill No. 1067 also amends § 2.1-124 to permit the Governor to request the Attorney General to institute or conduct criminal prosecutions in cases involving alleged "violation of the criminal laws involving child pornography and sexually explicit visual material involving children."


\(^4\)The term ['knowingly'] is used in pleading to signify an allegation (or that part of the declaration or indictment which contains it) setting out the defendant's previous knowledge of the cause which led to the injury complained of, or rather his previous knowledge of a state of facts which it was his duty to guard against, and his omission to do which has led to the injury complained of. The term is frequently used to signify the defendant's guilty knowledge." BLACK'S LAW DICTIONARY 1345 (6th ed. (1990) (defining "scienter").

\(^5\)223 Va. at 311, 288 S.E.2d at 466 (holding that § 18.2-374.1(B)(2) requires proof of knowledge even though statute does not say "knowingly").


\(^7\)Smith v. California, 361 U.S. 147, 153 (1959).


\(^10\)I note, however, that it is not unreasonable to expect that all reputable electronic media—communications entities and cable networks—will make every effort to ensure that sexually explicit material involving persons under the age of eighteen is not displayed or transmitted on their systems.
CRIMINAL PROCEDURE: DISABILITY OF JUDGE; APPOINTED COUNSEL, ETC. - DISABILITY OF ATTORNEY FOR COMMONWEALTH.

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

General district court may not appoint private attorneys who volunteer to serve as unpaid private prosecutors of misdemeanor cases when Commonwealth's attorney has decided not to prosecute such cases in that court.

March 31, 1995

The Honorable Charles D. Griffith Jr.
Commonwealth's Attorney for the City of Norfolk

You ask whether the general district court may appoint private attorneys who volunteer to serve as unpaid private prosecutors of misdemeanor cases when the Commonwealth's attorney has decided not to prosecute such cases in that court.1

You relate that certain local attorneys and a judge of the General District Court of the City of Norfolk have organized a volunteer prosecutor program for the purpose of prosecuting certain misdemeanor cases in that court. You also relate that this effort has not been coordinated with your office, and, furthermore, that you have not been contacted for the purpose of appointing any of the volunteer attorneys to act as volunteer, unpaid assistant Commonwealth's attorneys. Finally, you relate that you have not consented to the use of such volunteer private prosecutors.

The General Assembly has not expressly authorized the appointment of volunteer, private prosecuting attorneys in the manner described in your letter.2 There is, however, a clear intent on the part of the General Assembly to limit the number of situations in which private attorneys may be authorized to prosecute criminal charges. Furthermore, the Supreme Court of Virginia has held that the authority of the circuit court to appoint a prosecutor under § 19.2-155 of the Code of Virginia when the Commonwealth's attorney is "unable to act" is limited to temporary situations analogous to that attorney's "sickness" or "disability."3

In Cantrell v. Commonwealth,4 the Supreme Court of Virginia, while acknowledging the historic right of a crime victim or his family to retain a private attorney to assist in the prosecution of a criminal case, commented that good public policy may support legislative change to this rule, and imposed strict limitations on its applicability. When a private attorney assists in the prosecution, "he may participate only with the express consent of the public prosecutor," and "the public prosecutor must remain in continuous control of the case."5 A prosecutor's "duty to administer the criminal law impartially, in the interest of justice, is essentially a judicial one."6 Generally, when the public prosecutor has exercised the discretion not to prosecute certain charges, the courts...
have no inherent authority to interfere with that decision by appointing private attorneys to prosecute such cases.7

A paramount consideration in the decision to prosecute a criminal case is that the function of controlling the prosecution of criminal cases be exercised by an attorney who is responsible to the public.8 It is my opinion, therefore, that a general district court does not have authority to appoint private attorneys who volunteer to serve as unpaid private prosecutors of misdemeanor cases when the Commonwealth’s attorney has decided not to prosecute such cases in that court.9

1Prior opinions of the Attorney General conclude that § 15.1-8.1(B) of the Code of Virginia leaves the decision whether to prosecute misdemeanors entirely to the discretion of the Commonwealth’s attorney. Op. Va. Att’y Gen.: 1993 at 163, 166; 1990 at 141, 142; 1987-1988 at 176, 179; 1981-1982 at 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 relate to the validity of the misdemeanor complaints. 1990 Op. Va. Att’y Gen., supra.

2Section 15.1-8.1(B) provides that Commonwealth’s attorneys shall have “the duty of prosecuting all warrants, indictments or informations charging felony and he may in his discretion, prosecute .... misdemeanors ....” (Emphasis added.)

Section 15.1-821 provides, in part, that “volunteer assistant attorneys for the Commonwealth serving without compensation may be appointed by the attorney for the Commonwealth without approval of the governing body or the Compensation Board.” (Emphasis added.)

Section 19.2-155 provides procedures whereby the circuit court may appoint an attorney to prosecute cases in the name of the Commonwealth when the Commonwealth’s attorney has a conflict of interests, or is unable to perform his duties “due to sickness, disability or other reason of a temporary nature.”

Section 19.2-156 provides a procedure for the circuit court judge to appoint an acting attorney for the Commonwealth when it is necessary for the Commonwealth’s attorney “to absent himself for a prolonged period of time from the performance of the duties of his office.”

5Id. at 393, 329 S.E.2d at 26. Section 15.1-821 also provides that “all assistant attorneys for the Commonwealth shall perform such duties as are prescribed by their respective attorney for the Commonwealth.”

6229 Va. at 393, 329 S.E.2d at 26.
8This opinion does not address the several areas of concern that arise from the prosecution of criminal charges by private prosecutors acting without statutory authority, such as validity of criminal convictions, enforceability of plea agreements and potential civil liability of such private prosecutors.

9In a different factual context, a prior opinion of the Attorney General concludes that a district court, in its discretion and under its continuing control, may allow a private prosecutor employed by the complainant to proceed with prosecution of a misdemeanor charge when neither the Commonwealth’s attorney nor one of his assistants is present in court to undertake that prosecution. See 1990 Op. Va. Att’y Gen. 141. To the extent that opinion concludes that the district court may do so without the express consent of the Commonwealth’s attorney, it is overruled.
CRIMINAL PROCEDURE: EXTRADITION OF CRIMINALS - UNIFORM CRIMINAL EXTRADITION ACT.

Bail provisions apply only to criminal proceedings involving adjudication of criminal charges pending in Virginia and not to civil extradition proceedings. Court has no authority to admit individual to bail once governor's warrant of extradition issues. Fugitive from demanding state held in Virginia jail pursuant to such warrant is not entitled to release on bail pending resolution of his challenge to extradition.

December 6, 1995

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

You ask whether a fugitive from justice from another state ("demanding state") who is being held in a jail in Virginia ("asylum state") pursuant to a governor's warrant of extradition ("rendition warrant") is entitled to release on bail pending resolution of his challenge to extradition.1

The Uniform Criminal Extradition Act is codified in Article 2, Chapter 8 of Title 19.2 of the Code of Virginia2 (the "Virginia Act"). The authority for the Virginia Act is found in the Extradition Clause of the Constitution of the United States3 and in the federal Extradition Act of 1793, as amended4 (the "federal Act"). It was the intent of Congress in enacting the federal Act, which implements the Extradition Clause, that extradition be a summary and mandatory executive proceeding, requiring an asylum state to deliver a fugitive from justice to the state from which he fled on demand of that state's executive authority.4 An extradition proceeding is "not the appropriate time or place for entertaining defenses or determining the guilt or innocence of the charged party."6 These are determinations "left to the prosecutorial authorities and courts of the demanding State," which ultimately is responsible for enforcement of its criminal law.7

The role of the courts in the extradition process is limited. When an individual is arrested in an asylum state and charged as a fugitive from justice prior to the issuance of a governor's rendition warrant, the court is to determine (1) whether the individual arrested was present in the demanding state when the offense was alleged to have been committed, and (2) whether such individual fled from that state.8 If so, the individual is to be committed to jail to await issuance of the governor's rendition warrant, unless he is admitted to bail.9 Once the rendition warrant issues, the fugitive must be advised of his right to contest extradition by applying for a writ of habeas corpus.10 The court reviewing an application for such a writ, however,

...can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in...
the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable.\textsuperscript{111}

Once the governor’s rendition warrant issues, the fugitive bears the burden to disprove the existence of one of these four factors. “A governor’s grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met.”\textsuperscript{12}

The majority of the courts that have considered the question of a fugitive’s eligibility for bail following arrest on a governor’s rendition warrant have held that bail is not available.\textsuperscript{13} Although there are many reasons supporting this conclusion, the essential determining factor is that “the fugitive should be readily available to be turned over to the demanding state, in which he would be accorded all his legal rights, including that of bail.”\textsuperscript{14} These cases focus on the fact that in states, such as Virginia, where there is no provision for bail following issuance of a governor’s rendition warrant, the denial of bail simply furthers the extradition process between states, and is not violative of any constitutional due process rights.\textsuperscript{15}

Virginia’s statute pertaining to the release on bail of a fugitive from a demanding state being held in a Virginia jail applies only prior to issuance of a governor’s rendition warrant. 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.\textsuperscript{16} The mention of one thing in a statute implies the exclusion of another.\textsuperscript{17} The specific authority in § 19.2-102 granting a prisoner’s release on bail prior to issuance of a governor’s rendition warrant strongly implies that courts do not have the authority to do so more generally.

When the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it.\textsuperscript{18} It is my opinion, therefore, that once a governor has issued his rendition warrant and it has been served upon the fugitive, a court has no power to admit that individual to bail. The federal and state constitutional bail provisions, unless clearly indicated to the contrary, have no application to extradition proceedings, which are considered to be civil in nature.\textsuperscript{19} The bail provisions in Chapter 9 of Title 19.2 are applicable only to criminal proceedings that involve the adjudication of criminal charges pending in Virginia.\textsuperscript{20} I can find no indication that the General Assembly intended for the bail provisions of Chapter 9 to apply to extradition proceedings.

The express purpose of the extradition process is to ensure the speedy transfer of a fugitive from justice in an asylum state to the demanding state where the fugitive must face criminal charges. Therefore, the protections afforded by due process, including consideration for release on bail, are best addressed in the jurisdiction where the individual is charged. Once a governor’s rendition warrant issues, the purpose of judicial review is limited. The fact that the governor has determined to issue a rendition warrant is prima facie evidence in support of the regularity of the extradition request, and may be over-
come only by substantial evidence to the contrary. Therefore, it is my opinion that a fugitive from a demanding state who is being held in a Virginia jail pursuant to a governor’s rendition warrant is not entitled to release on bail pending resolution of his challenge to extradition.

1Section 19.2-92 of the Code of Virginia provides: “If the Governor decides that a demand for the extradition of a person, charged with, or convicted of, crime in another state should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to the sheriff or sergeant of any county or city or to any peace office or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.”

2Sections 19.2-85 to 19.2-118.

3“A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.” U.S. CONST. art. IV, § 2, cl. 2.

4“Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.” 18 U.S.C.A. § 3182 (West 1985).


6California v. Superior Court of California, supra, 482 U.S. at 407.

7Id. at 408.


9Section 19.2-102 provides: “Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, any judge, magistrate or other person authorized by law to admit persons to bail in this Commonwealth may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned upon his appearance before a judge at a time specified in such bond and upon his surrender for arrest upon the warrant of the Governor of this Commonwealth.” (Emphasis added.)

10The first sentence of § 19.2-95 provides: “No person arrested upon such warrant shall be delivered over to the agency whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a circuit or general district court in this Commonwealth, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge or trial justice shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.”
CRIMINAL PROCEDURE: TAXATION AND ALLOWANCE OF COSTS.

COSTS, FEES, SALARIES AND ALLOWANCES: COSTS GENERALLY.

Court may not waive jury costs required to be paid by defendant who pleads guilty after jury has been called, whether pursuant to plea agreement or otherwise. Defendant may be excused from paying costs required to be reimbursed to Commonwealth only when accused waives trial by jury, at least ten days before trial.

August 2, 1995

The Honorable John T. Frey
Clerk, Circuit Court of Fairfax County

You ask whether jury costs required to be paid by a defendant in a criminal case pursuant to § 19.2-336 of the Code of Virginia may be waived by the court as part of a plea agreement reached on the day of the scheduled jury trial.1

You present a hypothetical situation in which jurors have reported for jury duty in a criminal case; therefore, the Commonwealth has incurred the obligation to reimburse them.2 After the jurors have reported for jury duty, the defendant and the Commonwealth's attorney enter into a plea agreement whereby the defendant pleads guilty, and which includes a waiver of jury costs under § 19.2-336. Upon entry of the guilty plea, the jurors are dismissed without having to serve in the criminal case.

Section 19.2-336 requires a convicted defendant to pay jury costs. The Supreme Court of Virginia has held that costs in a criminal case

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11Michigan v. Doran, supra note 5, 439 U.S. at 289.
12Id.
14Id. § 5[b], at 141.
15Id. §§ 5[c], 7, 9[b], 10.
161994 Op. Va. Att'y Gen. 9, 12 (concluding that general district court does not have authority to override statutory discretion conferred by § 15.1-8.1(B) on Commonwealth's attorney by requiring him to appear daily to review and prosecute citizen-initiated misdemeanor complaints).
19See 13 A.L.R.5th §§ 3-4, 5[c], supra note 13.
are exacted simply for the purpose of reimbursing to the public treasury the
precise amount which the conduct of the defendant has rendered it
necessary should be expended for the vindication of the public justice of
the state and its violated laws.... Payment of costs is no part of the
sentence of the court, and constitutes no part of the penalty or punishment
prescribed for the offence.\[4]

In a prior opinion, the Attorney General concludes that “[s]tatutes prescribing costs ‘are
to be construed as remedial statutes and liberally and beneficially expounded for the sake
of the remedy which they administer.’”\[4]

In other prior opinions, the Attorney General concludes that a defendant in a
criminal case should be held responsible for the cost of two juries when the first jury was
unable to reach a verdict,\[5] and that a criminal defendant is responsible for the costs of
the jury dismissed when the Commonwealth’s attorney moved for a postponement
because of a missing witness.\[6] The Attorney General also has concluded that the defen-
dant is responsible for reimbursement of all jurors summoned to court, including those
discharged or excused during \textit{voir dire},

\[s]ince all of the jurors summoned to appear in court must be compensated
for their services, and since the Commonwealth otherwise would be obli-
gated to make such reimbursements, it is apparent that a convicted defen-
dant, having necessitated the calling of the jurors by his request for a jury
trial, would be liable for such expenses.\[7]

Jurors are entitled to compensation for each day they attend the term of court even
though they may not be selected as part of a jury panel.\[8]

The General Assembly has not provided any discretion to be exercised by the
court in excusing a defendant from the payment of costs required to be reimbursed to the
Commonwealth under § 19.2-336, other than a case “in which an accused waives trial
by jury, at least ten days before trial.”\[9] It is unnecessary to resort to any rules of statu-
tory construction when the language of a statute is unambiguous.\[10] In those situations, the
statute’s plain meaning and intent govern. It is my opinion, therefore, that the court does
not have the authority to waive the payment of jury costs when a defendant pleads guilty
after the jury has been called, whether pursuant to a plea agreement or otherwise.

\[1\] Section 19.2-336 provides that “[i]n every criminal case the clerk of the circuit court in which
the accused is found guilty ... shall, as soon as \(\approx x \approx\) be, make up a statement of all the expenses
incident to the prosecution, ... and execution for the amount of such expenses shall be issued and
proceeded with.... However, in any case in which an accused waives trial by jury, at least ten days
before trial, but the Commonwealth or the court trying the case refuses to so waive, then the cost
of the jury shall not be included in such statement or judgment."

\[2\] The first sentence of § 14.1-195.1 provides that “[e]very person summoned as a juror in a
civil or criminal case shall be entitled to thirty dollars for each day of attendance upon the court
for expenses of travel incident to jury service and other necessary and reasonable costs as the court may direct."

Section 14.1-195.2(A) provides: "The compensation and allowances of persons attending the court as jurors in all felony cases shall be paid by the Commonwealth ...."


41990 Op. Va. Att’y Gen. 72, 73 (quoting Anglea, &c. v. Commonwealth, 51 Va. (10 Gratt.) at 701). "The right to enforce payment of [costs] is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it." Anglea, &c. v. Commonwealth, 51 Va. (10 Gratt.) at 701.


61953–1954 Op. Va. Att’y Gen. 41, 41 (if it becomes necessary to dismiss and reconvene jury for trial of accused who is ultimately convicted, expense incurred in assembling jury on both occasions should be taxed against accused, regardless of who brought about necessity for postponing trial).

71978–1979 Op. Va. Att’y Gen. 63, 64 (footnote omitted) (rationale is that wrongdoer should be compelled to make full reimbursement of expense he has caused Commonwealth to suffer).


EDUCATION: DIVISION SUPERINTENDENTS.

County school board simultaneously may terminate by mutual consent employment agreements of division superintendent and reappoint superintendent to office, provided such action creating vacancy in office does not occur within statutorily designated 60-day period for appointment of superintendents.

December 15, 1995

Mr. Patrick M. McSweeney
County Attorney for Powhatan County

You ask whether a county school board simultaneously may terminate and reappoint the division superintendent when such action does not occur within the sixty-day period prescribed by § 22.1-60 of the Code of Virginia for the appointment of superintendents.1

You relate that on May 11, 1995, a resolution was adopted by the Powhatan County School Board, with the consent of the division superintendent, providing both
In § 22.1-60, the General Assembly explicitly requires that “[t]he division superintendent shall be appointed by the school board ... within sixty days before March 1 of the year in which the term of the incumbent division superintendent expires,” unless a vacancy occurs. (Emphasis added.) A prior opinion of the Attorney General concludes that the command requiring appointment within the sixty-day time period before March 1 as specified in § 22.1-60 is “unambiguous.”3 “The General Assembly has specified that all appointments of superintendents must be made ‘within’ the sixty-day period preceding March 1 of the year in which the term will commence unless a vacancy is involved.”4 In the case where a vacancy occurs, “other than by expiration of term,” the school board’s appointment must be made within 180 days after such vacancy occurs.5

The General Assembly has not specifically defined the term “vacancy” or specified how a “vacancy” may occur as contemplated in § 22.1-60 other than to provide that a vacancy may not occur by “expiration of term.” In § 22.1-66, however, the General Assembly has provided that “[t]he office of any division superintendent ... shall be deemed vacant ... upon his resignation or his removal from office.” The primary object of statutory construction and interpretation is to ascertain and give effect to the legislative intent.6 To determine legislative intent, statutes dealing with the same subject matter should, to the extent possible, be read together.7 “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.’”8 Finally, statutes relating to the same subject are not to be considered in isolation but must be construed together to produce a harmonious result that gives effect to all provisions if possible.9

From the facts you present, the superintendent, in effect, both resigned and was removed from office on May 11, 1995, by the mutual consent termination of her employment agreement in the resolution adopted by the school board.10 When the office of superintendent became vacant by the resignation/removal resolution, the school board was required to make an appointment under the provisions of clause (ii) of § 22.1-60. The use of the word “shall” in a statute generally indicates that its procedures are intended to be mandatory.11

I am, therefore, of the opinion that a county school board simultaneously may terminate by mutual consent the employment agreement of a division superintendent and reappoint the superintendent when such action does not occur within the sixty-day period prescribed by § 22.1-60 for appointments of superintendents, because a vacancy has occurred in the office of division superintendent.
Section 22.1-60 provides:

"The division superintendent of schools shall be appointed by the school board of the division from the entire list of eligibles certified by the State Board [of Education]. All contract terms for superintendents shall expire on June 30. The division superintendent shall serve for an initial term of not less than two years nor more than four years. At the expiration of the initial term, the division superintendent shall be eligible to hold office for the term specified by the employing school board, not to exceed four years.

The division superintendent shall be appointed by the school board (i) within sixty days before March 1 of the year in which the term of the incumbent division superintendent expires or (ii) within 180 days after a vacancy occurs other than by expiration of term. In the event a school board appoints a division superintendent in accordance with the provisions of this section and the appointee seeks and is granted release from such appointment prior to assuming office, the school board shall be granted a sixty-day period from the time of release within which to make another appointment.

"A school board that has not appointed a superintendent within 120 days of a vacancy occurring other than by expiration of term shall submit a written report to the Superintendent of Public Instruction demonstrating its timely efforts to make an appointment."

You have provided no details regarding the terms, conditions or particulars of the employment agreements of the superintendent.

1984-1985 Op. Va. Att'y Gen. 263, 263 (construing § 22.1-60 and its predecessor as requiring that division superintendent shall be appointed by school board within sixty days preceding March 1 of year in which incumbent's term expires or after vacancy occurs other than by term's expiration).


Section 22.1-60(ii).


"A "fiction of law" was created by this action of the school board. "A 'fiction of law' is an assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place." 16A WORDS AND PHRASES Fiction of Law 27 (1959) (emphasis added). See 1991 Op. Va. Att'y Gen. 144, 147, 149 (office of superintendent is not deemed vacant on unilateral act of superintendent's resigning, because removal from office requires action by school board or reviewing court; § 22.1-66 should be interpreted to permit school board to reappoint superintendent after having deemed him to have vacated his office, if board determines, in its discretion, to do so).

EDUCATION: PUPIL TRANSPORTATION.

CONSTITUTION OF VIRGINIA: EDUCATION — BILL OF RIGHTS (ESTABLISHMENT OF RELIGION CLAUSE) — LEGISLATURE.

Neither federal nor state constitution prohibits local governing body or local school board from transporting students on public school buses to and from sectarian and nonsectarian private schools as part of general public transportation program for all students. Fact that tax dollars are expended or that religious group receives public benefit is not sufficient to render program invalid, when such program is of neutral, general benefit; i.e., providing safe and reliable bus transportation for all school-age children. Constitutional validity of particular transportation program requires examination of purpose of program, its primary effect, and whether administration of program fosters excessive religious entanglement. Local governing bodies and local school boards must have express statutory authority permitting use of public school transportation facilities and equipment to transport private school students pursuant to constitutional authority.

September 12, 1995

The Honorable Robert F. McDonnell
Member, House of Delegates

You ask whether the federal or state constitution prohibits local school boards and governing bodies from providing public school buses to transport students to and from sectarian and nonsectarian private schools. You also ask whether local school boards and governing bodies are authorized to allow such transportation of private school students by public school buses.

The Supreme Court of the United States has held that a New Jersey statute authorizing local school districts to provide for the transportation of pupils to and from their schools was not a violation of the Establishment Clause of the First Amendment to the Constitution of the United States, even though some of the schools to which pupils were transported were parochial. The Court commented that the focus of such an inquiry was not on the schools, but on the parents and their children:

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

Accordingly, I am of the opinion that the federal constitution does not prohibit local school boards and governing bodies from providing transportation for students to and from sectarian and nonsectarian private schools as part of a general public transportation program for all students.
The Supreme Court of Virginia, however, examined the constitutionality of the appropriation act for the 1954-1956 biennium, which authorized "tuition, institutional fees, board, room rent, books and supplies" for war orphans, some of whom sought to attend private schools, including sectarian schools. The Court held that the 1954-1956 appropriation act contravened former Article IX, § 141 of the Constitution of Virginia, as amended in 1952. The Court further held that, to the extent such appropriations were made for the benefit of children attending sectarian schools, those appropriations violated basic state constitutional guarantees of "complete separation of Church and State in civil affairs" in former Article I, § 16, and former Article IV, §§ 58 and 67 of the Virginia Constitution, as well as the First and Fourteenth Amendments of the federal constitution.

In its decision in Almond v. Day, the Supreme Court of Virginia acknowledged the decision of the United States Supreme Court in Everson v. Board of Education, but did not decide whether the child benefit theory articulated by the federal court also would be read into the Virginia Constitution. The Virginia Supreme Court focused on the issue of whether direct tuition payments to a religious school constituted a prohibited appropriation:

Assuming, but not deciding, the soundness of the view that the private institutions involved receive no direct benefit from the transportation of pupils ... the same cannot be said of provisions for the payment of tuition and institutional fees at such schools. Tuition and institutional fees go directly to the institution and are its very life blood. Such items are the main support of private schools which are not sufficiently endowed to insure their maintenance. Surely a payment by the State of the tuition and fees of the pupils of a private school begun on the strength of a contract by the State to do so would be an appropriation to that school.

The Virginia Supreme Court has not addressed the issue of funding student transportation under the Virginia Constitution. That issue, however, has been examined by the United States Court of Appeals for the Fourth Circuit. In the case of Phan v. Commonwealth of Virginia, the Fourth Circuit considered whether Article IV, § 16 or Article VIII, § 10 of the Constitution of Virginia (1971) prohibited reimbursement by the Commonwealth of a student attending an out-of-state sectarian college of incidental expenses, such as books, transportation and living expenses. Noting that Almond v. Day "provides no guidance on the question of incidental expenses," the Fourth Circuit found the rationale of the United States Supreme Court in Everson v. Board of Education and subsequent federal cases to be persuasive, by analogy, and concluded:

[T]here is no Virginia constitutional barrier to ... reimbursement for incidental educational expenses such as books, transportation and living expenses other than tuition and fees exacted by [the college].
"There is nothing in the language of [Article VIII, § 10] that would prevent the Virginia courts from adopting the 'child benefit' theory or some other approach that would allow given forms of aid to be extended to children in sectarian schools." I am, therefore, of the opinion that under the child benefit theory, it would not be a violation of the Virginia Constitution for a school district or local governing body to provide public school buses for transporting students to both public and private schools, even when some of those private schools are sectarian in nature.

In addition, there are certain public benefits that, under long-established constitutional doctrine, do not implicate Establishment Clause concerns when such benefits are extended to religious groups. The "general benefits" doctrine is a consistent theme in First Amendment jurisprudence, and is implicit in the jurisprudence surrounding Virginia's Establishment Clauses. In Everson v. Board of Education, Justice Black warned that "we must be careful, in protecting the citizens ... against state-established churches, to be sure that we do not inadvertently prohibit [the state] from extending its general state law benefits to all its citizens without regard to their religious belief." Accordingly, the fact that tax dollars are expended or that a religious group may receive a public benefit is not sufficient to render the program invalid under the First Amendment.

As the Court noted in Widmar v. Vincent: "If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" Neither the federal constitution nor the Virginia Constitution prohibits religious groups from receiving such publicly funded benefits. In my opinion, safe and reliable bus transportation for all children of school age would be analogous to other generally available public measures, such as police and fire protection, road and sidewalk maintenance, and sanitation services. If such a benefit were to be conferred on public and private schools in general, there would be no requirement to withhold the benefit from those schools that are sectarian in nature.

As to your second inquiry regarding current statutory authority, in order for a local governing body or school board to authorize use of a public school transportation system by private school students, authority also must be found, either expressly or by implication, in some existing state statute. Local governing bodies and local school boards possess only those powers granted to them expressly or by necessary implication.

No existing state statutes contain express language authorizing use of public facilities or equipment to transport private school students. The only statute authorizing the use of public school buses for any purpose other than transportation of public school students is § 22.1-182 of the Code of Virginia. That section authorizes local school boards to make agreements only with local governing bodies in the school division, state agencies, or agencies "established or identified pursuant to United States Public Law 89-73."
Moreover, the General Assembly at one time granted local school boards the authority to provide public transportation for nonsectarian private school students, or to make grants to parents of nonsectarian private school students to cover transportation costs. Local governing bodies were authorized to appropriate public funds for these purposes. This enabling legislation, which previously was codified as §§ 22-294.1 through 22-294.3, was repealed in 1964. Such a grant and subsequent repeal of express statutory authority effectively negates any argument that local school boards and governing bodies have that authority by implication.

In view of the legislative history of repeal of such express authority, and the limiting language in § 22.1-182, it is my opinion that local school boards and governing bodies require additional statutory authority before they may permit use of public school transportation facilities and equipment to transport private school students pursuant to the constitutional authority discussed above.

2Id. at 18 (emphasis added).
3Although the Supreme Court of the United States decided Everson v. Board of Education before enunciating the three-prong test in Lemon v. Kurtzman, it is clear that such a program also would be allowed under Lemon v. Kurtzman, because (1) a secular purpose for such a transportation program exists (e.g., public safety and convenience), (2) the primary effect of such a general transportation program would neither advance nor inhibit religion, and (3) such a program would not foster an excessive government entanglement with religion. 403 U.S. 602, 612-13 (1971), aff’d, 411 U.S. 192 (1973). While the Court has avoided explicit use of the Lemon test, it has not repudiated the test. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 132 L. Ed. 2d 700 (U.S. 1995). Whether a governmental program satisfies the Lemon criteria remains a useful guide as to how a court may view its constitutionality.
5Id. at 430, 89 S.E.2d at 858. Former Article IX, § 141 is now Article VIII, § 10 of the Constitution of Virginia (1971), which 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.” (emphasis added.)

At a constitutional convention held in March 1956 for the purpose of considering amendments to former § 141, the emphasized language was added to effectively address that part of the decision in Almond v. Day that applied to nonsectarian schools. Ch. 1, 1956 Va. Acts Reg. Sess. 3 (providing for election of convention delegates and specifying purpose of convention); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE COMMONWEALTH OF VIRGINIA TO REVISE AND AMEND
SEC. 141 OF THE CONSTITUTION OF VIRGINIA (photo. reprint of March 7, 1956, ordinance amending § 141, following p. 94) (1956). This amendment, however, did not alter the impact of the Court's decision on state aid to sectarian private school students, because the language added to § 141 expressly mentioned only nonsectarian school students.

6197 Va. at 429, 89 S.E.2d at 858. Former Article I, § 16 and former Article IV, § 58 are combined into current Article I, § 16, and former Article IV, § 67 is presently Article IV, § 16. Article I, § 16 provides:

"That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please."

The first sentence of 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."

7197 Va. at 426-27, 89 S.E.2d at 856.

8Id. at 427, 89 S.E.2d at 856-57 (emphasis added). During the forty years that have passed since Almond v. Day was decided, there has been substantial development of Establishment Clause jurisprudence in the federal courts. It is well-established that the First and Fourteenth Amendments do not preclude a state from granting aid that may flow to a religious institution "only as a result of the genuinely independent and private choices of aid recipients." Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481, 487 (1986), cert. denied, 493 U.S. 850 (1989); accord Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, _, 113 S. Ct. 2462, 2467, 125 L. Ed. 2d 1, 11 (U.S. 1993) (quoting Mueller v. Allen, 463 U.S. 388, 399 (1983)) (no violation of Establishment Clause occurs when public funds become available to sectarian schools "'only as a result of numerous private choices of individual parents of school-age children'"). In light of these decisions treating the recipients of funds as independent decision-makers rather than as mere conduits between the government and the school, it is unclear as to how much viability the decision in Almond v. Day retains, even with respect to the Virginia Constitution. Because this question is beyond the scope of your inquiry, I express no opinion on it.

9806 F.2d 516 (4th Cir. 1986).

10Id. at 524.

11Id. at 525.


1962-1963 at 239. Two of these prior opinions, however, were issued before the 1986 decision in Phan v. Virginia, and the 1991 opinion fails to address the issues raised in that case. Moreover, the 1991 opinion concludes that the Virginia Supreme Court in Almond v. Day 'explicitly rejected the 'child benefit' theory that the Supreme Court of the United States had adopted in Everson.' 1991 Op. Va. Att'y Gen., supra, at 52. I find no such explicit rejection in Almond v. Day addressing the issue of transportation. On the contrary, Almond "assume[ed], but [did] not decid[e], the soundness of the view that the private institutions involved receive no direct benefit from the transportation of pupils ...." 197 Va. at 427, 89 S.E.2d 856-57. Therefore, I am of the opinion that these prior opinions do not accurately state the current law.

1330 U.S. at 16. The U.S. Supreme Court also observed that "state-paid policeman, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." Id. at 17-18.

1454 U.S. 263, 274-75 (1981) (citations omitted); see also Zobrest v. Catalina Foothills School Dist., supra note 8, 509 U.S. at __, 113 S. Ct. at 2466, 125 L. Ed. 2d at 10 ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); Lee v. Weisman, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) (Establishment Clause is not violated when "the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria"); Mueller v. Allen, 463 U.S. 388 (1983) (upholding constitutionality of Minnesota program permitting all parents, including parents who chose religious schools, to deduct from their state taxes certain educational expenses); Walz v. Tax Commission, 397 U.S. 664 (1970) (upholding property tax exemptions for churches as part of general statutory exception for variety of nonprofit institutions).

16While there is no reported Virginia case on point, it is the long-standing, and apparently unchallenged, practice in this Commonwealth to provide churches with the same police and fire protection, road and sidewalk maintenance, and sanitation services as secular institutions. This common-sense practice, when coupled with the analogy of federal Establishment Clause jurisprudence, is sufficient to persuade me that the Virginia Constitution incorporates the general benefits theory.

17I note that any final determination of the constitutionality of a particular transportation program necessarily would require an examination of the details of that program, including its purpose, primary effect, and whether its administration fosters excessive entanglement with religion. See Lemon v. Kurtzman, supra note 3.

Section 22.1-182 provides: "The school board of any school division may enter into agreements with the governing body of any county, city or town in the school division, any state agency or any agency established or identified pursuant to United States Public Law 89-73 or any law amendatory or supplemental thereto providing for the use of the school buses of such school division by such agency or by departments, boards, commissions or officers of such county, city or town for public purposes, including transportation for the elderly. Each such agreement shall provide for reimbursing the school board in full for the proportionate share of any and all costs, both fixed and variable, of such buses incurred by such school board attributable to the use of such buses pursuant to such agreement. The governing body, state agency or agency established or identified pursuant to United States Public Law 89-73 or any law amendatory or supplemental thereto shall indemnify and hold harmless the school board from any and all liability of the school board by virtue of use of such buses pursuant to an agreement authorized herein."

Public Law No. 89-73 is the Older Americans Act of 1965, 79 Stat. 218 (codified as amended in 42 U.S.C.A. § 3001, et seq. (West 1994)). This language in § 22.1-182, therefore, refers to agencies receiving federal funding to operate programs for the elderly under the Older Americans Act.


EDUCATION: SCHOOL BOARDS; SELECTION, ETC.

Campbell County board of supervisors may abolish existing appointed at-large seats on school board before initial election of school board at November 1995 general election. Supervisors may reappoint any member whose term expires before December 31, 1995, or appoint replacement, to serve on school board until elected member’s term begins. Terms of appointed school board members who will not be replaced by elected member at November 1997 general election are extended until expiration on December 31, 1997. Statutory scheme for election of school board members does not permit towns of Altavista and Brookneal each to continue to appoint member to county school board, as provided in their charters.

January 11, 1995

The Honorable Joyce K. Crouch
Member, House of Delegates
You ask the following questions regarding the first election to be held at the November 1995 general election of members to the Campbell County school board:

1. Whether the board of supervisors may abolish the two at-large seats presently existing on the school board before the first election of school board members.

2. If an appointed member's term expires before the member's replacement is elected, whether the board of supervisors may appoint a school board member to serve until the replacement is elected.

3. Whether the towns of Altavista and Brookneal each may continue to appoint a member to the county school board, as provided in their charters.

You relate that the Campbell County board of supervisors is composed of seven members, with one elected from each of the county's seven election districts. The present Campbell County school board is composed of eleven members. The board of supervisors appoints one member from each election district and two at-large members. The town council of the towns of Altavista and Brookneal each appoint one member. The appointments by the two towns are pursuant to express provisions in the charters of each town. At the November 1993 general election, the voters of Campbell County approved the election of school board members.

I will answer your questions seriatim.

Section 22.1-57.3(B) of the Code of Virginia requires that the initial elected board consist of the same number of members as the appointed school board it replaces. There is nothing in § 22.1-57.3, however, that appears to alter the authority of the governing body to abolish the additional at-large seats created pursuant to § 22.1-44 before the first election. Prior opinions of the Attorney General conclude that boards of supervisors that create at-large school board positions pursuant to § 22.1-44 retain the ability to abolish those positions. Therefore, it is my opinion that, at least until the initial school board election, the Campbell County board of supervisors may abolish the existing at-large seats established under § 22.1-44.

You relate that the terms of some of the existing appointed school board members will expire before the election will be held for those positions. Under § 22.1-57.3(C), the terms of the appointed members of the Campbell County school board who will be replaced at the November 1995 general election expire on December 31, 1995. If, under the county's existing plan, the terms of any of these members expire before December 31, 1995, the board of supervisors may reappoint the member, or appoint a replacement, to serve until the elected member's term begins.

The entire Campbell County school board will not be elected at the November 1995 election. The terms of some of the appointed members who will not be replaced at
the November 1995 election will expire before replacements are elected at the November 1997 general election. Under § 22.1-57.3(C), if the entire county school board is not elected at the first election, the term of any appointed member who is not replaced by an elected member "shall continue or be extended to expire on December 31" of the year in which his replacement is elected. Accordingly, the terms of these appointed members are to be extended until expiration on December 31, 1997.

Section 22.1-57.3(A) provides that, upon voter approval at a referendum, "the members of the school board shall be elected by popular vote." (Emphasis added.) While both the Altavista and Brookneal town charters require appointed representatives on the county school board, § 22.1-57.3(A) makes no provision for appointed membership on a school board after the full board has been elected.

It is a general rule of statutory construction that, when a charter and a statute conflict, the charter controls. An exception to this rule occurs when the statute clearly indicates that the General Assembly intended it to control over any conflicting charter provisions. That exception applies here, where the language of § 22.1-57.1 clearly provides that "[t]he provisions of this article shall apply to every school division, county, city, and town, notwithstanding any other provision of this chapter, or of Title 15.1, or of any charter." (Emphasis added.)

The continued appointment of school board members from the towns of Altavista and Brookneal is in conflict with the statutory scheme for the election of school board members. It is, therefore, my opinion that the provisions of § 22.1-57.3 control and that the towns may not continue to appoint members to the county school board.

1See Ch. 47, § 26, 1985 Va. Acts 64 (Brookneal town council shall have right to appoint one member to serve on Campbell County school board); Ch. 512, § 33, 1958 Va. Acts 650 (Altavista school board shall designate annually one member of town school board as member of county school board for ensuing calendar year).
3While the decision to abolish the at-large seats is within the discretion of the governing body, I note that, in connection with obtaining preclearance under § 5 of the Voting Rights Act of 1965, as amended, the United States Department of Justice has, at times, viewed at-large positions as adversely affecting the voting rights of minorities.
4The appointing body may continue to make appointments until the first elected members take office. A provision of § 22.1-57.3(C) requires that any county school board selection commission be abolished on December 31 following the first election of county school board members.
8Article 7, Chapter 5 of Title 22.1 (pertaining to popular election of school boards).
Pittsylvania County board of supervisors may enact ordinance providing for seven-member school board, representing each county election district, before November 1995 initial election of school board; may abolish two at-large seats and eliminate three town seats on its appointed school board to conform composition of school board to seven-member board of supervisors before election. Resident voters of incorporated towns within county may participate in election of school board members of county election districts in which towns are situated, assuring representation on school board that is apportioned on population basis.

April 13, 1995

The Honorable Charles R. Hawkins
Member, Senate of Virginia

You ask several questions relating to the election of the initial school board in Pittsylvania County.

You indicate that the county board of supervisors is composed of seven members, each elected from a separate district to serve concurrent four-year terms. The county has an appointed school board composed of twelve members, one representing each of the seven election districts in the county, one representing each of the three incorporated towns in the county, and two at-large representatives.

In a referendum held in November 1993, the voters approved changing from an appointed to an elected school board. The first school board elections will be held in November 1995 simultaneously with the election of the board of supervisors.

The present appointed school board is constituted in accordance with Chapter 416 of the 1932 Virginia Acts of Assembly ("Chapter 416") and § 22.1-44 of the Code of Virginia. Section 1 of Chapter 416 establishes Pittsylvania County, along with the counties of Roanoke and Pulaski, as the unit for the entire county for school purposes and abolishes town school districts within the counties, except for representation. Section 2 of Chapter 416 establishes the representation of the school boards of these counties. For purposes of representation, each magisterial district and each incorporated town within the county having a population of one thousand or more constitutes a school district. The county school board is to be composed of a representative from each district. The member from a magisterial district is not to be a resident of a town that constitutes a school district. The two at-large seats on the Pittsylvania County school board were established in accordance with the optional authority granted to boards of supervisors by § 22.1-44 to appoint no more than two at-large school board members, in addition to the members representing districts.
You relate that in October 1994, the Pittsylvania County board of supervisors enacted an ordinance providing for a seven-member school board with one representative from each county election district. The members will be elected for four-year terms. The ordinance provides for no further appointments of at-large members or members from the towns.

You ask whether, in light of Chapter 416 and the provision in § 22.1-57.3(B) that the initial elected school board "consist of the same number of members as the appointed school board it replaces," the county may place into effect the ordinance establishing a seven-member school board.

Prior opinions of the Attorney General conclude that the optional authority granted to boards of supervisors to create at-large seats on a school board includes the implied authority to abolish those seats after they have been created. In my opinion, it is not inconsistent with § 22.1-57.3(B) for the board of supervisors to abolish the two at-large seats on its appointed school board before the date the school board is initially elected.

It is further my opinion that, notwithstanding any language in § 22.1-57.3(B) or in Chapter 416, changing from an appointed to an elected school board necessitates the elimination of the three current town seats on the school board. Once the school board is popularly elected, representation on that board is subject to the one-person, one-vote mandate of the Constitution of the United States. This mandate requires that, as a basic constitutional standard under the Equal Protection Clause, representation on elected governmental bodies must be apportioned on a population basis.

The purpose of the doctrine is to achieve fair and effective representation by assuring that, as far as practicable, each person's vote has the same effect. The ultimate goal is for officials to be elected by, and to represent citizens in, districts of substantially equal size.

It is my opinion that allowing town voters to elect a town representative to the school board, in addition to permitting them to participate in the election of members of the election district in which the town is situated, would violate the one-person, one-vote principle. Although the seven county election districts are of substantially equal population, residents of the towns would be entitled to vote for two representatives. The effect would be to give the towns, and the county election districts in which the towns are located, representation disproportionate to their relative population. This result conflicts with the principle of one person, one vote.

Therefore, I am of the opinion that the board of supervisors may enact an ordinance providing for a seven-member school board with one representative from each county election district before the date of the initial election of the school board.

EDUCATION: SCHOOL BOARDS; SELECTION, ETC.

CONSTITUTION OF VIRGINIA: EDUCATION (SCHOOL BOARDS).

School board, in exercising its powers of appointment, may appoint teacher(s) recommended by board’s licensed instructional personnel to serve on advisory committee to board, but is not authorized to appoint to its membership ex officio, nonvoting teacher representative.

October 2, 1995

The Honorable Elliott S. Schewel
Member, Senate of Virginia

You ask whether § 22.1-86 of the Code of Virginia authorizes a school board to appoint to its membership an ex officio, nonvoting teacher representative, selected by and from the licensed instructional employees of the school board. Senate Bill No. 753, which failed to pass in the 1995 Session of the General Assembly, proposed to add a new § 22.1-86.1:
A. Local school boards may adopt procedures for the appointment to the school board of teacher representatives selected by and from among the licensed instructional personnel employed by the particular school board. The representative shall serve in an ex officio, nonvoting capacity and shall be appointed under such circumstances and serve for such terms as the board prescribes.

B. Nothing in this section shall prohibit any school board from excluding the nonvoting teacher representative from executive sessions or closed meetings pursuant to § 2.1-344.

As Chairman of the Senate Committee on Education and Health, you ask whether school boards presently are authorized by § 22.1-86 to appoint advisory teacher representatives to their boards, the effect of which would be to render unnecessary introduction of a bill at the 1996 Session of the General Assembly amending that statute.

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

Chapter 5 of Title 22.1 prescribes the qualifications of school board members and requires that public hearings be held before appointing members to the school board. Appointments to school boards presently are made by the local governing authority, by a school board selection commission or by popular election, and the number of "seats" allotted to each school board depends on the composition and nature of the districts, cities or towns represented on the board.

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." It is equally well-settled that "[a statute] which is plain needs no interpretation." Section 22.1-86 does not authorize appointments on a school board or legislate an exception to general law regulating school board appointments. That section clearly authorizes a school board to appoint a committee solely to advise that board. The plain language of § 22.1-86 also indicates the intent of the General Assembly that advisory committee members are not considered members of a school board, since the committee is to "advise the members" and "cooperate with the school board." While § 22.1-86 does not authorize appointments on a school board, I can find nothing in § 22.1-86 that precludes a school board from appointing a teacher to serve on an advisory committee to the school board. In exercising its powers of appointment, the board may choose to appoint one or more specific teachers who have been recommended by the licensed instructional personnel of the board; however, the board should not delegate its powers of appointment.
Accordingly, it is my opinion that § 22.1-86 does not authorize a school board to appoint an *ex officio* nonvoting teacher representative to the board.¹

¹Section 22.1-86 does not presently authorize appointments on the school boards themselves, but instead authorizes appointments by local school boards of advisory committees to those boards: "Each school board is authorized to appoint a committee of not less than three nor more than seven members for each public school in the school division. The committee's duty shall be to advise the members of the school board with reference to matters pertaining to the school and to cooperate with the school board in the care of the school property and in the successful operation of the school. Such committee shall serve without compensation."

²Sections 22.1-28 to 22.1-57.5.
³See, e.g., §§ 22.1-29, 22.1-29.1.
⁵Temple *v.* City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944).
⁷The fact that the teacher representative appointed under failed Senate Bill 753 would be an "*ex officio*" member does not mean that such new member would not add to the number of school board members. *Ex officio* is defined as "[f]rom office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office." BLACK'S LAW DICTIONARY 575 (6th ed. 1990). Generally, an *ex officio* member would be counted for the purposes of determining a quorum. See Op. Va. Att'y Gen.: 1975-1976 at 188, 189; 1968-1969 at 137, 138.
⁹To the extent local school boards desire to receive the ongoing advice and input of its teachers, however, that objective may be accomplished pursuant to § 22.1-86.

EDUCATION: SCHOOL BOARDS; SELECTION; ETC. — POWERS AND DUTIES OF SCHOOL BOARDS.

CONSTITUTION OF VIRGINIA: EDUCATION (SCHOOL BOARDS).

School board's provision of health care coverage for its members does not contravene intent of General Assembly that local governing bodies may provide same benefits to members as are provided to their employees, so long as funds have been appropriated by local governing body to pay health insurance premiums. School board's payment of premiums is fringe benefit that need not be deducted from board members' salaries.

July 7, 1995

The Honorable Mitchell Van Yahres
Member, House of Delegates
You ask whether a school board may pay some or all of the premium of its members for health care coverage under group hospitalization policies for the board’s officers and employees. If so, you ask whether the payments must be deducted from its members’ salaries, as authorized by § 22.1-32 of the Code of Virginia.

As a legal entity separate and distinct from a local governing body, a school board is a body corporate and has independent powers. The powers of a school board include generally the power to determine, within available funds, the employment benefits to be provided its employees. The exercise of this power may not conflict with state law and State Board of Education regulations or contravene the intent of the legislature.

Section 22.1-85 authorizes school boards to “establish a fund for the payment of hospital, medical, surgical and related services [for] its officers, employees and their dependents out of funds appropriated to the school board or by payroll deductions or other mode consistent with state and federal income tax law and regulations.” A prior opinion of the Attorney General concludes that school boards have the authority to provide health insurance for their officers and employees. Generally, members of a school board are public officers. It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous. In those situations, the statute’s plain meaning and intent govern. A school board may establish the fund for payment of any such services provided any of its officers and their dependents. It is my opinion that provision of such a discretionary benefit does not contravene the intent of the legislature. The General Assembly has evidenced an intent that local governing bodies may provide their members the same benefits provided employees.

The authority of a school board to pay health insurance premiums for members of the school board is subject to the condition that the local governing body has appropriated sufficient funds for that purpose. Should funds be available, it is my opinion that a school board may pay the premiums to the extent and in the same manner that it pays the premiums for its other employees.

Because § 22.1-32 establishes maximum salaries for school board members, you ask also whether the amount of the premiums paid for school board members must be deducted from the members’ salaries. An employer’s payment of insurance premiums is a fringe benefit distinct from salary. The plain language of § 22.1-85 permits health insurance to be provided “out of funds appropriated to the school board or by payroll deductions or other mode consistent with state and federal income tax law and regulations.” Words used in a statute must be afforded their plain and ordinary meaning unless the context demands a different result. Therefore, assuming that the governing body has appropriated funds to pay the premiums, it is my opinion that the premiums are a fringe benefit that need not be deducted from the school board members’ salaries.
Section 22.1-71; see VA. CONST. art. VIII, § 7 (1971) (school board has supervisory power over schools in its division); § 22.1-79(5) (school board has power to operate and maintain public schools in school division); 1987–1988 Op. Va. Att’y Gen. 181, 182.


See § 22.1-79(5) ("[i]nsofar as not inconsistent with state statutes and regulations of the Board of Education," school board shall operate public schools in school division); see also Op. Va. Att’y Gen.: 1984–1985 at 89, 90 (although school board has broad authority, General Assembly may circumscribe that authority); 1975–1976 at 311, 312 (while school board may adopt sick leave policy for teachers, it may not adopt policy that conflicts with regulations of State Board of Education); 1973–1974 at 309, 310 (absent statutory authority, school board may not provide self-insurance for property loss).


See, e.g., § 14.1-46.01:1(4) (board of supervisors may grant fringe benefits to its members in same manner as such benefits are provided for county employees); § 14.1-47.2 (city council members may be compensated with same benefits city provides its employees).

See Op. Va. Att’y Gen.: 1977–1978 at 360, 361 (expenses of health insurance program may not exceed appropriation provided); 1972–1973 at 30, 31 (assuming county has appropriated funds for hospitalization insurance coverage, it is prerogative of school board to select insurance company to provide such coverage for its employees); 1969–1970 at 233, 233 (absent appropriation provision in budget, school board lacks authority to supplement budgeted salaries by providing health insurance).

See Op. Va. Att’y Gen.: 1974–1975 at 4, 5 ("salary" is payment earned in performance of duties of job classification; does not include cash awards paid to employees for outstanding performance); 1969–1970, supra note 8 (school board acting under general powers need not deduct insurance premiums from teachers’ salaries if budget provides for appropriation of such premiums).


ELECTIONS: CANDIDATES FOR OFFICE - NOMINATION OF CANDIDATES BY POLITICAL PARTIES.

Statute limiting when political party, once having chosen to nominate federal officeholder by primary, may revert to convention or other method of nomination, burdens party’s associational rights and raises serious constitutional questions; however, requiring or favoring primaries as means of conducting nomination contests while providing mechanism for returning to nomination by convention provides protection for voters deprived of opportunity to vote in future primaries, thereby serving compelling governmental interest in enhancing democratic character of election process. Court, in reviewing matter, may not find burden on party so great or governmental interest so slight as to justify invalidating statute. Because Virginia Attorneys General historically have
refrained from issuing opinions declaring statute unconstitutional, and they have not been vested with power to invalidate state statute, and because every reasonable doubt is to be resolved in favor of statute’s constitutionality, Attorney General cannot conclude beyond reasonable doubt that statute limiting associational rights guaranteed by First and Fourteenth Amendments is violative of U.S. Constitution.

November 22, 1995

The Honorable Robert G. Marshall
Member, House of Delegates

You ask whether the provisions of § 24.2-509(B) of the Code of Virginia are constitutional when applied to incumbent federal officeholders seeking reelection.

At the outset, it is important to state clearly that this opinion involves one narrow issue: whether it violates the dictates of the Constitution of the United States to require that where an incumbent federal officeholder was nominated by means of a primary, a primary must be held in the next election for that office unless the incumbent consents to a different method of selecting a nominee. Section 24.2-509(B) comes into effect when a political party initially chooses to nominate a federal officeholder by primary. The statute then requires that the method of nomination by that party in the next election will be by primary. Only if the party proposes a change of nominating process and the incumbent agrees does the party avoid the statutory primary requirement.

I am aware of no court decision or prior opinion of the Attorney General that resolves this issue. In assessing the constitutionality of § 24.2-509(B), however, I am guided by the doctrine that a statute is not to be declared unconstitutional unless the court is driven to that conclusion. “Every reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature.” Following this doctrine, it has been a long-standing practice of Virginia’s Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitutionality is clear beyond a reasonable doubt. This practice has its origins in well-founded considerations. Unlike a court, the Attorney General has no power to invalidate a statute. Thus, when an Attorney General opines that a statute violates the Constitution, that statute nevertheless remains in force. Further, by opining that a statute is unconstitutional, an Attorney General, in effect, is advising the enforcing state agency to ignore the statute. This an Attorney General should not do unless he is certain beyond a reasonable doubt that a reviewing court would strike down the statute.

While there are serious questions concerning the constitutionality of § 24.2-509(B), I cannot say beyond a reasonable doubt that a reviewing court would strike down the statute. Accordingly, I cannot opine that this statute is unconstitutional.

Political parties are not creatures of government. Rather, “[a] political party is the creation of free men, acting according to their own wisdom, and in no sense whatever
the creation of any department of the government." The Supreme Court of the United States has declared it "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces [First Amendment] freedom of speech," and, further, that states may not interfere with the right to freedom of association guaranteed by the First and Fourteenth Amendments to the United States Constitution. Moreover, the internal workings of a political party are within the protection of the First Amendment.

Political parties, however, are nevertheless subject to reasonable regulation by government. Consequently, virtually every state has a considerable body of law on the subject. Moreover, the methods of nominating candidates are controlled by detailed legislation. Case law makes it clear that the rights of political parties to nominate "whomever they want, however they want," is not absolute. In determining the constitutionality of any law limiting that right of association, courts assess the burden on the constitutional right, balancing that burden against the state interest justifying the statute. As was stated in a recent United States Supreme Court case:

Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends."...

... A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

In a series of cases, the United States Supreme Court has identified rights under the First and Fourteenth Amendments of such character and magnitude as to require that a state statute be struck down. In the case of Democratic Party of United States v. Wisconsin, the Court held that the State of Wisconsin could not bind a national political party to a state statute permitting cross-over voting in an open primary. The Court reasoned that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party’s choice among the various ways of determining the makeup of a State’s delegation to the party’s national convention is protected by the Constitution."

The Court has invalidated state laws as unconstitutional interference with the rights of political parties where the laws have limited, over the objections of a political party,
who may vote in primary elections. In the case of *Tashjian v. Republican Party of Connecticut*,19 the Court held that Connecticut’s closed primary law violated the Republican Party’s right to hold a primary open to independent voters. Striking down the law, the Court held that “[t]he right to associate with the political party of one’s choice is an integral part” of the basic constitutional right to freedom of association.20

In the case of *Eu v. San Francisco Democratic Committee*,21 a unanimous Court invalidated provisions of the California Elections Code that prohibited official governing bodies of political parties from endorsing candidates in party primaries and limited how parties select internal officers. The Court reasoned that the California Elections Code “limits a political party’s discretion in how to organize itself, conduct its affairs, and select its leaders.”22 The Court further emphasized that the associational rights of party members to select their party leaders “are much stronger than those we credited in *Tashjian*.”23

In each of these cases, the Court overturned statutes that purported to dictate internal party governance or limit who may participate in a party’s primary. It is possible, perhaps even probable, that a court reviewing Virginia’s primary statute would find that it too places an impermissible burden on a political party’s First and Fourteenth Amendment rights. Cases have made it clear that an essential component of a political party’s associational rights is the right to “identify the people who constitute the association” and to select a ‘standard bearer who best represents the party’s ideologies and preferences.’”24 Thus, a political party, within certain bounds, is free to control the selection of its candidates for public office. Section 24.2-509(B) does limit when a party, once having chosen to nominate a federal officeholder by primary, may revert to a convention (or some other means) of conducting a nomination contest for that office. As such, the statute clearly burdens a party’s associational rights and raises serious constitutional questions.

Yet, the United States Supreme Court also has recognized that statutes requiring or favoring primaries as the means for conducting nomination contests involve a strong governmental interest in widening participation in the democratic process. “It is too plain for argument … that the State … may insist that intraparty competition be settled before the general election by primary election or by party convention.”25 Indeed, no federal court has ever struck down a statute favoring or directing a primary over a convention as the means of conducting party nomination contests.

In the case of *Lightfoot v. Eu*,26 the Court of Appeals for the Ninth Circuit upheld a California statute requiring political parties to nominate candidates by direct primary. Under the statute, if a party failed to nominate a candidate through the primary process, it could not fill the resulting vacancy on the general ballot by other means, such as a nominating convention.27 The Ninth Circuit determined that, notwithstanding the burden on the parties’ freedom of association, the law was valid, because California had an interest in “enhancing the democratic character of the election process.”28 Indeed, the Ninth Circuit concluded that it could “imagine no government interest more compelling.”29
The analysis and conclusions of the Ninth Circuit in *Lightfoot v. Eu* are equally applicable to a state law requiring candidate selection by direct primary as opposed to party convention. Section 24.2-509(B) requires that where an incumbent has been nominated by means of a primary in the last election, a primary shall be held again should the incumbent run for the same office in the succeeding election. Section 24.2-509(B) allows only one exception—where the incumbent consents to a different means of conducting the nomination process. "[T]hese provisions assured those voters who had supported a candidate previously that their majority voice could not be bypassed in succeeding elections ... without the consent of the person they had elected." This statute, thus, "'make[s] government accessible to the superior disinterestedness and honesty of the average citizen.' "

Section 24.2-509(B) is far less intrusive into the workings of political parties than the California law upheld in *Lightfoot v. Eu*. Section 24.2-509(B) is triggered when a political party first chooses to nominate by convention, and then limits a political party’s choice of the method of nominating its candidate for federal office only when the incumbent is a member of that party who was selected by means of a primary election or who sought a primary but was unopposed, and only when the party desires to hold a convention to select its candidate for public office. The statute creates a presumption, once agreed to by the party, in favor of primaries in future elections while providing a mechanism for returning to nomination by convention. That mechanism, in turn, is intended to provide some protection for voters who may be deprived of an opportunity to vote in future primaries. As such, the statute "strikes a balance between the interests of the parties and those of the state that will best enhance the democratic character of our system" of government. Thus, it is not certain that a court reviewing this matter would find the burden on a party so great or the governmental interest so slight as to justify invalidating the statute.

In assessing the foregoing case law as it may apply to § 24.2-509(B), I must remain mindful that the Constitution of Virginia does not vest in me the power to invalidate a state statute; that the Supreme Court of Virginia has declared that every reasonable doubt should be resolved in favor of the constitutionality of a statute; and that it has been the long-standing practice of Virginia’s Attorneys General to refrain from opining that a statute is unconstitutional when a reasonable doubt may exist as to its constitutionality.

Accordingly, I cannot conclude beyond a reasonable doubt that a court would declare that § 24.2-509(B) violates the First and Fourteenth Amendments of the Constitution of the United States.

1Section 24.2-509(B) provides, in part: "A party shall nominate its candidate for election for a General Assembly district where there is only one incumbent of that party for the district by the method designated by that incumbent, or absent any designation by him by the method of nomination determined by the party. A party shall nominate its candidates for election for a General Assembly district where there is more than one incumbent of that party for the district by a
primary unless all the incumbents consent to a different method of nomination. A party, whose candidate at the immediately preceding election for a particular office other than the General Assembly (i) was nominated by a primary or filed for a primary but was not opposed and (ii) was elected at the general election, shall nominate a candidate for the next election for that office by a primary unless all incumbents of that party for that office consent to a different method."

Because this issue may have a direct impact on the conduct of future elections and on the rights of political parties and voters who participate in those elections, an invitation was issued for interested parties to submit briefs and memoranda of legal points and authorities from legal counsel on the constitutionality of § 24.2-509(B). At the close of the public comment period, this Office received three substantive briefs and memoranda. The Office also received thirty-five letters expressing opinions on the issue. Because these letters are expressions of preference and do not discuss the legal issues involved in this matter, they have not been considered in formulating this opinion.


ELECTIONS: ELECTION OFFENSES GENERALLY; PENALTIES — CAMPAIGN FINANCE DISCLOSURE ACT.

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

Statutory provision requiring disclosure of identity of person(s) responsible for writings concerning referendum issue(s) to be submitted to voters would likely not survive constitutional challenge, based on U.S. Supreme Court’s decision in McIntyre v. Ohio Elections Commission; such disclosure of identity of person(s) responsible for writings concerning candidate elections would survive constitutional challenge, given narrow construction accorded statutes imposing criminal sanctions. Requiring identification of source of person(s) supporting election or defeat of candidates and of campaign advertising is governmental interest that clearly outweighs First Amendment right to anonymity. Requiring identification of individuals and groups of individuals who advocate in writing election or defeat of candidate(s) promotes interests of Commonwealth in fully informing electorate and in avoiding circumvention of other statutory provisions, and is thus not overbroad in regard to persons and entities encompassed within statute. Statute encompassing writings related to clearly identified candidate(s) in particular election is not unconstitutionally overbroad. Criterion for determining whether identity is required is whether writing advocates election or defeat of candidate(s) or whether writing advocates political issues. Decision whether facts in particular instance support prosecution for violation of statutory identification requirements concerning elections is within discretion of local Commonwealth’s attorney.

July 13, 1995
You ask whether the recent decision of the Supreme Court of the United States in *McIntyre v. Ohio Elections Commission* affects the constitutionality of § 24.2-1014 of the *Code of Virginia*.

In *McIntyre*, the Supreme Court held that an Ohio statute prohibiting the distribution of anonymous campaign literature violates the First Amendment. The Ohio statute prohibits the writing or distribution of any advertisement, notice or other form of general publication designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election ... unless there appears on such form of publication in a conspicuous place ... the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.\(^1\)

Margaret McIntyre printed and distributed handbills opposing a school tax levy to be voted on by referendum.\(^3\) Mrs. McIntyre acted independently and did not identify herself on the handbills.\(^4\) The Ohio Elections Commission fined Mrs. McIntyre $100.\(^5\) Reversing a lower court finding that the statute was unconstitutional as applied to Mrs. McIntyre's conduct, the Ohio Supreme Court concluded that the statute was valid.\(^6\) The United States Supreme Court reversed.\(^7\)

The Supreme Court determined that the Ohio statute involved the "regulation of pure speech," rather than "the mechanics of the electoral process."\(^8\) Because free speech in the political arena "occupies the core of the protection afforded by the First Amendment,"\(^9\) any law that burdens this speech will be upheld "only if it is narrowly tailored to serve an overriding state interest."\(^10\)

The Ohio statute could not satisfy this standard of exacting scrutiny. Neither of the state's interests—preventing fraudulent or libelous statements and providing the electorate with relevant information—was sufficiently compelling to justify removing the shield of anonymity that protects the minority "from the tyranny of the majority" and protects "unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."\(^11\)

Justice Scalia noted in his dissent that every state except California has a statute similar to the Ohio statute.\(^12\) The Virginia statute is § 24.2-1014. Section 24.2-1014(A) defines "writing" as "any printed or otherwise reproduced statement or advertisement." Section 24.2-1014(B) provides:
It shall be unlawful for any person to cause any writing ... to appear concerning any potential nominee or candidate, or concerning any question to be submitted to the voters unless such writing plainly identifies the person responsible for it. The writing shall carry the statement “authorized by” .............. and contain the following information to complete the statement[.]

The information required is the name of the candidate or the name of the political party committee. If the writing is not authorized by a candidate or political party committee, the writing is to contain either the name and registration number of the authorizing committee or “the full name and residence address of the individual responsible for the writing.”

The Commonwealth’s attorney enforces the statute. The penalty for violation is a civil fine not to exceed fifty dollars. A willful violation of the statute constitutes a Class 1 misdemeanor. A violation of the statute does not void any election.

In assessing the effect of McIntyre on a challenge to the constitutionality of § 24.2-1014, I am guided by the doctrine that every presumption is to be made in favor of the constitutionality of a statute. A reasonable doubt as to a statute’s constitutionality must be resolved in favor of the validity of the law.

If the writing is not authorized by a candidate or political party committee, the writing is to contain either the name and registration number of the authorizing committee or “the full name and residence address of the individual responsible for the writing.”

The identification provision in § 24.2-1014 regarding referendum issues is essentially the same as the provision in the Ohio statute. The purpose of § 24.2-1014 is the same as the purpose for the Ohio statute, i.e., preventing fraud and informing the public. Section 24.2-1014 encompasses all writings concerning a question to be submitted to referendum and applies to all individuals or groups of individuals. Accordingly, it is my opinion that, in light of McIntyre, the provision in § 24.2-1014(B), requiring the identification of all persons responsible for writings “concerning any question to be submitted to the voters,” would not survive constitutional challenge.

Section 24.2-1014(B) additionally requires the identification of persons responsible for writings “concerning any potential nominee or candidate.” The statute applies to writings authorized by candidates and their campaign committees (§ 24.2-1014(B)(1)), by political party committees (§ 24.2-1014(B)(2)), by political committees qualifying under § 24.2-908 (§ 24.2-1014(B)(3)(a)), and by individuals (§ 24.2-1014(B)(3)(b)).

Whether and to what extent the identification requirement may be imposed when the writing relates to a candidate for election, rather than to an issue for referendum, was not presented by the facts in McIntyre. It is my opinion that, for the reasons that follow, McIntyre does not direct a conclusion that the requirement is unconstitutional. That question requires independent constitutional analysis.
While the decision in McIntyre does not invalidate restrictions on political advertising in candidate elections, it does establish the test to apply in determining whether such restrictions are valid. The Court held that the Ohio statute was a content-based restriction on "core political speech," was subject to "exacting scrutiny," and would be upheld "only if it is narrowly tailored to serve an overriding state interest." It is my opinion that a court would apply this same level of scrutiny to a restriction on political advertising in candidate elections.

The determination of the validity of any restriction on First Amendment rights begins with a consideration of a state's interest in imposing the restriction. The Court in McIntyre acknowledges that a state's interest in candidate elections differs from a state's interest in ballot questions. The Court also distinguished its holding in Buckley v. Valeo on this ground. The Court stated that because the federal act at issue in Buckley related to the election or defeat of candidates, and not ballot measures, the government could identify a different state interest. It appears, therefore, that Buckley continues to be the primary source of guidance from the Court on whether a state's interest justifies the restriction a disclosure requirement imposes on First Amendment rights.

Buckley considered the constitutionality under the First Amendment of various provisions of the Federal Election Campaign Act of 1971 (the "federal Act"), including provisions requiring the filing of contribution and expenditure reports with the Federal Election Commission. The holding in Buckley did not involve political advertising; however, as in McIntyre, the Court in Buckley based its holdings on the deterrent effect disclosure has on the free exercise of political speech.

The federal Act imposes reporting obligations on expenditures by candidates, campaign and political committees, and by other groups and individuals. The reports are available for public inspection and copying. Because such compelled disclosure "has the potential for substantially infringing the exercise of First Amendment rights," the Court in Buckley subjected the requirements to exacting scrutiny. Holding that "[t]he governmental interests sought to be vindicated by the disclosure requirements" were of sufficient magnitude to outweigh the possibility of infringement, the Court concluded that the disclosure requirements of the federal Act contained no facial constitutional infirmity.

The Court identified two substantial governmental interests furthered by the disclosure requirements: providing the electorate with information and promoting the integrity of the election process. The Court recognized that opening to public view the identities of those who support the candidates not only aids the electorate in evaluating those who seek office, but also deters corruption and avoids the appearance of corruption in the electoral process.

These interests are fully promoted by the disclosure of those responsible for writings supporting the election or defeat of candidates. During an active campaign, voters
are deluged with campaign literature, often contradictory, on matters ranging from a candidate's position on issues, to his record of public service, to his personal character. The bias, interest or credibility of the speaker is a significant factor in enabling a voter to assess the weight to be given to a particular statement. This critical information is unavailable to voters who have no access to the identity of the speaker. An additional danger is that a voter may attribute the information to the wrong source. The result, whether attributable to ignorance or error, is an electorate handicapped in its ability to evaluate those who seek office. Moreover, the proliferation of information that the electorate considers unreliable could eventually result in a loss of voter confidence in the campaign process.

Requiring the identity of the source of campaign advertising also opens the election process to public view by alerting the electorate of those interests to which a candidate is likely to be responsive. This information not only may predict future performance, but also may detect future favors. It is my opinion that the interest of the Commonwealth in fully informing the electorate and in preserving the integrity of candidate elections furthered by the disclosure requirement is an interest of the most compelling nature.

This government interest clearly outweighs the restriction on First Amendment rights imposed by § 24.2-1014 on writings connected with candidate elections. Section 24.2-1014 contains no restrictions on writings other than removing the shield of anonymity by requiring the identity of the source. It is my opinion that this First Amendment right to anonymity is insufficient to overcome the government interest promoted by the disclosure of identity.

The next step in the application of strict scrutiny to an infringement of First Amendment rights is determining whether the restriction is narrowly drawn, i.e., whether § 24.2-1014 extends further than necessary to accomplish the governmental interests. As noted above, § 24.2-1014 reaches candidates and their campaign committees, political party committees, other political committees, and individuals.

There can be no serious dispute that, in order to accomplish the government interests of § 24.2-1014, it is necessary to impose the identity requirement on candidates and on political committees whose primary purpose is to influence the outcome of elections and who, working toward that goal, distribute writings to the electorate.

Imposing the identification requirement on individuals or groups of individuals presents a somewhat different issue. The writings of individuals may have a lesser impact on the electorate, while requiring identification may impinge more seriously First Amendment rights. The Court in Buckley considered whether imposing the disclosure of contributions and expenditures directly on individuals went further than necessary to accomplish the government interests of the federal Act. The appellants attacked the requirement as a "direct intrusion on privacy of belief, in violation of Talley v. California, 362 U.S. 60 (1960)," certain to deter individuals from exercising their independent political speech.
The Court accepted that the provision may have a deterrent effect on speech but, nevertheless, upheld the constitutionality of the requirement as necessary to achieve the government interests. The Court stated:

[The section] is part of Congress' effort to achieve “total disclosure” by reaching “every kind of political activity” in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible. The provision is responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the [federal] Act.\(^4\)

The analysis and conclusions of the Court in *Buckley* are applicable directly to the disclosure requirement of §24.2-1014(B)(3)(b). Requiring the identity of individuals and groups of individuals who advocate in writing the election or defeat of a candidate promotes the interests in fully informing the electorate and in avoiding circumvention of the other provisions of the statute.\(^4\) It is thus my opinion that §24.2-1014 is not overbroad in regard to the persons and entities encompassed within the statute.

The final question is whether §24.2-1014 is narrowly tailored in regard to the type of writings encompassed within the requirement. This question presents related issues of overbreadth and vagueness, and arises for two reasons. Because the statute infringes First Amendment rights, it must be narrowly drawn to accomplish the government interest. Because the statute imposes criminal sanctions, it must provide adequate notice whether contemplated conduct is illegal.\(^4\)

The Court in *Buckley* likewise considered this question in regard to imposing the disclosure requirement on individuals.\(^4\) The focus of the inquiry is whether the information relates directly to the election or defeat of a candidate, rather than to political issues in general. The question is particularly relevant in analyzing §24.2-1014 in light of *McIntyre*, since *McIntyre* invalidated disclosure requirements when a writing relates to an issue for referendum.

Although the language of the federal Act under review in *Buckley* required disclosure of expenditures “for the purpose of influencing” the nomination or election of candidates, the Court avoided vagueness or overbreadth problems by confining the meaning to expenditures used for “communications that expressly advocate the election or defeat of a clearly identified candidate.”\(^4\) Thus, the communications must relate directly to a particular candidate and to his election or defeat.\(^4\)

The language of §24.2-1014 and prior opinions of the Attorney General support a similar construction of that statute. Section 24.2-1014(B) encompasses writings “concerning any potential nominee or candidate.” Opinions of the Attorney General
construing the predecessor statutes to § 24.2-1014 recognize that because a violation of the statute carries criminal sanctions, the statute must be narrowly construed. Prior opinions narrowly interpret the statute (1) as applying only when the writing is directed at a candidate for a particular public office in a particular election, despite the language “potential nominee or candidate”; (2) as not applying when the writing is informational rather than promotional; and (3) as intending to apply to persons responsible for campaign materials.

Moreover, § 24.2-101 defines “candidate” as “a person who seeks or campaigns for an office of the Commonwealth” and “shall include a person who seeks the nomination of a political party or who, by reason of receiving the nomination of a political party for election to an office, is referred to as its nominee.” This definition is consistent with an interpretation that § 24.2-1014 is confined to writings related to a clearly identified candidate in a particular election. It is thus my opinion that § 24.2-1014 is not unconstitutionally overbroad in relation to the type of writings encompassed within the statute.

Applying the limiting construction to § 24.2-1014, the Virginia statute is essentially the same as the federal Act requiring the identity of those responsible for political advertising in federal campaigns. The federal Act contains the language approved by the Court in Buckley and applies “[w]henever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate.” The federal Act applies to all persons who pay for such communications, including individuals. The writing is to state the name of the person who paid for the communication and whether the communication is authorized by the candidate or his political committee. The statute applies to general and primary elections and to political party conventions. Section 24.2-1014 is not significantly different in application or effect from the federal Act.

I am aware of decisions concluding either that the types of writings must be derogatory or that they must expressly include the words “vote for” or “elect.” I find these decisions unpersuasive. Such requirements are inconsistent with the purposes of § 24.2-1014, are detrimental to achieving the purposes, and create indefiniteness and vagueness in the statute.

The electorate has an interest in the identity of those who praise a candidate, as well as those who criticize a candidate. I see no rational basis for requiring the identity of only those who derogate a candidate and, in fact, consider this requirement to be an unwarranted, discriminatory intrusion on the content of the speech.

I also see no rational basis for confining § 24.2-1014 to writings that expressly use such words as “vote for” or “elect.” This requirement, in my view, invites abuse and attempts at circumvention through clever language manipulation. It also places unnecessary discretion in those charged with enforcing the statute. The criterion for determining whether identity is required is whether the writing advocates the election or defeat of a
particular candidate or whether the writing advocates political issues. While this dividing line may not always be clear, it is less arbitrary and easier to apply in a fair, consistent manner than one based on the inclusion or avoidance of particular words.

In summation, it is my opinion that, based on *McIntyre*, the present provision in § 24.2-1014 requiring the disclosure of the identity of those responsible for writings concerning ballot issues would not survive constitutional challenge. It is my opinion, however, that if given the narrow construction accorded statutes imposing criminal sanctions, the provision in § 24.2-1014 requiring the disclosure of the identity of those responsible for writings concerning candidate elections would survive constitutional challenge. Finally, the decision as to whether the facts in a particular instance support prosecution for a violation of the statute is within the discretion of the Commonwealth’s attorney of the county or city in which the alleged violation occurred.

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2Ohio REV. CODE ANN. § 3599.09(A) (Anderson 1988).

3McIntyre, 514 U.S. at ___, 115 S. Ct. at 1514, 131 L. Ed. 2d at 433.

4Id.

5Id. at ___, 115 S. Ct. at 1514, 131 L. Ed. 2d at 434.

6Id. at ___, 115 S. Ct. at 1515, 131 L. Ed. 2d at 435.

7Id. at ___, 115 S. Ct. at 1524, 131 L. Ed. 2d at 446.

8Id. at ___, 115 S. Ct. at 1518, 131 L. Ed. 2d at 438.

9Id. at ___, 115 S. Ct. at 1519, 131 L. Ed. 2d at 440.

10Id. at ___, 115 S. Ct. at 1533, 131 L. Ed. 2d at 459 (Scalia, J., dissenting).

11Section 24.2-1014(B)(1)-(3).

12Section 24.2-1014(B)(3)(b); see also § 24.2-1014(B)(3)(a).

13Section 24.2-1019: "Any complaint or allegation concerning unlawful conduct under [Title 24.2] shall be filed with the attorney for the Commonwealth of the county or city in which the alleged violation occurred." As in McIntyre, challenges to the constitutionality of such statutes generally arise as a defense to a prosecution for violation of the statute. See State v. Burgess, 543 So. 2d 1332 (La. 1989); People v. Durleya, 76 Misc. 2d 948, 351 N.Y.S.2d 978, aff’d, 44 A.D.2d 663, 354 N.Y.S.2d 129 (1974) (per curiam).

14Section 24.2-1014(E).

15Id.

16Id.

17Id.


19I do not interpret McIntyre to hold that a state may never impose an identification requirement on writings related to issues to be submitted to referendum. See 514 U.S. at ___, 115 S. Ct. at 1522, 131 L. Ed. 2d at 443 ("State’s enforcement interest might justify a more limited identification requirement"); id. at ___, 115 S. Ct. at 1524, 131 L. Ed. 2d at 447 (state may, in certain circumstances, “require the speaker to disclose its interest by disclosing its identity”) (Ginsburg, J., concurring). Section 24.2-1014, however, contains no language limiting the requirement of the disclosure of the writer’s identity to particular circumstances or to particular persons or organizations. I am thus unable to conclude that, under certain circumstances defined in the statute, its application would survive constitutional challenge.
Section 24.2-908 requires "[e]ach ... political committee which anticipates receiving contributions or making expenditures in excess of $100 [to] file with the State Board [of Elections] a statement of organization." Section 24.2-901 defines "political committee" to include not only political party committees and political action committees, but also any "other committee or group of persons which receives contributions or makes expenditures for the purpose of influencing the outcome of an election."


See id. at ___, 115 S. Ct. at 1519, 131 L. Ed. 2d at 441. See id. at ___, n.10, 115 S. Ct. at 1518 n.10, 131 L. Ed. 2d at 439 n.10 (strict scrutiny applies to content-based restriction on political speech in public forum). See id. at ___, n.15, 115 S. Ct. at 1521 & n.15, 131 L. Ed. 2d at 442-43 & n.15 (risk of libel and appearance of corrupt advantage perceived in cases involving candidate elections is not present in popular vote on public issues).

See 514 U.S. at ___, 115 S. Ct. at 1523, 131 L. Ed. 2d at 445.

See 424 U.S. at 60-84.


See id. § 438(4).

424 U.S. at 66.


See 514 U.S. at ___, 115 S. Ct. at 1523, 131 L. Ed. 2d at 445.

See 424 U.S. at 60-84.


See id. § 438(4).

424 U.S. at 66.

Id. at 66, 61. Governmental interests are accorded particular weight "when the 'free functioning of our national institutions' is involved." Id. at 66 (quoting Communist Party v. Control Board, 367 U.S. 1, 97 (1961)).

Id. at 66-67. The Court also identified as a third, less significant interest—the creation of a means to monitor contribution limitations. Id. at 67-68.

Id. at 66-67.

The disclosure requirement becomes more important in local elections. In contrast to candidates in large federal elections, a candidate in a local election may have insufficient campaign resources to independently investigate and determine the source, and thus effectively combat the impact, of negative and untrue campaign writings.

The purpose in identifying the speaker is not to control the content of the speech, but to provide information to assist each voter in deciding which candidate he will support. The identity of the speaker and his possible bias or interest may have a positive or a negative impact on the weight a particular voter gives the speech.

Unlike those who advocate candidates through financial support, those who advocate candidates in writings intend the writing to have a direct, immediate and unavoidable impact on the electorate. Thus, it is reasonable that while one group discloses its identity by filings with government agencies, the other discloses its identity directly on the writing. No alternative disclosure would enable voters to assess the particular writing.

Compare FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 252 (1986) (limiting expenditure of corporate treasury funds in connection with election is substantial restriction on
speech). See also id. at 265 (in contrast to limiting expenditures, disclosing expenditures is “reasonable and minimally restrictive”) (O’Connor, J., concurring).

See Buckley, 424 U.S at 66-74 (disclosure requirement applies to candidates and political committees, including minor parties and independent candidates); see also Griset v. Fair Political Practices Com’n, 8 Cal. 4th 851, 862, 35 Cal. Rptr. 2d 659, 666, 884 F.2d 116, 123 (1994), cert. denied, 115 S. Ct. 1794, 131 L. Ed. 2d 722 (U.S. 1995) (candidates seeking public office cannot claim anonymity in presenting views to those they seek to govern).

40424 U.S. at 74-84.

41Id. at 75.

42Id. at 76 (footnotes omitted).

43The United States Supreme Court has indicated that the disclosure of a person’s identity may, nevertheless, be unconstitutional if the person can show that disclosure will subject him to harassment or retaliation. See Buckley, 424 U.S. at 68; N. A. A. C. P. v. Alabama, 357 U.S. 449 (1958). In such circumstances, the application of § 24.2-1014 may be unconstitutional.


45424 U.S. at 76-82.

46Id. at 80.

47See F. E. C. v. Central Long Island Tax Reform, etc., 616 F.2d 45 (2d Cir. 1980) (bulletin containing Congressman’s picture and voting record is not within disclosure requirement of federal Act where it does not refer to any election).


53Id. § 441d(a).

54See id. § 441d(a)(1)-(3).

55Id.

56See id. § 431(1) (West 1985) (defining “election”).

57See State v. Petersilie, 334 N. C. 169, 432 S.E.2d 832 (1993) (statute is constitutional because it covers only derogatory statements); People v. Duryea, supra note 15, 76 Misc. 2d at 963-66, 351 N.Y.S.2d at 993-96 (statute is not limited to deterring defamation or personal attacks).

58See Faucher v. Federal Election Com’n, 928 F.2d 468, 470 (1st Cir.), cert. denied, Federal Election Com’n v. Keefer, 502 U.S. 820 (1994) (meaning of “express advocacy”); see also FEC v. Massachusetts Citizens for Life, Inc., supra note 38, 479 U.S. at 249 (use of “vote for,” “elect,” “support,” etc. constitutes “express advocacy”; purpose is to distinguish between discussion of issues and candidates and exhortation to vote for particular person).

59See Federal Election Com’n v. Furgatch, 807 F.2d 857, 862 (9th Cir.), cert. denied, 484 U.S. 850 (1987) (“express advocacy” is not limited to using certain key phrases).

60See § 1-17.1: “The provisions of statutes in this Code or the application thereof to any person or circumstances which are held invalid shall not affect the validity of other statutes, provisions or applications of this Code which can be given effect without the invalid provisions or applications. The provisions of all statutes are severable unless (i) the statute specifically provides that its provisions are not severable; or (ii) it is apparent that two or more statutes or provisions must operate in accord with one another.”

61See § 24.2-1019.
Giles County electoral board may assign by lot which successful at-large school board candidate will serve four-year term and which will serve two-year term, on day after and upon certification of results of November 1995 general election in which term of at-large members of school board will occur simultaneously with first election of staggered board of supervisors. Candidates for at-large seats should be notified that term for which he or she will be elected is unknown until after election.

March 1, 1995

Mr. Richard L. Chidester
County Attorney for Giles County

You ask about the appropriate procedure for determining the initial term of the at-large members of the Giles County school board when the first school board election will occur simultaneously with the first election of a staggered board of supervisors.

You relate that Giles County has a five-member board of supervisors and a five-member school board. The board of supervisors consists of one member elected by each of the county's three election districts and two members elected at-large, with all members presently serving concurrent four-year terms. The current appointed school board likewise consists of one member appointed from each of the three election districts and two members appointed at-large.

You also relate that the board of supervisors plans to enact an ordinance pursuant to § 24.2-219 of the Code of Virginia to provide for the biennial election of county supervisors for staggered terms. The first election of the staggered board of supervisors will be at the November 1995 general election. In accordance with § 24.2-219(B)(2), three of the members will serve four-year terms, and two will serve two-year terms, with the county electoral board "assign[ing] the individual terms of members by lot at its meeting on the day following the election and immediately upon certification of the results."1

Section 22.1-57.3 establishes the procedure for the initial election of school board members. Under § 22.1-57.3(B), the term for each district and each at-large member of the Giles County school board is to be the same as the term for the corresponding member of the board of supervisors.2 In the assignment by lot of the initial terms of the staggered board of supervisors, it is possible that one at-large member will receive a four-year term and one will receive a two-year term. If this occurs, you ask how to determine which at-large member of the school board is to receive the four-year term and which is to receive the two-year term in the absence of any procedure established in § 22.1-57.3.
The primary object of statutory construction is to ascertain and give effect to the intent of the legislature. In giving effect to the intent of the legislature, statutes bearing upon the same subject matter are to be read together.

In § 24.2-219, the General Assembly has approved the assigning of terms by lot as an appropriate method to place a staggered county board of supervisors into effect. Section 22.1-57.3(B) expresses a legislative intent that members of the school board be elected in the same manner and for the same term as members of the governing body. Accordingly, it is my opinion that, if necessary, as a result of the at-large members of the governing body receiving different terms, the county electoral board also may assign by lot which successful at-large school board candidate will serve a four-year term and which will serve a two-year term.

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1In all subsequent elections, members of the board will be elected for four-year terms. See § 24.2-219(B)(2).

2Section 22.1-57.3(B) contains the following provisions:

“The terms of the members of the elected school board for any county, city, or town shall be the same as the terms of the members of the governing body for the county, city, or town. In any locality in which both the school board and the governing body are elected from election districts, as opposed to being elected wholly on an at-large basis, the elections of the school board member and governing body member from each specific district shall be held simultaneously ....

* * *

“[T]he terms of the members of the school board shall be staggered only if the terms of the members of the governing body are staggered....

* * *

“In any case in which school board members are elected from election districts ... the election districts for the school board shall be coterminous with the election district for the county, city, or town governing body ....”


5See supra note 2.

6The fact that this procedure will be used should be made clear to the candidates for the at-large seats before the election, so that each candidate will be on notice that the term for which he or she is running will not be known until after the election.

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ELECTIONS: VOTER REGISTRATION — ELECTION OFFENSES GENERALLY; PENALTIES.

General Assembly’s designation that courts and incumbent officeholders may receive lists of voters registered in Commonwealth or persons who voted for purpose of either jury selection or reporting to constituents does not extend to entities or persons not so classified. Persons/groups seeking to further candidacy of others may obtain lists to be used
for legislatively ordained political and official purposes, but not for commercial purposes or to harass voters. Confining organizations that may obtain lists to nonprofit organizations would be subject to constitutional attack; organization must have political purpose and use list for political, rather than commercial, purpose. State Board of Elections may provide lists of persons who voted in two preceding primary or general elections to persons or entities involved in election process only for specific statutory purposes. If such lists are provided to other persons or entities for their districts, State Board should interpret term “district” in manner that fulfills statutory intent and purpose. Lists may not be provided to commercial vendor for commercial purpose. State Board should forward to appropriate Commonwealth’s attorney any information concerning alleged violation of statutory oath.

October 19, 1995

Mr. M. Bruce Meadows
Secretary, State Board of Elections

You ask a number of questions regarding the application of §§ 24.2-405 through 24.2-407 of the Code of Virginia, in light of the decision of the Supreme Court of Virginia in Mahan v. National Conservative Political Action Committee [hereinafter Mahan v. NCPAC].

The State Board of Elections maintains a central record of all voters registered in the Commonwealth. Section 24.2-405 provides that “[t]he State Board shall furnish ... lists of registered voters” to the following persons or entities, for the specified purposes:

(i) courts ... for jury selection purposes, (ii) candidates for election or political party nomination to further their candidacy, (iii) political party committees or officials ... for political purposes only, (iv) incumbent officeholders to report to their constituents, and (v) nonprofit organizations which promote voter participation and registration for that purpose only.

Section 24.2-405 further provides that “[t]he lists shall be furnished to no one else and used for no other purpose.” Section 24.2-406 relates to lists of persons who voted at primary and general elections held in the two preceding years. Only “candidates, elected officials, or political party chairmen” may obtain these lists. Those requesting either list are to pay “a reasonable price” and sign under oath the statement set out in § 24.2-407.

At issue in Mahan v. NCPAC was whether NCPAC, a nonprofit political action committee organized to influence federal, state and local elections, could obtain the list of registered voters in Virginia. NCPAC fit within none of the categories specified in the statute; it had no candidates of its own, was neither a political party nor a political party committee, and did not promote voter participation and registration. NCPAC requested the list for the purpose of making independent expenditures on behalf of candidates. It planned to use the list for direct mailings to registered voters and assured the State Board
that the list would not be used for commercial purposes. The State Board denied NCPAC's request, and NCPAC filed a motion for declaratory judgment, contending that the denial violated its constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

NCPAC did not assert that the statute was unconstitutional on its face but, rather, as applied to NCPAC. NCPAC conceded that confining dissemination of the list to persons or entities involved in legitimate political persuasion or discussion, as opposed to those who might use the list for commercial purposes or the improper harassment of voters, was a valid and compelling state interest. NCPAC argued, however, that because it planned to use the list for the same political purposes as organizations whose activities were indistinguishable from its activities, the denial violated its equal protection rights to be treated the same as those similarly situated. The Court agreed:

NCPAC argues ... that since the legislature has seen fit to make the central voters' list available to some advocates of political causes and candidates, it may not, within the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, deny it to others. NCPAC contends that in order for the statute to be constitutional, it must be construed so as to make the central voters' list equally available, without discrimination, to all persons and groups who intend to use it for the legislatively-ordained political and official purposes, and who will subscribe to the requisite oath and pay the requisite fee. We agree with this analysis.

The opinion of the Court in Mahan v. NCPAC and the language of the relevant statutes provide answers to some of the specific questions you present. The answers to others will depend on the particular facts and circumstances. The analysis in each instance, however, should focus on two principal questions: (1) whether the requester is a person or entity who “advocates ... political causes and candidates,” and (2) whether the requester “intend[s] to use [the list] for the legislatively-ordained political and official purposes.”

You ask first whether there are entities similar to courts that may obtain the registered voter lists. The General Assembly designated the courts to receive the lists for the specific purpose of jury selection. I know of no other entity that would meet this purpose.

You next ask whether there are others who would compare to “incumbent officeholders” for purposes of obtaining the lists of registered voters or of persons who voted. Section 24.2-405 authorizes incumbent officeholders to obtain the lists for the purpose of “report[ing] to their constituents.” The language “incumbent officeholders” in that section appears to encompass the entire class of persons who “report to their constituents.” I am aware of no other persons or entities that must be included in this class, provided the use of the lists is to “report” to the officeholders’ constituents.
Your third question is whether only candidates may receive the lists, or whether persons seeking to further the candidacies of others may receive the lists. The answer to this question depends on the particular facts and circumstances. Clearly, furthering the candidacies of others fits within the statutory purposes recognized in Mahan v. NCPAC. It is my opinion that whether persons or groups seeking to further the candidacy of others may obtain the lists depends on whether the persons and groups intend to use them only for the legislatively ordained political and official purposes, as is evidenced by subscription to the required oath. The Court clearly stated that the list may not be obtained by persons or groups for commercial purposes or to harass the voters.\textsuperscript{13}

Your fourth question is whether nonprofit organizations are the only organizations that may obtain the registered voters’ lists. The State Board must apply § 24.2-405 in accordance with the language and intent of the statute and with the constitutional principles stated in Mahan v. NCPAC. A strict application of the language of § 24.2-405 would confine access to the list not only to “nonprofit organizations” but also to such organizations “which promote voter participation and registration.” This limitation appears inconsistent with the Court’s statement in Mahan v. NCPAC that the statute must be construed in a manner that makes any such list available, without discrimination, to all “who intend to use it for the legislatively-ordained political and official purposes, and who will subscribe to the requisite oath and pay the requisite fee.”\textsuperscript{14}

Based on the broad scope of this statement, it is my opinion that confining the organizations that may obtain the lists to nonprofit organizations, regardless of the circumstances, would be subject to constitutional attack. Other organizations may be substantially similar to nonprofit organizations for the purposes of § 24.2-405. Whether an organization may obtain the lists will essentially be a question of the degree of its involvement in “legitimate political persuasion” or discussion and the purpose for which it will use the lists.\textsuperscript{15} An organization that uses its resources, or a significant portion of its resources, to inform the public on political issues or to engender public discussion or involvement in the electoral process may qualify to obtain the lists, provided the specific purpose for obtaining the lists satisfies the legislative intent of § 24.2-405. The focus should be (1) the extent to which the organization holds itself out to be, and actually is, an entity with a political purpose, and (2) the extent to which the lists will be used for a political, as opposed to a commercial, purpose.

You next ask whether organizations may obtain copies of the lists under § 24.2-406. Section 24.2-406 covers “lists ... of persons who voted at any primary or general election held in the two preceding years.” The lists may be furnished to “candidates, elected officials, or political party chairmen and to no one else” and may be used “only for campaign and political purposes and for reporting to constituents.” The persons or entities entitled to the lists under § 24.2-406 are confined to those directly involved in the election process. The information on these lists constitutes a greater intrusion on the privacy of voters than the list of registered voters. It is my opinion that nothing in
Mahan v. NCPAC suggests that these lists must be provided to persons or entities beyond those specified in § 24.2-406.

You ask also whether qualified persons or entities are limited in their use of the lists to the purposes specified in the statutes. In my opinion, limiting the use of the lists to the specified purposes is consistent with the statutory language, the legislative intent and the holding in Mahan v. NCPAC. The Court in Mahan v. NCPAC acknowledged that “[t]he ... statute’s restriction of the use of the list to political and official purposes” was an appropriate step in furthering the state’s “legislative interest in protecting the privacy of voters.” The Court also agreed with NCPAC’s argument that the State must not discriminate in making any such list available to those “who intend to use it for the legislatively-ordained political and official purposes.”

Your seventh question involves the proper interpretation of the words “for their districts” in §§ 24.2-405 and 24.2-406. Both sections provide that when candidates, party committees, party chairmen and incumbents request the lists, the lists are to be provided “for their districts.” You ask how to interpret this language when the lists are provided to other persons or entities. The State Board is to apply the statutes in a manner that effectuates the express language, and fulfills the purpose and intent, of the statutes. If a specific district is identified, the State Board should provide the lists for that district. If, however, the use of the lists is within the language and intent of either statute, the State Board should interpret the term “district” in a manner consistent with that use. If the requester intends to use the lists throughout the State for a legitimate political purpose, the “district” may be the entire Commonwealth.

You ask also whether commercial vendors may obtain the lists for commercial use. The statutory language limits the persons and entities who may obtain the lists to those engaged in communication with citizens of the Commonwealth for specific political purposes. The statute clearly does not contemplate providing the lists to a commercial vendor for a commercial purpose. It is equally clear that Mahan v. NCPAC does not require the State Board to provide the lists to commercial entities seeking access to the lists for commercial purposes. The parties conceded in Mahan v. NCPAC that the government has a compelling interest in excluding “those who might use the voters’ list for commercial purposes” and restricting availability to “those who would use it only for bona fide political or official purposes.” It is my opinion, therefore, that the State Board is prohibited from providing the lists to a commercial vendor to be used for a commercial purpose, regardless of whether that purpose has some relationship to politics or elections.

Your final question is how the State Board is to enforce the prohibitions contained in § 24.2-407. The person signing the oath under § 24.2-407 acknowledges that the lists are the property of the State Board. The person also swears to use the lists only for the prescribed purposes and not to permit the use or copying of the lists by unauthorized
persons. He also acknowledges that he signs the oath and agrees to the conditions "subject to felony penalties for making false statements pursuant to § 24.2-1016." 22

Sections 24.2-1016 and 24.2-1017 provide the penalties for violation of the elections laws. Section 24.2-1019 provides that an allegation of unlawful conduct under Title 24.2 is to be filed with the Commonwealth’s attorney for the county or city in which the alleged violation occurred. When the State Board has reason to believe that a person who has received the lists has violated the oath, the State Board should forward the information to the appropriate Commonwealth’s attorney for further action, including determining any issues related to the Commonwealth’s jurisdiction over entities whose principal place of business is in another state.


2See § 24.2-404.

3Section 24.2-406.

4Sections 24.2-405, 24.2-406.

5Section 24.2-407 contains the following statement:

"I understand that the lists requested are the property of the State Board of Elections of the Commonwealth of Virginia, and I hereby state or agree, subject to felony penalties for making false statements pursuant to § 24.2-1016, that (i) I am a person authorized by § 24.2-405 or § 24.2-406 of the Code of Virginia to receive a copy of the lists described; (ii) the lists will be used only for the purposes prescribed and for no other use; and (iii) I will not permit the use or copying of the lists by persons not authorized by the Code of Virginia to obtain them.

"Signature of Purchaser ...........................................""

6227 Va. at 334, 315 S.E.2d at 831. The language in § 24.2-405 is essentially the same as in now repealed § 24.1-23(8), the statute in effect when Mahan v. NCPAC was decided.

7227 Va. at 333-34, 315 S.E.2d at 831.

8Id. at 334, 315 S.E.2d at 831.

9Id. at 334, 335, 315 S.E.2d at 831, 832.

10Because the statute affected fundamental First Amendment rights to discuss and debate the qualifications of candidates, the Court applied strict scrutiny to the equal protection challenge. 227 Va. at 336, 315 S.E.2d at 832. The Court recognized that, while the legislature is under no compulsion to make the list available at all, once it makes the list available to some, it must make it available to all who are similarly situated, absent a compelling state interest to deny the list. Id. at 338, 315 S.E.2d at 834.

11227 Va. at 338, 315 S.E.2d at 834 (footnote omitted).

12Id.

13Id. at 337-38, 315 S.E.2d at 833-34.

14Id. at 338, 315 S.E.2d at 834.

15Id. at 338, 315 S.E.2d at 833.

16Id. at 339, 315 S.E.2d at 834-35.

17Id. at 338, 315 S.E.2d at 834.


19Section 24.2-101 defines "election district" to mean "the territory designated by proper authority or by law which is represented by an official elected by the people, including the Commonwealth, a congressional district, a General Assembly district, or a district for the election of an official of a county, city, town, or other governmental unit."
227 Va. at 338, 315 S.E.2d at 833-34.
1 A commercial entity planning to use the lists for a commercial purpose is distinguishable from an organization, although not qualified as nonprofit, obtaining and using the lists for a legitimate political purpose. See supra textual discussion of question four.
22 Section 24.2-407.

INSURANCE: ACCIDENT AND SICKNESS INSURANCE - MANDATED BENEFITS.

Health insurer that offers and makes available in its standard package of benefits coverage subject to a mandated offer requirement also may satisfy statutory obligation by offering and making coverage available in package of benefit options. Insurer may offer and make available low-dose screening mammograms in combination with other benefit options under health insurance policy, contract or plan coverage.

August 9, 1995

The Honorable Kenneth W. Stolle
Member, Senate of Virginia

You ask whether the practice by an insurer, health services plan or health maintenance organization of offering and making available coverage for low-dose screening mammograms only in combination with other benefit options violates § 38.2-3418.1 of the Code of Virginia.

You state that at least one insurer providing coverage in Virginia for health care services reportedly “bundles” coverage for mammograms with other benefit options. You also state that the insurer offers and makes available coverage for mammograms only as part of an optional package of benefits. I presume for the purposes of this opinion, therefore, that the insurer does not offer and make available coverage for mammograms as a separate, individually priced option that may be added to a policy, contract, or plan of “basic” or “standard” coverage.

Section 38.2-3418.1 is one of several statutes that establish “mandated offers” of coverage. In general, these statutes require health insurers to offer and/or make available coverage for particular health care services or procedures. The “mandated offer” statutes are in contrast with other statutes that establish “mandated benefits,” that is, provisions that must be included in all health insurance policies.

By its plain language, § 38.2-3418.1(A.1) provides that every health insurer proposing to issue health care policies, contracts or plans “shall offer and make available coverage” for mammograms. The use of the word “shall” in a statute generally connotes a mandatory act. Nothing in the statute obligates a health insurer to offer and make
available separate coverage for mammograms, and such an obligation may not be implied. "[I]f statutory language is not ambiguous but has a usual and plain meaning, rules of construction do not apply and resort to legislative history is both unnecessary and improper. Instead, [the] legislative intent [is determined] from the plain meaning of the words used."7

In addition, the State Corporation Commission's Bureau of Insurance, the administrative agency charged with regulating the business of insurance and the conduct of insurers in the Commonwealth, has, on numerous occasions, indicated in reports to the General Assembly that some insurers "include the mandated offers of coverage in their base level of benefits."8 It would follow that if an insurer were to offer and make available in its standard package of benefits coverage subject to a mandated offer requirement, the insurer also may satisfy its obligation by offering and making the coverage available in a package of benefit options.

I am, therefore, of the opinion that offering and making available mammograms in combination with other benefit options under a health insurance policy, contract or plan coverage is permissible.9

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1For the purposes of this opinion, unless stated otherwise, all three types of third-party payors that offer coverage for health care services will be referred to, collectively, as "insurer(s)" or "health insurer(s)."

2Section 38.2-3418.1(A.1) specifies, in part, that "[e]ach insurer proposing to issue individual or group accident and sickness insurance policies providing hospital, medical and surgical or major medical coverage on an expense incurred basis, each corporation providing individual or group accident and sickness subscription contracts, each health maintenance organization providing a health care plan for health care services and each insurer proposing to issue individual or group Medicare supplement policies shall offer and make available coverage under such policy, contract or plan delivered, issued for delivery or renewed in this Commonwealth on and after January 1, 1990, for low-dose screening mammograms for determining the presence of occult breast cancer."


4Section 38.2-3411.1(A) requires that "[e]very individual or group accident and sickness insurance policy, subscription contract providing coverage under a health services plan, or evidence of coverage of a health care plan ... shall offer and make available coverage under such policy or plan for child health supervision services." Section 38.2-3414(A) requires that "[e]ach insurer proposing to issue a group hospital policy or a group major medical policy in this Commonwealth and each corporation proposing to issue group hospital, group medical or group major medical subscription contracts shall provide coverage for obstetrical services as an option available to the group policyholder." Section 38.2-3418.1:1(A) requires that each insurer proposing to issue health insurance policies, subscription contracts, or health care plans "shall offer and make available coverage under such policy, contract or plan ... for the treatment of breast cancer by dose-intensive chemotherapy/autologous bone marrow transplants or stem cell transplants."


9The General Assembly could, if it so deemed advisable, amend § 38.2-3418.1 and the other statutes that establish “mandated offers” of coverage to require insurers to offer and make available each particular coverage as a separate benefit option, to be selected individually, or in combination with other benefits, at the option of the policyholder.

METROPOLITAN PLANNING ORGANIZATION.

Boundary of Richmond Area MPO may be expanded to include Charles City County without having to redesignate MPO because county is part of Richmond nonattainment area for ozone that is to be included within MPO boundaries, unless Governor and MPO agree to different arrangement. If Governor and MPO agree, entire area of New Kent County, which is expected to be urbanized within 20-year forecast period and made part of MPO, may, but need not, be included in MPO. When counties are added as MPO members, each county should have appropriate representation on MPO policy board and other committees. Previous designations of such organizations, state and local law, and organizational bylaws should be reviewed to determine if addition of new members may be accomplished without formal redesignation. Because MPO bylaws address procedure for adding nonvoting members only, bylaws must be amended to allow addition of two counties as voting members; if bylaws cannot be amended, MPO must formally redesignate to add two counties.

March 10, 1995

The Honorable Franklin P. Hall
Member, House of Delegates

You ask whether the Richmond Area Metropolitan Planning Organization (the “MPO”) must be formally “redesignated” to add the counties of New Kent and Charles City as new member jurisdictions to the regional board.
You relate that the MPO is created to fulfill a requirement imposed by federal statute as a condition to receiving certain federal aid for transportation planning purposes. In addition, you relate that certain transportation projects will not be approved for funding by the Secretary of Transportation unless those projects have been considered by the MPO.

The applicable federal regulation in effect at the time the MPO was created required that the principal elected officials of general purpose local governments be represented on the MPO to the extent that the Governor and the units of local government could agree. In addition, publicly owned operators of mass transportation services were required to participate in the development of the planning work plan and the “transportation improvement plan.” As a consequence, the MPO bylaws you provide reflect that the following political subdivisions and entities were, and remain, voting members of the MPO, with the respective voting strength of each set out:

<table>
<thead>
<tr>
<th>Entity</th>
<th>Voting Strength</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Richmond</td>
<td>4</td>
</tr>
<tr>
<td>County of Henrico</td>
<td>4</td>
</tr>
<tr>
<td>County of Chesterfield</td>
<td>4</td>
</tr>
<tr>
<td>County of Hanover</td>
<td>3</td>
</tr>
<tr>
<td>County of Goochland</td>
<td>2</td>
</tr>
<tr>
<td>County of Powhatan</td>
<td>2</td>
</tr>
<tr>
<td>Town of Ashland</td>
<td>1</td>
</tr>
<tr>
<td>Capitol Region Airport Commission</td>
<td>1</td>
</tr>
<tr>
<td>Greater Richmond Transit Company</td>
<td>1</td>
</tr>
<tr>
<td>Richmond Metropolitan Authority</td>
<td>1</td>
</tr>
<tr>
<td>Richmond Regional Planning District Commission</td>
<td>1</td>
</tr>
<tr>
<td>Virginia Department of Transportation</td>
<td>1</td>
</tr>
</tbody>
</table>

Bylaws of the Richmond Area Metropolitan Planning Organization (MPO) art. III, § 1, at 2 (July 8, 1993). The MPO bylaws, however, do not address the procedure for adding voting members. Nonvoting members may be added by majority vote. See id. § 3, at 3.

Charles City County has been designated as part of the Richmond nonattainment area for ozone under the federal Clean Air Act. Federal law requires that the boundaries of the MPO include the boundaries of the nonattainment area for ozone, except as otherwise provided by agreement between the MPO and the Governor. Consequently, unless the MPO and the Governor agree to a different arrangement, the boundary of the MPO may be expanded to include Charles City County under the provisions of applicable federal regulation without having to redesignate the MPO.

Portions of New Kent County may constitute a contiguous area expected to become urbanized within the twenty-year forecast period. The areas of New Kent County expected to be urbanized within the twenty-year forecast period also must be made a part of the MPO. Whether there is a need to have a formal redesignation of the MPO will
depend on whether the addition of the New Kent County area may be accomplished within the parameters contained in the regulation.\textsuperscript{10} If the Governor and the MPO agree, the entire area of New Kent County may, but need not, be included in the MPO.

Federal law requires that local elected officials be included as representatives on the MPO, and any added area should have appropriate representation on the MPO policy body and other MPO committees.\textsuperscript{11} Therefore, when the counties of Charles City and New Kent are added as members to the MPO, each county should have representation on the MPO policy board and other committees.

The applicable federal regulation does not require formal redesignation of the MPO upon the addition of new members.\textsuperscript{12} The regulation encourages additions to a metropolitan planning organization as are required in instances such as you describe without a formal redesignation.\textsuperscript{13} The regulation also directs states to review previous designations of such organizations, state and local law, and organizational bylaws to determine if the addition of new members may be accomplished without formal redesignation.\textsuperscript{14}

I know of no state or local law that addresses the situation you describe. The MPO bylaws currently provide only for the addition of nonvoting members. In my opinion, adding the counties of New Kent and Charles City as nonvoting members does not satisfy the requirements of federal law and federal regulation requiring "appropriate representation."\textsuperscript{15} Therefore, the MPO bylaws must be amended to allow the addition of the two counties as voting members of the MPO. If the bylaws cannot be amended, it is my opinion that the MPO will have to be formally redesignated to add these two jurisdictions.\textsuperscript{16}

\begin{itemize}
\item[\textsuperscript{1}] Former 23 U.S.C.A. § 134 (West 1990) provided, in part:

\textquoteleft b(1) Within one year after enactment of this subsection [November 6, 1978], in the absence of State law to the contrary, units of general purpose local government within an urbanized area or contiguous urbanized areas for which a metropolitan planning organization has been designated prior to enactment of this subsection, may by agreement of at least 75 per centum of the units of general purpose local government representing at least 90 per centum of the population of such urbanized area or areas, and in cooperation with the Governor, redesignate as the metropolitan planning organization any representative organization.

\textquoteleft (2) Except as provided in paragraph (1), after [November 6, 1978] designations of metropolitan planning organizations shall be by agreement among the units of general purpose local government and the Governor.\textquoteright

\item[\textsuperscript{2}] See former 23 C.F.R. § 450.106(b) (1984).

\item[\textsuperscript{3}] See id. § 450.112.

\item[\textsuperscript{4}] The MPO bylaws provide for a minimum number of local elected officials, or their alternates, to serve, and voting may be weighed, in part, on the basis of population. Id. art. III, §§ 1, 2, 5, at 2-3.


\item[\textsuperscript{6}] 23 U.S.C.A. § 134(c) (West Supp. 1994).

\item[\textsuperscript{7}] See 23 C.F.R. § 450.306(k) (1994). Under this federal regulation, membership may be added to the policy body and the MPO expanded without redesignation. This regulation requires review
\end{itemize}
of the MPO bylaws and other documents to determine whether such may be accomplished without a formal redesignation.

23 U.S.C.A. § 134(c) (describing boundaries of metropolitan area as existing urbanized area and contiguous area expected to become urbanized within 20 years).

"See id.

"See supra note 7.


"See supra note 7.

"See id.

"See id.

23 C.F.R. 450.306(j); see also 23 U.S.C.A. § 134(b)(2).

Because this area is a transportation management area under the provisions of 23 U.S.C.A. § 134(i)(1) (West Supp. 1994), federal regulation requires that the voting membership of a metropolitan planning organization redesignated after December 18, 1991, serving a transportation management area, include representation of local elected officials. 23 C.F.R. § 450.306(i) (1994). Therefore, in such a redesignation of the MPO, the counties of Charles City and New Kent must be added as voting members.

MOTOR VEHICLES: LICENSURE OF DRIVERS.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRUGS.

PROFESSIONS AND OCCUPATIONS: DRUG CONTROL ACT.

Federal regulations properly promulgated have full force and effect of federal law. Statutory mandate that DMV Commissioner revoke driver’s license of Virginia citizen convicted of possession of cocaine in federal district court, under federal regulation substantially similar to Virginia law, is administratively imposed requirement, denying citizen’s privilege to drive on Virginia’s highways, and is not penal in nature.

February 3, 1995

The Honorable Gladys B. Keating
Member, House of Delegates

You ask several questions regarding the application of § 46.2-390.1 of the Code of Virginia to a defendant’s conviction in a federal district court for possession of cocaine.

You provide a copy of a judgment in a criminal case in a federal district court indicating that a Virginia citizen pled guilty to the charge of possession of crack cocaine under 36 C.F.R. § 2.35(b)(2).¹ Section 2.35(b)(2) specifically prohibits a person from
possessing a controlled substance on lands subject to the jurisdiction of the National Park Service. Conviction of this offense is a misdemeanor, with a maximum possible sentence of six months in jail and/or a fine of $500. You state that § 2.35(b)(2) was properly promulgated and within the authority given by Congress to the Secretary of the Interior. Upon receiving the district court judgment, the Commissioner of the Department of Motor Vehicles revoked the driver’s license of the Virginia citizen for six months pursuant to § 46.2-390.1.

You first ask whether the Commissioner has the authority to revoke the driver’s license of the Virginia citizen convicted in federal district court for possession of cocaine under 36 C.F.R. § 2.35(b)(2).

Section 46.2-390.1(A) provides, in part:

[T]he Commissioner [of the Department of Motor Vehicles of the Commonwealth] shall forthwith revoke, and not thereafter reissue for six months from ... the date of conviction ... the driver’s license, registration card, and license plates of any resident ... on receiving notification of ... his conviction ... for any violation of any provisions of Article 1 (§ 18.2-247 et. seq) of Chapter 7 of Title 18.2, or of any state or federal law ... substantially similar to provisions of such Virginia laws.

Clearly, § 46.2-390.1(A) imposes a mandate on the Commissioner to revoke the license for the conviction of any violation of any “federal law ... substantially similar” to any of the provisions found in Article 1, Chapter 7 of Title 18.2, §§ 18.2-247 through 18.2-264, relating to drug offenses. Therefore, if the Commissioner receives a federal court judgment convicting an individual in a criminal case under a federal law substantially similar to one of the requisite Virginia provisions, I am of the opinion that the Commissioner is required to revoke the individual’s operator’s permit.

You next ask whether a conviction under 36 C.F.R. § 2.35(b)(2) constitutes a violation of a “federal law” under § 46.2-390.1. It is well-established that federal regulations promulgated pursuant to authority delegated by Congress have the full force and effect of law. You acknowledge that § 2.35(b)(2) is properly promulgated and within the authority delegated by Congress. Section 46.2-390.1(A) does not differentiate between federal statutory law passed by Congress and federal regulatory law promulgated by a federal agency. The body of law known as “federal law” customarily is accepted as including federal regulations properly promulgated. Therefore, I am of the opinion that a violation of 36 C.F.R. § 2.35(b)(2) is a violation of “federal law” under § 46.2-390.1(A).

You next ask whether 36 C.F.R. § 2.35(b)(2) is “substantially similar” to § 18.2-250. Though analyzed in a slightly different context under a different revocation provision, the Court of Appeals of Virginia held that, for another state’s law or a federal
law to be “substantially conforming” to a corresponding Virginia law, “another state’s law [need not] substantially conform in every respect” to Virginia law. A similar analysis should apply to determining what is “substantially similar” under § 46.2-390.1(A). Clearly, the General Assembly anticipated differences in language between the laws of different jurisdictions. One legislative body will not always enact a law identical in language to that enacted by another legislative body. In this instance, § 18.2-250(A) is not exactly identical in wording, but is substantially identical in wording to 36 C.F.R. § 2.35(b)(2). In my opinion, the differences are not so great as to render the two provisions to be not “substantially similar.”

Furthermore, the statutory descriptions of the “controlled substance”—cocaine—are also nearly identical. A “controlled substance” means a drug included in Schedule II of part B of the Controlled Substances Act, 21 U.S.C. § 812. Schedule II includes the following description:

Coca leaves except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

21 U.S.C.A. § 812(a)(4) (West Supp. 1994). In comparison, § 18.2-247 states that the term “controlled substances” refers to that term as defined in The Drug Control Act, Chapter 34 of Title 54.1, §§ 54.1-3400 through 54.1-3472. Section 54.1-3448 contains a listing of controlled substances in Schedule II, and includes the following description:

Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine; cocaine or any salt or isomer thereof.

These two descriptions of controlled substances in both federal and Virginia law are almost identical and, therefore, are also “substantially similar.”

Finally, you ask whether § 46.2-390.1 is a “penal statute,” which should be construed strictly against the Commonwealth and in favor of a criminal defendant. For a statute to be characterized as “penal” or as a “penal law,” the statute must impose some punishment or penalty for certain offenses. Section 46.2-390.1 is an administratively imposed license revocation that is separate and apart from the criminal procedures that lead to a criminal conviction. The Supreme Court of Virginia has held that revocation of a license is “civil and not criminal in its nature.” The Court further found that a driver whose license has been revoked is no longer a fit person to hold and enjoy the
privilege previously granted to him under the police power, and revocation is not part of the punishment for the offense committed. In another case, the Supreme Court found that "the revocation of a license to drive an automobile upon the highways of the Commonwealth was the denial of a mere privilege and not the imposition of a penalty." Accordingly, it is my opinion that § 46.2-390.1 is not a penal statute. Under the facts you relate, however, even if § 46.2-390.1 were a "penal statute" strictly construed against the state, the Virginia citizen you describe was convicted under a federal law that was substantially similar to § 18.2-250(A), even under a strict construction. It is, therefore, my opinion that the Commissioner properly revoked the operator's permit under the facts and law you present.

The Secretary of the United States Department of Interior is responsible for promulgating regulations that govern public use of, and recreation within, areas under the jurisdiction of the National Park Service. See generally 36 C.F.R. (1994).

See Farmer v. Philadelphia Electric Company, 329 F.2d 3, 7 (3d Cir. 1964); see also Resolution Trust Corp. v. Home Sav. of America, 946 F.2d 93, 96 (8th Cir. 1991) (threshold issue was whether bank repurchase agreement violated "federal law" under 1980 federal "sale-without-recourse regulation"); General Motors Corp. v. Abrams, 897 F.2d 34, 39 (2d Cir. 1990) (federal administrative agency rule-making actions have binding force of "federal law")

In construing a statute, "statutory words must be given the meaning they have acquired from customary usage." Greer v. Dillard, 213 Va. 477, 479, 193 S.E.2d 668, 670 (1973).

Section 18.2-250(A)(a) makes unlawful possession of a Schedule II controlled substance a Class 5 felony.


See BLACK'S LAW DICTIONARY 1132, 1133 (6th ed. 1990) (defining "penal", "penal laws"); see also Kloss' Case, 103 Va. 864, 868, 49 S.E. 655, 656 (1905) (revenue statute imposing penalties for its violation is penal statute).


Id. at 462, 17 S.E.2d at 396.

Anglin v. Joyner, 181 Va. 660, 664, 26 S.E.2d 58, 59 (1943); see also Prichard v. Battle, supra note 9, 178 Va. at 462, 17 S.E.2d at 395-96.

MOTOR VEHICLES: LICENSURE OF DRIVERS - COMMERCIAL DRIVER'S LICENSES.

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

Individual issued commercial driver's license and/or regular driver's license may be convicted of driving under influence of alcohol intoxicants while operating personal
vehicle with BAC between 0.04 and 0.08%. Commonwealth must obtain credible proof of intoxication other than test result when BAC is less than 0.08% and must overcome presumption that individual was not under influence when BAC measures less than 0.05% to obtain conviction. Individual operating private vehicle with BAC of 0.04% or more may be prosecuted under Virginia Commercial Driver's License Act only when vehicle is used as "commercial motor vehicle" to transport "hazardous materials," as both terms are defined in Act.

December 1, 1995

The Honorable Ward L. Armstrong
Member, House of Delegates

You ask whether an individual issued a commercial driver's license ("CDL") under the provisions of the Virginia Commercial Driver's License Act\(^1\) (the "CDL Act") may be convicted of driving while intoxicated when operating a personal vehicle with a blood alcohol content ("BAC") between 0.04 and 0.08 percent.

Section 18.2-266 of the Code of Virginia prohibits any person from driving and operating any motor vehicle while under the influence of alcohol, intoxicants or drugs.\(^2\) Section 46.2-341.24 of the CDL Act, however, prohibits any person from driving and operating any commercial motor vehicle while intoxicated.\(^3\) Under the provisions of § 46.2-341.7, a person lawfully may drive a commercial motor vehicle only after he has been issued a CDL to drive such vehicle in the Commonwealth.\(^4\) The provisions of § 18.2-266 apply to any individual operating any motor vehicle, regardless of whether the individual possesses either a CDL or a regular driver's license. The provisions of § 46.2-341.24, however, apply only to individuals driving or operating commercial motor vehicles in the Commonwealth.

The primary object of statutory construction and interpretation is to ascertain and give effect to the legislative intent.\(^5\) To determine legislative intent, statutes dealing with the same subject matter should, to the extent possible, be read together.\(^6\) "The purpose for which a statute is enacted is of primary importance in its interpretation or construction."\(^7\)

In a prosecution for driving under the influence of alcohol intoxicants, in violation of § 18.2-266(ii), the General Assembly has created three rebuttable presumptions in § 18.2-269(A) that shall arise, depending on the amount of alcohol in the blood of the accused:\(^8\) (1) when the BAC of the accused is less than 0.05 percent, it is presumed that the accused is not under the influence of alcohol intoxicants; (2) when the BAC of the accused is in excess of 0.05 percent but less than 0.08 percent, the accused is not presumed to be under the influence of alcohol intoxicants, but such BAC may be considered with other evidence in determining the guilt or innocence of the accused; and (3) when the BAC of the accused is in excess of 0.08 percent, the accused is presumed to be under the influence of alcohol intoxicants. Under the provisions of § 18.2-266, it
is, therefore, possible for an individual who has been issued a CDL to be convicted of driving while under the influence when driving his personal vehicle with a BAC between 0.04 and 0.08 percent. Accordingly, I am of the opinion that an individual issued a CDL and/or a regular driver's license may be convicted of driving under the influence of alcohol intoxicants while operating a personal vehicle with a BAC between 0.04 and 0.08 percent.

The presumptions in § 18.2-269(A), however, specifically do not apply to and "shall not affect any prosecution for violation of § 46.2-341.24." Under the provisions of § 46.2-341.24(B), it is unlawful for an individual who has been issued a commercial driver's license to operate a commercial motor vehicle with a BAC of 0.04 percent or more. A violation of § 46.2-341.24(B) does not, however, constitute driving a commercial motor vehicle while intoxicated. Violation of § 46.2-341.24(B) is a lesser included offense of driving a commercial motor vehicle while intoxicated, prohibited by § 46.2-341.24(A). The distinction is that a conviction under § 46.2-341.24(A) will result in license revocation under the provisions of §§ 18.2-271, 46.2-389 and 46.2-391, will be treated as a prior conviction under § 18.2-270, and will be applied toward habitual offender status under § 46.2-351. A conviction under § 46.2-341.24(B), however, does not have any such ramifications. The primary consequence of such a conviction is to disqualify the individual from operating commercial motor vehicles. Such a conviction does not affect the individual's regular driving privilege.

As to whether § 46.2-341.24 applies to a driver issued a CDL when driving a personal vehicle, the prohibition against driving or operating a commercial motor vehicle when a driver's BAC is 0.04 or more clearly indicates that the General Assembly intended the statute to apply only when the vehicle being driven is a commercial motor vehicle. 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." It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous. In those situations, the statute's plain meaning and intent govern. Moreover, because of the definition of "commercial motor vehicle" in § 46.2-341.4, a private vehicle ordinarily will not be considered a commercial motor vehicle. Therefore, I am of the opinion that an individual operating a private vehicle may be prosecuted under § 46.2-341.24 only when that vehicle is used as a "commercial motor vehicle" to transport "hazardous materials," as those terms are defined in the CDL Act.

1Tit. 46.2, Ch. 3, Art. 6.1, VA. CODE ANN. §§ 46.2-341.1 to 46.2-341.34.
2The first paragraph of § 18.2-266 provides: "It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight or volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely,
or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely."

Section 46.2-341.24 provides:

"A. It shall be unlawful for any person to drive or operate any commercial motor vehicle (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams per 210 liters of breath as indicated by a chemical test administered as provided in this article; (ii) while such person is under the influence of alcohol; (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any commercial motor vehicle safely; or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any commercial motor vehicle safely.

"B. It shall be unlawful and a lesser included offense of an offense under provision (i), (ii), or (iv) of subsection A of this section for a person to drive or operate a commercial motor vehicle while such person has a blood alcohol concentration of 0.04 percent or more by weight by volume or 0.04 grams or more per 210 liters of breath as indicated by a chemical test administered in accordance with the provisions of this article." (Emphasis added.)

Section 46.2-341.7 provides:

"A. No person shall drive a commercial motor vehicle in the Commonwealth unless he has been issued a commercial driver’s license and unless such license authorizes the operation of the type and class of vehicle so driven, and unless such license is valid.

"B. Every driver of a commercial motor vehicle, while driving such vehicle in the Commonwealth, shall have in his immediate possession the commercial driver’s license authorizing the operation of such vehicle and shall make it available to any law-enforcement officer upon request. Failure to comply with this subsection shall be punishable as provided in § 46.2-104.

"C. No person shall drive a commercial vehicle in Virginia in violation of any of the restrictions or limitations stated on his commercial driver’s license. A violation of the subsection shall constitute a Class 2 misdemeanor."
“(3) If there was at that time 0.08 percent or more by weight by volume of alcohol in the accused’s blood or 0.08 grams or more per 210 liters of the accused’s breath, it shall be presumed that the accused was under the influence of alcohol intoxicants at the time of the alleged offense.”

9There must be credible proof of intoxication other than the test result to obtain a conviction when the BAC is less than 0.08 percent, and, in the case of an individual whose BAC measures 0.04 or 0.05 percent, the Commonwealth would have to overcome a presumption that the individual was not under the influence. See § 18.2-269(A)(1)-(2).

10Section 18.2-269(B) provides that “[t]he provisions of this section shall not apply to and shall not affect any prosecution for a violation of § 46.2-341.24.”

11Section 46.2-341.30(A) provides that “[t]he judgment of conviction under any provision of § 46.2-341.24 shall of itself operate to disqualify the person so convicted from the privilege to drive or operate any commercial motor vehicle as provided in § 46.2-341.18. Notwithstanding any other provision of law, such disqualification shall not be subject to any suspension, reduction, limitation or other modification by the court of the Commissioner [of the Department of Motor Vehicles of the Commonwealth].”

12Although § 46.2-341.24 appears in the CDL Act, the express language of that statute clearly applies only to any person driving or operating a commercial motor vehicle. The mere possession of a CDL is not mentioned as an element of the offense.


15“Commercial motor vehicle” is defined in § 46.2-341.4, as follows:

“Except for those vehicles specifically excluded in this subdivision, every motor vehicle, vehicle or combination of vehicles used to transport passengers or property which either: (i) has a gross vehicle weight rating of 26,001 or more pounds; or (ii) has a gross combination weight rating of 26,001 or more pounds inclusive of a towed vehicle with a gross vehicle weight rating of more than 10,000 pounds; or (iii) is designed to transport sixteen or more passengers including the driver; or (iv) is of any size and is used in the transportation of hazardous materials as defined in this section. Every such motor vehicle or combination of vehicles shall be considered a commercial motor vehicle whether or not it is used in a commercial or profit-making activity.”

16An automobile may be a commercial motor vehicle under § 46.2-341.4 if it is carrying hazardous materials as defined in the CDL Act. “Hazardous materials” is defined in § 46.2-341.4 as “materials determined to be hazardous in accordance with § 103 of the federal Hazardous Materials Transportation Act (49 U.S.C. § 1801 et seq.), as amended, and which require placarding when transported by motor vehicle as provided in the federal Hazardous Materials Regulations (49 C.F.R. Part 172, Subpart F).”

MOTOR VEHICLES: REGULATION OF LIMOUSINES AND EXECUTIVE SEDANS — REGULATION OF MOTOR VEHICLE CARRIERS.

Limousine and executive sedan carries are subject to exclusive control, supervision and regulation by Department of Motor Vehicles, except that intracity or intratown operations are subject to licensing and regulatory authority of municipality that has adopted ordinance regulating such vehicles. Virginia Beach may, by ordinance, regulate limousine
and executive sedans operated primarily, although not exclusively, within city’s corporate limits, by carrier located in city.

August 29, 1995

The Honorable Robert P. Vaughan
Commissioner of the Revenue for the City of Virginia Beach

You ask whether the City of Virginia Beach may regulate limousines and executive sedans, as defined in § 46.2-2500 of the Code of Virginia, operated primarily, although not exclusively, within the corporate limits of the city, by a carrier that is located in the city.

You relate that Virginia Beach has adopted an ordinance to require taxicab services and operators of “for-hire” cars (including limousines and executive sedans) to meet certain standards of general character, financial responsibility, and driver fitness as prerequisites to being granted a local license—a certificate of convenience and public necessity. You also relate that a question has arisen as to whether limousine and executive sedan carriers are subject to such regulation.

The provisions relating to the regulation of limousines and executive sedans by the Department of Motor Vehicles appear in Chapter 25 of Title 46.2, while the provisions relating generally to motor vehicle carriers, and the regulation of passenger carriers by localities specifically, are contained in Chapter 20 of Title 46.2. Section 46.2-2016(A) permits localities to regulate “any motor vehicles used for the transportation of passengers for a consideration on any highway” in such locality. Section 46.2-2503, however, provides that “[e]xcept as provided in subdivision 3 of § 46.2-2501, every limousine carrier or executive sedan carrier shall be subject to the exclusive control, supervision and regulation by the Department [of Motor Vehicles].” Section 46.2-2501(3) provides that Chapter 25 shall not apply to “[m]otor vehicles while used exclusively in transportation within the corporate limits of incorporated cities or towns, provided the incorporated city or town by local ordinance regulates such motor vehicles pursuant to existing regulations.”

In the case of Black & White Cars, Inc. v. Groome Transportation [hereinafter Black & White Cars], the Supreme Court of Virginia considered an argument by Groome Transportation that, because it held a certificate from the State Corporation Commission (the “SCC” or the “Commission”) allowing it to operate as a common carrier of passengers within a large geographic area, including Norfolk, Chesapeake, Suffolk and Virginia Beach, it could ignore the licensing and regulatory requirements of those cities while operating in those cities, even for intracity operations. The City of Norfolk had enacted an ordinance that regulated taxicab operations within its boundaries under former §§ 56-291.3:1 through 56-291.3:5 (now §§ 46.2-2016 through 46.2-2020). Groome was not authorized by the City of Norfolk to conduct taxicab services in that jurisdiction. The
Supreme Court rejected Groome’s argument, pointing out that the definition of “certificate,” under which the SCC certificate had been issued pursuant to § 56-273, provided that “nothing contained in this chapter shall be construed to mean that the Commission can issue any such certificate authorizing intracity transportation.” In addition, the Court noted that “common carriers and restricted common carriers are specifically excluded from the definition of ‘taxicab or other motor vehicle performing a taxicab service.’”

The Court concluded:

Contrary to Groome’s position, these definitions establish that Groome’s SCC certificate does not entitle it to operate as a taxicab in Norfolk or any other locality without complying with the applicable ordinances. The General Assembly has specifically precluded the SCC from issuing certificates for intracity taxicab operation and has not preempted localities from regulating intracity taxicab activities, but, in fact, has specifically authorized such regulation.

Although the case of Black & White Cars did not involve limousines and executive sedans, it is clear that the provisions of Chapter 25 governing such carriers, when read in pari materia with the motor carrier provisions of Chapter 20, are intended by the General Assembly to provide the same result as to limousines and executive sedans as the Court found in Black & White Cars; that is, limousine and executive sedan carriers are subject to the exclusive control, supervision and regulation by the Department of Motor Vehicles (formerly the Commission) under the provisions § 46.2-2503, except that any intracity, or intratown, operations are subject to the licensing and regulatory authority of the locality under the provisions of § 46.2-2501(3) where the locality has adopted ordinances pursuant to §§ 46.2-2016 through 46.2-2020 to regulate such vehicles.

Under the facts you present, the limousines and executive sedans operate within the corporate limits of the City of Virginia Beach. Virginia Beach has adopted ordinances pursuant to §§ 46.2-2016 through 46.2-2020, thereby subjecting the limousines and executive sedans to the licensing and regulatory authority of the city under § 46.2-2501(3) for intracity, or intratown, operations. It is, therefore, my opinion that the City of Virginia Beach may regulate limousines and executive sedans engaged primarily, although not exclusively, in intracity operations.

Section 46.2-2500 defines the following terms:

‘Executive sedan’ means a chauffeur-driven, unmarked, unmetered sedan automobile having a seating capacity of not more than five passengers transporting a person or his party under a single-contract agreement for a minimum time period of one hour. A person and his party shall be limited to the contracting person, group, family, or employees of a company or corporation. ‘Executive sedan’ shall not include limousines, vehicles used by funeral directors, taxicabs, trucks, vans, minivans, buses, or minibuses.

‘Limousine’ means a chauffeur-driven, luxurious automobile with a seating capacity of not more than ten passengers transporting a person or persons under a single contract for a minimum
time period of one hour. The automobile shall be equipped with amenities not normally provided in passenger cars. These amenities should be in the nature of, but not limited to or inclusive of, a television, musical sound system, ice storage area, telephone, additional interior lighting, and driver-passenger communication, such as intercom or power-operated divider partitions.

'Limousine' shall not include taxicabs, vehicles used by funeral directors, executive sedans, trucks, vans, minivans, buses, or minibuses."

3Sections 46.2-2500 to 46.2-2519.
4Sections 46.2-2000 to 46.2-2050.
5Sections 46.2-2017 through 46.2-2019, portions of Chapter 20 of Title 46.2, authorize localities to license and otherwise regulate operators of motor vehicles that transport passengers for a consideration. Section 46.2-2020 provides that violation of Chapter 20 or the regulations adopted by a locality pursuant to that chapter constitutes a misdemeanor for which prescribed fines are imposed for first and subsequent offenses.
7Id. at 428-29, 442 S.E.2d at 393-94.

The 1995 Session of the General Assembly repealed certain sections of Title 56, and placed the responsibility for regulating motor carriers at the state level from the State Corporation Commission to the Department of Motor Vehicles in Title 46.2, effective July 1, 1995. See Ch. 744, 1995 Va. Acts Reg. Sess. 1243; Ch. 803, id. at 1530.

9247 Va. at 429, 442 S.E.2d at 394.
10Id.

11"Upon the same matter or subject. Statutes ‘in pari materia’ are those relating to the same person or thing or having a common purpose." Black’s Law Dictionary 791 (6th ed. 1990).

12It is an established principle of statutory construction that statutes relating to the same subject are not to be considered in isolation, but must be construed together to produce a harmonious result that gives effect to all provisions if possible. See Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); see also 2B Norman J. Singer, Sutherland Statutory Construction § 51.02 (5th ed. 1992); Op. Va. Att’y Gen.: 1990 at 108, 108-09; id. at 220, 223 n.4; id. at 233, 234-35. Therefore, Chapters 25 and 20 must be read together, to the extent possible, to ascertain the intent of the General Assembly in enacting the interrelated provisions. See Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793 (1976). Moreover, § 46.2-2506, a part of Chapter 25, specifically provides that “[a]ll provisions of law applicable to common carriers of passengers, as provided in Chapter 20 (§ 46.2-2000 et. seq.), to the extent not inconsistent with this chapter, shall be applicable to limousine carriers or executive sedan carriers[.]”

13If the carrier operates exclusively intracity (or intratown), then it is exempt entirely from regulation by the Department of Motor Vehicles and is subject only to regulation by the city or town, provided that the city or town has adopted ordinances to regulate such vehicles, pursuant to § 46.2-2501(3).
MOTOR VEHICLES: REGULATION OF TRAFFIC.

HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD, ETC. - SECONDARY SYSTEM OF STATE HIGHWAYS.

City of Colonial Heights may not permit civic organization to create roadblock to conduct fund-raising activity by stopping motorists to solicit monetary contributions for organization's charitable cause; may create common law nuisance by impeding lawful use of highway.

February 3, 1995

The Honorable M. Kirkland Cox
Member, House of Delegates

You ask several questions regarding a request by a civic organization in the City of Colonial Heights to conduct what you label a "roadblock" to raise money for charity. You relate that the proposed fund-raising "roadblock" would consist of members of the organization standing either in the center or on the edge of three city streets, seeking to have motorists stop and place money in a container held by a member of the organization.

Your specific questions are: (1) whether § 46.2-818 of the Code of Virginia prohibits this activity; (2) if not, whether the City of Colonial Heights has the authority under state law, or otherwise, to approve or permit such an activity on a city street; and, (3) whether Colonial Heights must repeal § 273-19 of the City Code to allow this activity or, in lieu of repeal, adopt a separate ordinance permitting the activity by making § 273-19 of the City Code inapplicable.¹

Section 46.2-818 states that any person who intentionally and willfully stops the vehicle of another for the sole purpose of impeding the progress of the vehicle shall be guilty of a Class 1 misdemeanor. The proposed fund-raising activity that seeks to have motorists stop to contribute money to the civic organization's charitable cause does not technically violate the provisions of § 46.2-818. The motorists, however, who are induced to stop their vehicles may violate § 46.2-888, which prohibits a person from "stop[ping] a vehicle in such a manner as to impede or render dangerous the use of the highway by others, except in the case of an emergency, an accident, or a mechanical breakdown." Violation of § 46.2-888 constitutes a traffic infraction, punishable under § 46.2-113.

While the General Assembly has not adopted a specific statute prohibiting the solicitation activity you describe, it has authorized only Arlington and Henrico Counties to enact ordinances similar to § 273-19 of the Colonial Heights City Code to prohibit the activity you describe on secondary highways within those counties.² Arlington and Henrico are the only two localities in the Commonwealth that have jurisdiction over the
secondary highway system within their boundaries.\(^3\) All other roads in the secondary system within counties and towns are under the control and jurisdiction of the Commonwealth Transportation Board.\(^4\)

The General Assembly has not enacted a statute having statewide application similar to § 46.2-931. The Commonwealth Transportation Board, which has authority over roads outside cities, has made it unlawful for anyone to "use or occupy the right of way of any highway [defined as the entire area under the jurisdiction of the Board] for any purpose except travel thereon except as may be authorized by the Board or Commissioner [of the Commonwealth Transportation Board] ... or as provided by law."\(^5\)

Section 46.2-818 does not explicitly prohibit the proposed solicitation activity, so long as the activity is not willful or intentional. When § 46.2-818 is read with § 46.2-888, however, it would appear that such activity is prohibited.\(^6\) Safety for the solicitors and those motorists who stop in or near the travel portion of the roadway, as well as the safety of other motorists who do not stop, is the public purpose being served by the implied prohibition. The Supreme Court of Virginia has held that a city had no power to grant to a carnival the authority to obstruct a public highway.\(^7\) In the case of Richmond v. Smith, a carnival sought to erect structures requiring the closing of certain streets for about a two-week period.\(^8\) The conclusion of the Court was premised on the general rule that "any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law."\(^9\) The Court acknowledged that exceptions to the common law rule exist when closure of a highway becomes necessary for repair or other exigencies.\(^10\)

The solicitation activity you describe may be considered analogous to the temporary obstruction in City of Richmond v. Smith, and, as such, the City of Colonial Heights has no authority to permit such activity which may create a common law nuisance under the rationale of that case. Therefore, I am of the opinion that both the implied prohibition contained in §§ 46.2-818 and 46.2-888 and the common law nuisance rule prohibit Colonial Heights from permitting such proposed solicitation activity.\(^11\)

\(^1\)The City Code provides that "[n]o person shall stand in the vehicular travel portion of any street or roadway for the purpose of ... soliciting for any ... purpose, from the occupant of any vehicle." COLONIAL HEIGHTS, VA., CODE § 273-19 (1994).


\(^3\)See id.

\(^4\)Section 33.1-69.


\(^6\)Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (statutes dealing with same subject matter must be read together to ascertain legislative intent).

\(^7\)Richmond v. Smith, 101 Va. 161, 43 S.E. 345 (1903).

\(^8\)Id. at 163, 43 S.E. at 345.

\(^9\)Id. at 166, 43 S.E. at 345.
Because I conclude that Colonial Heights is prohibited from permitting the proposed solicitation activity you describe, I do not consider the question of whether the city must repeal § 273-19 of the City Code to allow this activity or, in lieu of repeal, adopt a separate ordinance permitting the activity by making § 273-19 inapplicable.

Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor's receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute "other recorded images" inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective.
The Honorable Jane H. Woods  
Member, Senate of Virginia

You ask several questions regarding the interpretation of § 46.2-833.01 of the Code of Virginia, which was enacted at the 1995 Session of the General Assembly, and relates to violation of traffic light signals by motor vehicle operators.¹

You relate that the City of Fairfax desires to create, by ordinance, traffic light photo-monitoring demonstration programs (the “demonstration program”) under the provisions of § 46.2-833.01. Several questions have arisen that do not appear to be addressed by the language of § 46.2-833.01.

I will address your questions seriatim.²

You first ask whether a local governing body may provide, by ordinance, that written warnings, rather than traffic summonses, be mailed to violators during the initial phase(s) of the demonstration program. Section 46.2-100 defines “traffic infraction” as “a violation of law punishable as provided in § 46.2-113, which is neither a felony nor a misdemeanor.” Section 46.2-113 provides that “[i]t shall be unlawful for any person to violate any of the provisions of [Title 46.2], or any regulation adopted pursuant to [Title 46.2], or local ordinances adopted pursuant to the authority granted in § 46.2-1300. Unless otherwise stated, these violations shall constitute traffic infractions punishable by a fine of not more than $200.” Finally, § 46.2-936 provides that summonses are to be issued for traffic infractions.³ The offender issued the summons must agree, in writing, to appear at a designated time and place to answer the charge alleging the infraction.⁴

The primary object of statutory construction and interpretation is to ascertain and give effect to the legislative intent.⁵ “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.’”⁶ In addition, weight must be given to the object of the statute and the purpose to be accomplished, and a reasonable construction of the statute must be made so that the purpose of the statute is not limited or defeated, but instead is promoted.⁷

Section 46.2-833.01(B) provides that “[t]he operator of a vehicle shall be liable for a monetary penalty imposed pursuant to this section if such vehicle is found ... to have failed to comply with a traffic light signal within such locality.” (Emphasis added.) This is mandatory language, in contrast to the permissive provision in § 46.2-833.01(A) that “[t]he governing body ... may provide by ordinance for the establishment of a demonstration program imposing monetary liability on the operator of a motor vehicle for failure to comply with traffic light signals in such locality.”⁸ By using the mandatory term “shall,” the General Assembly has required any vehicle operator who violates this
new provision to be subjected to a monetary penalty not to exceed fifty dollars. A written warning does not carry with it the imposition of a monetary penalty. In addition, the General Assembly clearly has stated that prosecution under § 46.2-833.01 will be initiated by the issuance of a summons showing "prima facie evidence that the vehicle described in the summons ... was operated in violation of this section." The General Assembly has not provided for the issuance of written warnings for violation of this section. Therefore, I am of the opinion that any local ordinance adopted pursuant to § 46.2-833.01 may not provide that written warnings be mailed to violators identified in the demonstration program, in lieu of issuing traffic summonses.

You next ask whether the technician referred to in § 46.2-833.01(C) may be the employee of a private contractor, rather than a local government employee. The General Assembly has not defined the term "technician" for purposes of enforcing the provisions of § 46.2-833.01, and there has been no judicial interpretation of the term as used in that statute. In the absence of such statutory or judicial definition, the term should be given its plain and ordinary meaning, given the context in which it is used. Generally, "technician" is defined as "a specialist in the technical details of a subject or occupation [or] one who has acquired the technique of an art or other area of specialization ...." In addition, the General Assembly has not defined the phrase "employed by a locality." The verb "employ" generally is defined as "to make use of (someone or something inactive); to use (as time) advantageously; and to use or engage the services of [or] to provide with a job that pays wages or a salary." The General Assembly has not specifically required in § 46.2-833.01(C) that a technician be an employee of the local governing body that has established a demonstration program. Therefore, I am of the opinion that such technician may be an employee of the local governing body or an employee of a contractor.

Your third inquiry is whether, in § 46.2-833.01(C), there are any special qualifications the technician must possess, and, if so, what are, and who must determine, those qualifications. The General Assembly has not identified specific qualifications the technician, who must execute the certificate required by § 46.2-833.01(C) to prove violation of the new statute, must possess. A rule of statutory construction, however, requires that words and phrases in a statute be considered in the context in which they are used to arrive at a construction that will promote the object and purpose of the statute. The technician, therefore, must be able to inspect and interpret "photographs, microphotographs, videotape, or other recorded images produced by a traffic light signal monitoring system," to identify the offending vehicle for the purposes of executing the certificate required by § 46.2-833.01(C) that will constitute proof of a violation of the section. Should a locality provide by ordinance for the establishment of the demonstration program contemplated by § 46.2-833.01, I am of the opinion that the locality establishing the demonstration program must make an initial determination whether the technician has the required qualifications to inspect and interpret such recorded images.
Your fourth inquiry is whether a private entity may contract with a locality to operate its traffic light signal monitoring system, and, if so, whether such entity may monitor the system on a periodic basis, gather evidence on violations, determine through the Department of Motor Vehicles (the “Department”) the registered owner of the vehicle operated in violation of the statute, prepare summonses, cause summonses to be issued, and mail summonses to violators.\(^{15}\)

Clearly, under the provisions of the Virginia Public Procurement Act,\(^{16}\) a locality may contract with a private entity to operate its traffic light signal monitoring system.

Section 46.2-102 provides that state police officers and local law-enforcement officers must enforce the motor vehicle statutes in Title 46.2, which are punishable as traffic infractions. Furthermore, that statute requires law-enforcement officers to be uniformed or to display their badges at the time of enforcement, and such officers must be salaried so that they derive no benefit from the enforcement of these laws. A prior opinion of the Attorney General concludes that private security guards who are not qualified as conservators of the peace may not enforce the motor vehicle statutes.\(^{17}\) That same opinion, however, concludes that if the private security officer qualifies as a conservator of the peace, he would be vested with the kind of authority contemplated by the General Assembly, and could, therefore, enforce the motor vehicle statutes.\(^{18}\)

Section 46.2-208(A)(3) requires that all vehicle information, including all descriptive vehicle data and title registration, be maintained as privileged information, and may be released only as specified in § 46.2-208(B). The General Assembly has not made any provisions for an entity such as you describe to obtain vehicle registration information from the Department. The Virginia Criminal Information Network is a computerized criminal justice information system maintained by the State Police pursuant to Chapter 2 of Title 52, §§ 52-12 through 52-15. Through computer terminals connected to the Virginia Criminal Information Network system, law-enforcement agencies and other authorized users may gain access to information stored in the Department's records. The only persons able to obtain such information through the Virginia Criminal Information Network, however, are law-enforcement officers. Therefore, unless employees of the private entity are sworn conservators of the peace who have general powers of arrest, they would not meet the definition of “law-enforcement officer[s]” in § 46.2-100,\(^{19}\) and would not have access to records, either privileged or nonprivileged, from the Commissioner of the Department, under the provisions in § 46.2-208(B)(9) requiring the Commissioner to provide such records “[o]n the request of any ... law-enforcement officer.” Consequently, when the employees of the private entity are not conservators of the peace, I am of the opinion that such employees may not determine through the Department’s records the registered owner of the vehicle operated in violation of the traffic light signal, nor prepare summonses, cause summonses to be issued, or mail them to suspected violators.
Your fifth inquiry is whether a locality may share or "split" monetary penalties received for violations of § 46.2-833.01 with private entities that agree to provide photo-monitoring equipment to the locality. If not, you ask whether contracts between the locality and the private entity for acquisition of the equipment may contain payment provisions based on the amount of monies received by the locality from monetary penalties received for such violations.

I can find no authorization by the General Assembly for a locality to share or "split" monetary penalties received from traffic infractions with private entities that agree to provide photo-monitoring equipment to the locality. Section 46.2-1308 requires that all fines imposed for violations of ordinances pertaining to traffic offenses be paid into the local treasury, and, further, that disposition of such fees be made according to law. I can find no statutory authority for a locality to include payment provisions in a contract of purchase based on the amount of monies received by the locality from monetary penalties received from violations of traffic ordinances. Under Dillon's rule of strict construction of local governmental powers, a locality may not engage in a particular activity unless the authority for it to do so is expressly granted in a statute or necessarily implied from a power that is expressly granted. Consequently, a locality may not share or "split" monetary penalties received from traffic infractions with private entities that agree to provide photo-monitoring equipment to the locality, and may not include payment provisions in a contract of purchase based on the amount received from monetary penalties enforced for violations of traffic ordinances.

Your sixth inquiry is whether it is permissible for a locality to accept a gift of photo-monitoring equipment to operate a demonstration program conditioned on the donor's receiving statistical information regarding the demonstration program. Section 15.1-526.4 permits counties to "acquire by gift ... personal property," both "within and without the county." Section 15.1-848 permits "[a] municipal corporation [to] accept ... gifts ... from any source, which are related to the powers, duties and functions of the municipal corporation." The General Assembly, however, has not provided any authority for a locality to accept gifts conditioned on the donor's receipt of statistical information of the nature you describe. Furthermore, under Dillon's rule of strict construction, the acceptance of a gift of photo-monitoring equipment to operate a demonstration program conditioned on the donor's receiving statistical information regarding the program may not be concluded to be implied necessarily from the power expressly granted by the General Assembly in § 46.2-833.01. Therefore, I am of the opinion that a locality may not accept a gift of photo-monitoring equipment to operate a demonstration program conditioned on the donor's receiving statistical information regarding the demonstration program.

Your seventh inquiry is whether a police officer, police department employee, magistrate, or person with whom the locality contracts to operate the demonstration program is authorized to issue summonses for violations of the traffic light signal photo-monitoring system. Section 46.2-102 requires every local law-enforcement officer to
enforce the provisions of Title 46.2 punishable as traffic infractions. A prior opinion of the Attorney General concludes that a conservator of the peace is vested with the kind of authority contemplated by former § 46.1-6 (recodified as § 46.2-102), and may enforce the motor vehicle statutes embodied in Chapters 1 through 4 of former Title 46.1 (recodified as Chapters 1, 2, 6, 8 and 10 of Title 46.2).21 Another prior opinion notes that special police officers possess the same general powers, authorities and duties as other conservators of the peace.22 Finally, a prior opinion concludes that conservators of the peace meet the definition of “law-enforcement officer[s]” contained in § 46.2-100.23 Section 46.2-936 authorizes law-enforcement officers to issue summonses for traffic infractions, and § 19.2-73 authorizes magistrates to issue summonses in any misdemeanor case. Therefore, the General Assembly permits only law-enforcement officers, magistrates and conservators of the peace to issue summonses for traffic infractions. I am, therefore, of the opinion that police department employees and persons with whom the locality contracts to operate the demonstration program must be sworn conservators of the peace before they may issue traffic summonses for traffic infractions.

Your eighth inquiry is whether digitally recorded images constitute “other recorded images” under § 46.2-833.01(C). The General Assembly has not defined the term “other recorded images” as used in that section. As previously stated, words and phrases must be considered in the context they are used, arriving at a construction that promotes the object and purpose of the statute.24 The General Assembly has required in § 46.2-833.01(C) that proof of a violation be evidenced by information obtained from a traffic light signal violation photo-monitoring system; a technician swears to or affirms in a certificate such information based on an inspection of “other recorded images.” Therefore, I am of the opinion that when a technician has properly executed such a certificate based on his inspection of those images, digitally recorded images may constitute “other recorded images” under § 46.2-833.01(C).

Your ninth inquiry is whether offenses referred to in § 46.2-833.01(D) are criminal offenses, traffic offenses, traffic infractions, or civil offenses. This new section is found in Article 3, Chapter 8 of Title 46.2, §§ 46.2-830 through 46.2-836. Section 46.2-113 provides that violations of Title 46.2 “shall constitute traffic infractions,” unless otherwise stated. (Emphasis added.) The General Assembly has not stated in § 46.2-833.01 that violations are to be treated otherwise than as traffic infractions. Section 46.2-492(D)(3) requires the Commissioner of the Department of Motor Vehicles to assign three demerit points to those convicted of failure to obey highway signs, in violation of § 46.2-830. Section 46.2-830 requires that “[n]o provision of this section relating to the prohibition of disobeying signs or violating local traffic signals, markings, and lights shall be enforced against an alleged violator where the signal is not able to be seen by an ordinary person. The General Assembly has provided that “[i]mposition of a penalty pursuant to §§ 46.2-833.01 shall not be deemed a conviction as an operator and shall not be made part of the operating record” of such person under the provisions of Article 19, Chapter 3 of Title 46.2.26 Therefore, violations of newly enacted § 46.2-833.01 are traffic infractions.27
Your final inquiry is whether newly enacted § 46.2-833.01 is defective because it does not specifically refer to the provisions of § 46.2-833 regarding "failure to obey traffic lights." Under the provisions of § 46.2-1300(A), localities may adopt traffic ordinances that are not in conflict with the provisions of Title 46.2. Section 46.2-833.01(A) allows localities to establish a demonstration program imposing monetary liability for failure to comply with traffic light signals. Section 46.2-833 specifies the meaning of the red, green and amber colors in traffic lights. The reference to traffic light signals in § 46.2-833.01 necessarily refers to the traffic light provisions of § 46.2-833. The latter statute sets forth the colors that are used in traffic lights and the meaning of each of those colors, which are considered traffic direction directives that a motorist must follow with reasonable care. Therefore, I am of the opinion that § 46.2-833.01 is not defective, because it does not specifically refer to the provisions of § 46.2-833 regarding "failure to obey traffic lights."

1See Ch. 492, 1995 Va. Acts Reg. Sess. 730. Section 46.2-833.01 provides:

"A. The governing body of any city having a population of more than 390,000, any city having a population of at least 200,000 but less than 225,000, any county having the urban county executive form of government, any county adjacent to such county, and any city or town adjacent to or surrounded by such county except any county having the county executive form of government and the cities surrounded by such county may provide by ordinance for the establishment of a demonstration program imposing monetary liability on the operator of a motor vehicle for failure to comply with traffic light signals in such locality in accordance with the provisions of this section. Each such locality may install and operate traffic light signal photo-monitoring systems at no more than twenty-five intersections within each locality at any one time.

"B. The operator of a vehicle shall be liable for a monetary penalty imposed pursuant to this section if such vehicle is found, as evidenced by information obtained from a traffic light signal violation monitoring system, to have failed to comply with a traffic light signal within such locality.

"C. Proof of a violation of this section shall be evidenced by information obtained from a traffic light signal violation monitoring system authorized pursuant to this section. A certificate, sworn to or affirmed by a technician employed by a locality authorized to impose penalties pursuant to this section, or a facsimile thereof, based upon inspection of photographs, microphotographs, videotape, or other recorded images produced by a traffic light signal violation monitoring system, shall be prima facie evidence of the facts contained therein. Any photographs, microphotographs, videotape, or other recorded images evidencing such a violation shall be available for inspection in any proceeding to adjudicate the liability for such violation pursuant to an ordinance adopted pursuant to this section.

"D. In the prosecution of an offense established under this section, prima facie evidence that the vehicle described in the summons issued pursuant to this section was operated in violation of this section, together with proof that the defendant was at the time of such violation the registered owner of the vehicle, shall constitute in evidence a rebuttable presumption that such registered owner of the vehicle was the person who committed the violation. Such presumption shall be rebutted if the registered owner of the vehicle (i) files an affidavit by regular mail with the clerk of the general district court that he or she was not the operator of the vehicle at the time of the alleged violation or (ii) testifies in open court under oath that he or she was not the operator of the vehicle at the time of the alleged violation. Such presumption shall also be rebutted if a certified copy of a police report, showing that the vehicle had been reported to the police as stolen prior to the time
of the alleged violation of this section, is presented, prior to the return date established on the summons issued pursuant to this section, to the court adjudicating the alleged violation.

"E. For purposes of this section "owner" means the registered owner of such vehicle on record with the Department of Motor Vehicles. For purposes of this section "owner" does not mean a vehicle rental or vehicle leasing company. For purposes of this section, "traffic light signal violation-monitoring system" means a vehicle sensor installed to work in conjunction with a traffic light that automatically produces two or more photographs, two or more microphotographs, a videotape, or other recorded images of each vehicle at the time it is used or operated in violation of this section.

"F. Imposition of a penalty pursuant to this section shall not be deemed a conviction as an operator and shall not be made part of the operating record of the person upon whom such liability is imposed nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage. No monetary penalty imposed under this section shall exceed fifty dollars and shall not include court costs.

"G. A summons for a violation of this section may be executed pursuant to § 19.2-76.2. Notwithstanding the provisions of § 19.2-76, a summons for a violation of this section may be executed by mailing by first-class mail a copy thereof to the address of the owner of the vehicle as shown on the records of the Department of Motor Vehicles. If the summoned person fails to appear on the date of return set out in the summons mailed pursuant to this section, the summons shall be executed in the manner set out in § 19.2-76.3. No proceedings for contempt or arrest of a person summoned by mailing shall be instituted for failure to appear on the return date of the summons.

"H. In any action at law brought by any person or entity as the result of personal injury or death or damage to property, such evidence derived from a photo-monitoring system shall be admissible in the same method prescribed as required in the prosecution of an offense established under this section without the requirements of authentication as otherwise required by law."

"You do not inquire regarding constitutional questions, if any, raised by the statute. Therefore, I do not consider any such matters in this opinion."

"See also § 46.2-937 (providing that "traffic infractions shall be treated as misdemeanors")."

"See § 46.2-936.


"10See § 46.2-833.01(D).


"13Id. at 408.


"I assume for the purpose of this opinion that your use of the word “operate” means “to cause to function: work[;] to put or keep in operation.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY, supra note 12, at 827."
PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

ADMINISTRATION OF GOVERNMENT GENERALLY: TREASURY, STATE TREASURER AND COMPTROLLER — DEPARTMENT OF GENERAL SERVICES - PURCHASES AND SUPPLY — PERSONNEL ADMINISTRATION — ATTORNEY GENERAL AND DEPARTMENT OF LAW.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

COSTS, FEES, SALARIES AND ALLOWANCES: SALARIES AND EXPENSES OF OFFICE.

Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement...
Act; all public funds must clear through Comptroller’s Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director’s salary without Governor’s approval. VRS must comply with Comptroller’s regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General.

April 3, 1995

Mr. James C. Wheat III
Chairman, Board of Trustees, Virginia Retirement System

You note that § 51.1-124.1 of the Code of Virginia establishes the Virginia Retirement System as “an independent agency of the Commonwealth.” You make several inquiries regarding whether this designation alters the obligation of the Retirement System to conform to certain other statutory requirements or procedures generally applicable to agencies in the executive branch of state government. I will answer your questions seriatim.

The 1994 Session of the General Assembly repealed and replaced the general provisions of Title 51.1 relating to administration of the Virginia Retirement System (“VRS”), its Board of Trustees (“VRS Board”), Medical Board and Advisory Committees, and investment of its funds. Former §§ 51.1-100 through 51.1-124 were replaced by §§ 51.1-124.1 through 51.1-124.35.2 Section 51.1-124.1 contains the legislative intent and purposes of VRS and states:

Article X, Section 11 of the Constitution of Virginia [1971] requires the General Assembly to maintain a state employees’ retirement system, subject to restrictions and conditions prescribed by the General Assembly, that shall be administered in the best interests of the beneficiaries thereof. To that end and for the purposes of providing adequate benefits and pensions to members, encouraging stable employer contribution rates, and ensuring the overall soundness of the Retirement System, the General Assembly hereby establishes the Virginia Retirement System as an independent agency of the Commonwealth, exclusive of the legislative, executive, and judicial branches of government ....

Section 51.1-124.22, which details the powers and duties of the VRS Board, provides, in part:

A. The Retirement System shall be administered by the Board of Trustees, whose powers and duties include but are not limited to:

* * *
3. Employing an actuary as its technical advisor and employing other persons and incurring expenditures as it deems necessary for the efficient administration of the Retirement System.

The 1994 Session of the General Assembly enacted the Appropriation Act for the 1994–96 biennium. Section 6 of the enacting clause of the Appropriation Act defines "state agency" as "a court, department, institution, office, board, council or other unit of state government located in the legislative, judicial, or executive departments or group of independent agencies, or central appropriations, as shown in this act, and which is designated in this act by title and a three-digit agency code." Part I of the Appropriation Act contains line item appropriations for individual state departments, agencies, institutions and programs. Section 1-126 contains "Central Appropriations" intended to be transferred for various purposes to supplement appropriations to other agencies. Item 624 within this section is an appropriation for compensation supplements, and contains provisions detailing the basis on which such compensation supplements may be transferred to various state agencies, including the following:

E. Transfers from this Item shall be used to effect performance-based increases in the base salary and related employee benefit increases on December 1, 1994, as described in Paragraph F. of this Item for:

* * *

2. Directors of the Virginia Retirement System and the State Lottery Department;

* * *

7. Full-time employees of the State Corporation Commission, the Virginia Workers' Compensation Commission, the Virginia Retirement System, and the State Lottery Department[.]

Sections 1-127 through 1-129.1 contain the respective line item appropriations for the four entities designated as "Independent Agencies." The line items for VRS are found in § 1-129.1. Item 643.10 contains appropriations for VRS's administrative and support services, general management and direction, and computer services.

Underlying your specific questions is the more general question whether designation of an agency as "independent" of the executive, legislative and judicial branches of state government affords the agency receiving such a designation exemption from procedural requirements of statutes or regulations generally applicable to state agencies. I am aware of no statutory or court decision conferring such a broad exemption by virtue of the independent agency designation.
You ask whether VRS is required to have its biennial budget request and amendments approved by the Governor and also whether VRS is required to operate within its appropriated funds. Article X, § 7 of the Virginia Constitution and § 2.1-224 both provide that no funds are to be paid out of the state treasury unless such funds have been duly appropriated.

In addition, § 2.1-224 provides that no such funds shall be available for expenditure until the agency, institution or department has submitted an annual estimate to the Department of Planning and Budget and that estimate has been approved by the Governor. Only the General Assembly and the judiciary are excepted from this requirement. Id. Section 4-1.02(a) of the Appropriation Act provides that the funds appropriated must be used only for the specific purpose for which they were appropriated.13

Therefore, it is my opinion that VRS must submit its budget estimate to the Department of Planning and Budget and the Governor for approval, and it must use appropriated funds for the purposes specified in the Appropriation Act.

You also ask whether VRS is required to adhere to the provisions of the Virginia Public Procurement Act, and if so, whether the VRS Board must adhere to the policies and procedures of the Department of General Services and the Department of Information Technology.

It is clear that under §§ 11-35(H) and 51.1-124.32, VRS may procure services “related to the management, purchase or sale of authorized investments, including but not limited to actuarial services” outside of the requirements of the Virginia Public Procurement Act.

Any purchases that fall outside the category described in these statutes, however, must be obtained in accordance with the Procurement Act and any applicable rules and regulations. See § 2.1-442.

You next inquire whether VRS must use banking services provided by the Department of the Treasury, such as check preparation, or whether VRS may procure banking services independently. I am aware of no statute that requires VRS to use banking services provided by the Department of the Treasury. All public funds, however, must clear through the Comptroller’s Office. See § 2.1-195.

Assuming that banking services are unrelated to the management, purchase or sale of authorized investments and actuarial services, VRS still must procure these services in accordance with the Procurement Act.

You also ask several questions concerning the compensation of VRS personnel. Section 51.1-124.27 exempts all VRS employees, both investment and noninvestment, from the provisions of the Virginia Personnel Act. Section 2.1-114.2(B) of the Personnel
Act authorizes the Governor to establish and administer a uniform compensation plan for all employees. VRS, therefore, is not bound by the uniform compensation plan in determining its employees’ compensation.

While § 51.1-124.22(A) authorizes the VRS Board to employ other persons and incur expenditures it deems necessary for the efficient administration of the Retirement System, VRS’s operating budget is nevertheless governed by and must be consistent with the provisions of the Appropriation Act.

In addition, § 14.1-2 requires the Governor’s prior written consent for any increase in the salary of any “officer or employee of any state institution, board, commission or agency which is not specifically fixed by law.”

Therefore, I am of the opinion that while VRS personnel are not covered by the uniform compensation plan, VRS may not increase its Director’s salary without the Governor’s approval pursuant to § 14.1-2.

You also ask whether VRS must comply with the administrative expense policies of the Department of Accounts relating to travel and lodging. Reimbursement of travel and lodging expenses incurred while conducting official business for the Commonwealth is governed, in part, by § 14.1-5, which provides that any person traveling on state business is entitled to reimbursement for actual expenses necessary and ordinarily incidental to such travel. Section 14.1-10 requires that “[a]ll travel expense accounts shall be submitted on forms prescribed or approved by the Comptroller.” In addition, § 4-5.06(f) of the Appropriation Act provides that “[r]eimbursement for the cost of travel on official business of the state government is authorized to be paid pursuant to law and regulations issued by the State Comptroller to implement such law.”

These provisions make it clear that VRS must comply with the Comptroller’s regulations and procedures governing reimbursement of official travel expenses. There is no authorization for the VRS Board to implement its own policies on the reimbursement of travel expenses.

Finally, you ask whether VRS may contract with private counsel without the prior approval of the Attorney General.

The Office of the Attorney General is responsible for providing “[a]ll legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge.” In addition, “[n]o regular counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, or official.” When, in the Attorney General’s opinion it is impracticable or uneconomical for his office to render legal services, the Attorney General may employ and fix compensation for special counsel, as may the Governor under certain specific conditions and circumstances.
When the General Assembly wishes to grant an exemption from the provisions of §§ 2.1-121 and 2.1-122, governing the appointment of outside private counsel for state entities, it does so explicitly. When there is no specific authorization for a state entity to employ legal counsel, however, the Attorney General’s Office will provide all legal services in civil matters.

I am therefore, of the opinion that VRS may not contract with private legal counsel without the prior approval of the Attorney General.

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1See Ch. 4, 1994 Va. Acts Reg. Sess. 3, 3; Ch. 85, id. at 178, 178. Both chapters adopt identical language for § 51.1-124.1, which is not set out in the Virginia Code.

2See id.

3Id.


5Id. § 6(D), at 2015.

6Id. at 2016-2320.

7Id. at 2298-2312.

8Id. at 2299.

9Id. at 2313-17. Section 58.1-4003 designates the State Lottery Department as an independent agency in language similar to that used in § 51.1-124.1 concerning VRS. The State Corporation Commission (“SCC”) is created by Article IX, § 1 of the Virginia Constitution; its organic statutes are found in Title 12.1. SCC members are elected by the General Assembly, or appointed by the Governor when the General Assembly is not in session, in a manner comparable to that used to select judges. See Art. IX, § 1; § 12.1-6. Although neither Article IX of the Constitution nor Title 12.1 specifically refers to the SCC as an “independent agency,” this method of appointment and the quasi-judicial nature of some of the SCC’s duties differentiate it from agencies in the executive, legislative and judicial branches of state government. The Virginia Workers’ Compensation Commission is not mentioned in the Constitution, but is created by § 65.2-200 and its members are elected or appointed in a manner similar to SCC members. It too performs functions of a quasi-judicial nature that support its designation in the Appropriation Act as an “independent agency.” See §§ 65.2-201 to 65.2-204.


11Id. at 2316.

12Other independent agencies are: State Corporation Commission, Virginia Workers’ Compensation Commission and State Lottery Department.

131994 Va. Acts, supra note 4, at 2359.


16Section 2.1-121.

17Id.

18Sections 2.1-121, 2.1-122. The procurement of legal services is exempt from the requirements of the Virginia Public Procurement Act pursuant to § 11-45(B)(i).

19See, e.g., § 12.1-15.1 (authorizing State Corporation Commission to retain counsel for its employees and agents).
PRISONS AND OTHER METHODS OF CORRECTION: AGREEMENT ON DETAINERS — LOCAL CORRECTIONAL FACILITIES — COMMENCEMENT OF TERMS; CREDITS AND ALLOWANCES.

CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE.

Agreement on Detainers requires sending state to credit prisoner's sentence with all time prisoner is physically in Virginia jail awaiting trial pursuant to Agreement; prisoner remains in custody of sending state for purposes of computing time served on sentence imposed by that state. Prisoner returned to Virginia under Agreement may not receive duplication of credit for time spent in jail awaiting trial on criminal charges pending in Virginia; may be allowed concurrent credit on Virginia sentence for time spent in Virginia jail awaiting trial on criminal charges only when expressly ordered by Virginia court.

October 3, 1995

The Honorable J. Randolph Smith Jr.
Commonwealth’s Attorney for the City of Martinsville

You ask whether a prisoner returned to Virginia under § 53.1-210 of the Code of Virginia, a portion of the law pertaining to Agreement on Detainers, is entitled to credit for time spent in jail awaiting trial on the criminal charges pending in Virginia.

A prior opinion of the Attorney General concludes that it was the intention of the General Assembly in passing § 53-208, the predecessor to § 53.1-187, “that an inmate be given credit for all time spent in jail awaiting trial regardless of the jurisdiction so long as there is no duplication.” Published opinions of the Attorney General interpreting legislation are presumptively indicative of legislative intent. “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.” The General Assembly has not enacted any amendments to § 53.1-187 affecting the conclusion of that prior opinion. There can, therefore, be no duplication of credit given to an inmate for time spent in jail awaiting trial.

When the language of a statute is unambiguous, its plain meaning controls, and resorting to rules of construction or legislative history is both unnecessary and improper. The plain language of Article V(f) of § 53.1-210 of the Agreement on Detainers provides:

During the continuance or temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.
In addition, Article V(g) of § 53.1-210 provides:

For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state ....

By the clear language of Article V(f) and (g) of § 53.1-210, the provisions apply whenever prisoners are "being made available for trial." It is my opinion that the Agreement on Detainers requires the sending state to credit the prisoner's sentence with all the time the prisoner is physically in a Virginia jail awaiting trial pursuant to the Agreement. Although the prisoner is physically located in a Virginia jail, under the Agreement, the prisoner is considered to remain in the custody of the sending state for the purposes of computing the time served on the sentence imposed by the sending state. Therefore, I am of the opinion that crediting jail time to a prisoner returned to Virginia under the Agreement on Detainers for time spent in jail awaiting trial on the criminal charges pending in Virginia would be a duplication of jail credit.

I note, however, that § 19.2-308.1 permits a criminal sentence imposed by a Virginia court to run concurrently with a sentence imposed by another state. In § 19.2-308, the General Assembly specifically has required a Virginia criminal defendant's sentences on two or more offenses to run consecutively, unless the sentencing court expressly orders the sentences to run concurrently. Therefore, I am of the further opinion that a prisoner returned under the Agreement on Detainers may be allowed to have concurrent credit on the Virginia sentence for time spent in a Virginia jail awaiting trial on criminal charges only when expressly ordered by the Virginia court.

1Sections 53.1-210 through 53.1-215 comprise the Agreement on Detainers, a congressionally sanctioned interstate compact that encourages disposition of outstanding criminal charges when one jurisdiction has lodged a detainer, based on an untried indictment, information or complaint, with prison authorities of another jurisdiction where the subject of the outstanding charges is incarcerated. See Carchman v. Nash, 473 U.S. 716, 719-20 (1985).

2A "local correctional facility," as defined in § 53.1-1, includes a "jail." Section 53.1-116(A) requires that "(t)he jailer shall keep a record describing each person committed to jail, ... for what offense or cause he was committed, and when received into jail."

3Section 53.1-187 provides: "Any person who is sentenced to a term of confinement in a correctional facility shall have deducted from any such term all time actually spent ... in a state or local correctional facility awaiting trial[.]"

41974–1975 Op. Va. Att'y Gen. 129; see also Op. Va. Att'y Gen.: 1989 at 268 (time spent in jail awaiting preliminary hearing, when charge is dismissed, must be credited against sentence returned on subsequent direct indictment for same offense); 1982–1983 at 197, 197 (§ 53.1-187 requires credit for time spent in pretrial confinement for same offense only; credit is not due when charges differ); 1977–1978 at 160 (no entitlement to credit for time spent in jail in another state awaiting extradition after escape from Virginia State Penitentiary); 1972–1973 at 313 (credit may be given for confinement while awaiting trial in two jurisdictions).

Section 53.1-210 defines "sending state" as "a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof."

Article III(a) of § 53.1-210 permits a prisoner to demand disposition of an untried indictment, information or complaint when a detainer based on such a document has been lodged with prison authorities in the state where the prisoner is incarcerated by a prosecutor in another state.

Article IV of § 53.1-210 gives a prosecutor a method to compel the return of a prisoner confined in another state.

Section 19.2-308.1 provides: "Notwithstanding any other provision of law, in the event that a person is convicted of a criminal offense in any court of this Commonwealth and such person has also been sentenced to imprisonment for a term of one year or more by a court of the United States, or any other state or territory, and, at the time of sentencing in this Commonwealth, is incarcerated in a federal or state penal institution, the court may order the sentence to run concurrently with the sentence imposed by such other court."

Section 19.2-308 provides: "When any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court."

PRISONS AND OTHER METHODS OF CORRECTION: COMMENCEMENT OF TERMS; CREDITS AND ALLOWANCES — STATE CORRECTIONAL FACILITIES — ADMINISTRATION GENERALLY - DEPARTMENT OF CORRECTIONS AND DIRECTOR OF CORRECTIONS.

Director of Department of Corrections is not required to provide statutorily specified programs to persons confined in local correctional facilities. Earned sentence credits are conditioned only in part on participation by inmates assigned to such programs. Inmates incarcerated in local correctional facilities are not required to participate in programs that are nonexistent to earn sentence credits. Sentence credits may be earned for each 30 days' service and may be applied to weekend service, but may not be prorated.

December 15, 1995

The Honorable Kennard L. Phipps
Sheriff for Montgomery County

You ask whether inmates in local correctional facilities must be required to adhere to the rules and programs referred to in § 53.1-202.3 of the Code of Virginia before they may earn sentence credits. You also ask whether earned sentence credits may be prorated and applied to the sentences of inmates in local correctional facilities serving sentences of less than thirty days. Finally, you ask whether earned sentence credits apply to convicted felons serving sentences on the weekends in local correctional facilities that exceed thirty days.
Section 53.1-202.3 provides that earned sentence credits "shall be conditioned, in part, upon full participation in and cooperation with programs to which a person is assigned pursuant to § 53.1-32.1." Section 53.1-32.1, however, is applicable only to the Director of the Department of Corrections who is

the chief executive officer of the Department and shall ...

1. [S]upervise and manage the Department and its system of state correctional facilities.

The General Assembly has defined "local correctional facilities" to be separate and apart from "state correctional facilities." The General Assembly also has provided that "the general purpose of the state correctional facilities [is] to provide proper employment, training and education in accordance with ... § 53.1-32.1." Therefore, the Director of the Department of Corrections is not required to provide the programs specified in § 53.1-32.1 to persons confined in local correctional facilities.

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." It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous. In those situations, the statute's plain meaning and intent govern. I am of the opinion that the language in § 53.1-202.3 is clear and unambiguous. The earning of sentence credits is to be conditioned only in part on participation in such programs. Consequently, earned sentence credits may be conditioned on program participation where an inmate is actually assigned to participate in such programs. Therefore, I am of the opinion that inmates in local correctional facilities who are not assigned to participate in a program pursuant to § 53.1-202.3, since such a program does not exist in such facilities, may not be required to meet this particular condition to earn sentence credits.

You next ask whether earned sentence credits may be prorated and applied for inmates in local correctional facilities serving sentences of less than thirty days. The language of § 53.1-202.3 clearly provides that sentence credits may be earned for each thirty days served. Virginia statutes are to be afforded their plain meaning where there is no ambiguity. The plain language of the statute states the maximum sentence credits to be earned for each thirty days served. Therefore, the General Assembly clearly intended that at least thirty days be served before any sentence credits may be earned. The General Assembly has not provided for the proration of sentence credits in § 53.1-202.3.

A prior opinion of the Attorney General concludes that § 53.1-116 does not apply to sentences of less than thirty days based on the plain language of that statute. The language of § 53.1-116 is substantially similar to the language of § 53.1-202.3. To determine legislative intent, statutes dealing with the same subject matter should, to the extent possible, be read together. It is my opinion, therefore, that inmates may not earn
sentence credits pursuant to § 53.1-202.3 unless they serve a sentence of at least thirty days, and earned sentence credits may not be prorated.

Your final inquiry is whether earned sentence credits may be applied to the sentences of convicted felons serving sentences on weekends in local correctional facilities that exceed a total of thirty days. The General Assembly has not specifically required in § 53.1-202.3 that the sentence imposed be served on consecutive days before sentence credits may be earned. Words in a statute are to be given their usual, commonly understood meaning. Therefore, I am of the opinion that so long as a person serves at least a total of thirty days, the person may earn sentence credits for serving a sentence on weekends in local correctional facilities.

1Section 53.1-1 defines “local correctional facility” to mean “any jail, jail farm or other place used for the detention or incarceration of adult offenders, excluding a lock-up, which is owned, maintained or operated by any political subdivision or combination of political subdivisions of the Commonwealth.”

2Section 53.1-202.3 provides: "A maximum of four and one-half sentence credits may be earned for each thirty days served. The earning of sentence credits shall be conditioned, in part, upon full participation in and cooperation with programs to which a person is assigned pursuant to § 53.1-32.1. Notwithstanding any other provision of law, no portion of any sentence credits earned shall be applied to reduce the period of time a person must serve before becoming eligible for parole upon any sentence."

3Section 53.1-32.1(A) requires the Director of the Department of Corrections to, among other things, maintain a system of classification to determine “appropriate program assignments including vocational and technical training, work activities and employment, academic activities [which meet minimum statutory requirements], counseling, alcohol and substance abuse treatment, and such related activities as may be necessary to assist prisoners in the successful transition to free society and gainful employment.” Section 53.1-32.1(B) requires the Director to “place prisoners in appropriate full-time program assignments or a combination thereof to satisfy the objectives of a treatment plan based on an assessment and evaluation of each prisoner’s needs.”

4Section 53.1-10. Section 53.1-1 defines “state correctional facility” to mean “any correctional center or correctional field unit used for the incarceration of adult offenders established and operated by the Department of Corrections.”

5Section 53.1-32.


Inmate ineligible for parole may not earn good conduct credit when mandatory minimum sentence is imposed. Intent of General Assembly is to ensure that inmate convicted of crime carrying mandated minimum sentence must serve entire time. Inmate is ineligible to receive good conduct credit for 30 days of 90-day sentence served as mandatory minimum sentence for third conviction of driving motor vehicle while intoxicated within five-year period, but is eligible to earn good conduct credit on last 60 days of three-month sentence.

September 1, 1995

The Honorable A.D. Mathews Sr.
Sheriff for Henrico County

You ask whether an individual who receives a three-month sentence upon conviction of driving a motor vehicle while intoxicated for the third time within less than five years may earn good conduct credit under the provisions of § 53.1-116 of the Code of Virginia\(^1\) for the mandatory minimum sentence of thirty days as required by § 18.2-270.\(^2\)

You relate that a question has arisen regarding computation of good conduct credit for an inmate convicted of driving a motor vehicle while intoxicated for the third time within less than five years. The circuit court sentenced the inmate to a total sentence of ninety days in jail.\(^3\)

When the language of a statute is clear and unambiguous, resort to rules of statutory construction is unnecessary.\(^4\) The language in § 53.1-116 is clear and unambiguous in providing that an inmate who is ineligible for parole shall earn good conduct credit “unless a mandatory minimum sentence is imposed by law.” (Emphasis added.) Therefore, inmates ineligible for parole may not earn good conduct credit on mandatory minimum sentences. The obvious intent of the General Assembly is to ensure that an inmate convicted of a crime carrying a mandatory minimum sentence must serve, without exception, the mandatory minimum time.

Section 18.2-270 provides that “[t]hirty days of confinement shall be a mandatory, minimum sentence not subject to suspension by the court if the third or subsequent offense occurs within less than five years.” An inmate serving such a mandatory minimum sentence is not eligible to earn good conduct credit for the mandatory sentence under the provisions of § 53.1-116.
Under the facts you present, it is my opinion that the inmate is not eligible to receive good conduct credit for the thirty days of confinement served as a mandatory minimum sentence under the provisions of § 18.2-270. It is further my opinion, however, that because the remaining two months are not part of the mandatory minimum sentence, the inmate is eligible to earn good conduct credit on the last two months of the three-month sentence.

1Section 53.1-116(A) provides, in part: "The jailer shall keep a record describing each person committed to jail, the terms of confinement, for what offense or cause he was committed, and when received into jail. The jailer shall keep a record of each prisoner. Each prisoner not eligible for parole under §§ 53.1-151, 53.1-152 or § 53.1-153 shall earn good conduct credit at the rate of one day for each day served while confined in jail prior to conviction and sentencing, in which the prisoner has not violated the written rules and regulations of the jail unless a mandatory minimum sentence is imposed by law; however, any prisoner committed to jail upon a felony offense committed on or after January 1, 1995, shall not earn any good conduct credit."

2Section 18.2-270 imposes mandatory, minimum sentences for driving while intoxicated: "Any person convicted of a second offense committed within less than five years after a first offense under § 18.2-266 shall be punishable by a fine of not less than $200 nor more than $2,500 and by confinement in jail for not less than one month nor more than one year. Forty-eight hours of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court. Any person convicted of a second offense committed within a period of five to ten years of a first offense under § 18.2-266 shall be punishable by a fine of not less than $200 nor more than $2,500 and by confinement in jail for not less than one month nor more than one year. Any person convicted of a third offense or subsequent offense committed within ten years of an offense under § 18.2-266 shall be punishable by a fine of not less than $500 nor more than $2,500 and by confinement in jail for not less than two months nor more than one year. Thirty days of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court if the third or subsequent offense occurs within less than five years. Ten days of such suspension shall be a mandatory, minimum sentence not subject to suspension by the court if the third or subsequent offense occurs within a period of five to ten years of a first offense."

3The Department of Corrections assumes responsibility for computing the sentences for parole eligibility of all inmates in either the state prison system or a local jail. I assume for the purpose of this opinion that, under the facts you present, the total sentence to be served is less than twelve months. Therefore, the inmate would not be eligible for parole under the provisions of §§ 53.1-151, 53.1-152 or § 53.1-153.


PROFESSIONS AND OCCUPATIONS: ARCHITECTS, ENGINEERS, SURVEYORS, LANDSCAPE ARCHITECTS AND INTERIOR DESIGNERS.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.
Political subdivision that employs certified professional engineer, or person other than licensed land surveyor engaged in practice of engineering or surveying whose employment position is exempted from statutory licensure requirements, is authorized to accept for recordation plats of property owned by local government when preparation of such plats is incidental to governmental engineering project and is not for general public or as independent contractor.

June 27, 1995

The Honorable Harry J. Parrish
Member, House of Delegates

You ask whether a certified professional engineer may endorse a subdivision plat for purposes of recordation pursuant to § 15.1-476 of the Code of Virginia, when the plat preparation is not incidental to an engineering project. You also ask whether a person other than a licensed land surveyor who is engaged in the practice of engineering or surveying as defined in §§ 54.1-400 and 54.1-408, but whose particular employment position is exempted from licensure requirements pursuant to the provisions of § 54.1-402.1, may endorse a subdivision plat that was not prepared incidental to an engineering project, but was intended to be submitted for recordation, where preparation of the plat was by a public employee for a political subdivision of the Commonwealth and not for the general public or as an independent contractor.

You relate that your inquiry pertains to the preparation of plans for city-owned property performed by the director of public works for the City of Manassas, whom you identify as a certified professional engineer.

Section 15.1-476 provides that every subdivision plat intended for recording “shall be prepared by a certified professional engineer or land surveyor.” A 1972 opinion of the Attorney General has, in the context of the general exemptions from professional licensure currently contained in § 54.1-401, addressed the following limitation on the authority of certified professional engineers to record plats:

The obvious intention [of the General Assembly in enacting § 15.1-476] is to allow recordation of those plats prepared by certified professional engineers pursuant to the exemption of § 54-37 (2), i.e., where its preparation is incidental to an engineering project. It does not authorize engineers to prepare plats that are not incidental to an engineering project. The Board [of Supervisors] would be authorized to reject plats drawn by engineers not incidental to an engineering project.  

The provisions of Chapter 4 of Title 54.1 authorize engineers to perform professional services. The provisions of Title 15.1 apply to local government, and, therefore, may neither expand nor restrict the practice of professional engineers. By the provisions of § 15.1-476, the General Assembly does not permit local governments to accept plat
recordations from unlicensed individuals or persons not otherwise authorized to perform the work in question. It is only when a certified professional engineer has prepared a plat incidental to an engineering project that a local government may accept the plat for recordation.

Twenty years later, the 1992 Session of the General Assembly also exempted from licensure state and local government employees engaged in the practice of engineering by enactment of § 54.1-402.1, which provides that state or local government employees working as engineers solely for the government and not furnishing professional services to the public shall be exempt from the licensure requirements of § 54.1-406. The license exemption codified by the General Assembly in § 54.1-402.1, therefore, also must be read as implicitly recognized by the provisions of § 15.1-476, in the same manner as is the exemption for incidental work, which was the subject of the 1972 opinion of the Attorney General. Published opinions of the Attorney General interpreting legislation are presumptively indicative of legislative intent. "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view." Therefore, the governing body would be authorized to accept plats drawn by such an engineer incidental to that engineer's employment.

Consequently, I am of the opinion that a certified professional engineer employed solely by local government, and therefore authorized to record plats pursuant to the exemption contained in § 54.1-402.1 is also authorized to record plats under the provisions of § 15.1-476. Section 54.1-402.1 authorizes certified professional engineers employed solely by local government to prepare plats for recordation of property owned by the local government when the preparation is incidental to their employment. Therefore, the governing body would be authorized to accept plats drawn by such an engineer incidental to that engineer's employment.

1The first sentence of § 15.1-476 provides: "Every subdivision plat which is intended for recording shall be prepared by a certified professional engineer or land surveyor, who shall endorse upon each such plat a certificate signed by him setting forth the source of title of the owner of the land subdivided and the place of record of the last instrument in the chain of title; when the plat is of land acquired from more than one source of title, the outlines of the several tracts shall be indicated upon such plat."

2I note that under current provisions of the Code, professional engineers are licensed rather than certified. See § 54.1-400 (defining "professional engineer" and "land surveyor"); § 54.1-406 (requiring licensure before engaging in practice of engineering). I shall use the terms interchangeably herein.

3Section 54.1-400 provides the following definitions:

The 'practice of land surveying' includes surveying of areas for a determination or correction, a description, the establishment or reestablishment of internal and external land boundaries, or the determination of topography, contours or location of physical improvements, and also includes the planning of land and subdivisions thereof. The term 'planning of land and subdivisions thereof' shall include, but not be limited to, the preparation of incidental plans and profiles for roads, streets and sidewalks, grading, drainage on the surface, culverts and erosion control measures, with reference to existing state or local standards.
"The 'practice of engineering' means any service wherein the principles and methods of engineering are applied to, but are not necessarily limited to, the following areas: consultation, investigation, evaluation, planning and design of public or private utilities, structures, machines, equipment, processes, transportation systems and work systems, including responsible administration of construction contracts. The term 'practice of engineering' shall not include the service or maintenance of existing electrical or mechanical systems."

The first two sentences of § 54.1-408 provide: "In addition to the work defined in § 54.1-400, a land surveyor may, for subdivisions, site plans and plans of development only, prepare plats, plans and profiles for roads, storm drainage systems, sanitary sewer extensions, and water line extensions, and may perform other engineering incidental to such work, but excluding the design of pressure hydraulic, structural, mechanical, and electrical systems. The work included in this section shall involve the use and application of standards prescribed by local or state authorities."

Section 54.1-402.1 provides: "Any person engaged in the practice of engineering, architecture, or land surveying as those terms are defined in § 54.1-400 as a regular, full-time, salaried employee of the Commonwealth or any political subdivision of the Commonwealth on March 8, 1992, who remains employed by any state agency or political subdivision shall be exempt until June 30, 2010, from the licensure requirements of § 54.1-406 provided the employee does not furnish advisory service for compensation to the public or as an independent contracting party in this Commonwealth or any political subdivision thereof in connection with engineering, architectural, or land surveying matters. The chief administrative officer of any agency of the Commonwealth or political subdivision thereof employing persons engaged in the practice of engineering, architecture, or land surveying as regular, full-time, salaried employees shall have the authority and responsibility to determine the engineering, architectural, and land surveying positions which have responsible charge of engineering, architectural, or land surveying decisions."


Section 54.1-406(A) provides, in the second paragraph: "Unless exempted by § 54.1-401 or § 54.1-402.1, a person shall hold a valid license prior to engaging in the practice of land surveying."


PROFESSIONS AND OCCUPATIONS: GENERAL PROVISIONS RELATING TO REGULATORY BOARDS — DENTISTRY - LICENSURE OF DENTISTS.

CONSTITUTION OF VIRGINIA: LEGISLATURE (EFFECTIVE DATE OF LAWS).

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

COMMISSIONS, BOARDS AND INSTITUTIONS: ADMINISTRATIVE PROCESS ACT.
1995 amendment removing authority of Board of Dentistry to recognize licenses issued by other jurisdictions as full or partial fulfillment of qualifications for licensure in Virginia does not apply to applications received before effective date of amendment—July 1, 1995; applications received by Board before July 1 should be processed according to law in effect before effective date of amendment. Board’s written notification to applicants requiring all applications to be postmarked by midnight, June 30, 1995, before July 1 deadline, is reasonable and entitled to great weight. Board may not license dentists licensed in other jurisdictions whose applications for licensure by endorsement were postmarked and received after July 1, 1995.

December 27, 1995

The Honorable Jane H. Woods
Member, Senate of Virginia

You ask whether the Board of Dentistry (the “Board”) may license dentists who are licensed in another state, the District of Columbia, or any territory or possession of the United States (“other jurisdictions”) and whose applications for licensure by endorsement were received but not acted upon before July 1, 1995. You next ask whether the Board may license dentists who are licensed in other jurisdictions and whose applications for licensure by endorsement were postmarked on or before June 30, 1995, but were not received by the Board until after July 1, 1995. Finally, you ask whether the Board may license dentists who are licensed in other jurisdictions and whose applications for licensure by endorsement were postmarked and received after July 1, 1995.

Section 54.1-103(C) of the Code of Virginia authorizes the Board to “promulgate regulations recognizing licenses ... issued by other states, the District of Columbia, or any territory or possession of the United States as full or partial fulfillment of qualifications for licensure in the Commonwealth.” The procedure for accepting licenses from other jurisdictions, commonly referred to as “licensure by endorsement,” was incorporated into the Board’s regulations.

The 1995 Session of the General Assembly amended § 54.1-2710 to make it unlawful for the Board to accept licensure by endorsement from other jurisdictions under the provisions of § 54.1-103(C), thereby repealing the licensure by endorsement procedures contained in the Board’s regulations. The 1995 amendment did not contain an emergency clause or a clause specifying an effective date. Thus, the effective date of this new provision was July 1, 1995.

It is an established rule of statutory construction that unless a statutory provision clearly states the General Assembly’s intention that it operate retrospectively, such an application cannot be made, and the statute will have only a prospective effect. Section 1-16 codifies this generally accepted principle. The Supreme Court of Virginia has applied § 1-16 to mean that new statutes may not be applied retroactively to modify existing substantive rights. Prior opinions of the Attorney General have noted that the
analysis of a statute’s retroactivity involves determining “whether the General Assembly intended the statute in question to have retroactive effect and, if so, the statute may be applied retroactively only if such application does not impair substantive ... rights.”

Nothing in the 1995 amendment to § 54.1-2710 suggests that the General Assembly intended it to have retrospective application. Thus, the statute will apply to applications received on or after its effective date—July 1, 1995—but it does not apply to applications made before that date. Accordingly, it is my opinion that the 1995 amendment removing the authority of the Board to recognize licenses issued by other jurisdictions as full or partial fulfillment of qualifications for licensure in Virginia does not apply to applications received before July 1, 1995. Therefore, applicants whose completed applications were received by the Board before the July 1, 1995, change in the law are entitled to have their applications processed in accordance with the law in effect at the time their applications were made.

You next ask whether the Board may issue licenses by endorsement to dentists whose completed applications were postmarked before, but were not received until on or after, July 1, 1995. I am advised that the Board expressly notified applicants, in writing, that all applications for dental licensure endorsement must be postmarked by midnight, June 30, 1995. The interpretation given to a statute by the state agency charged with its administration is entitled to great weight. The Board’s notification to applicants that all applications must be postmarked by midnight, June 30, 1995, is reasonable. Therefore, I am of the opinion that the decision whether to treat mailing or receipt of the applications as the requirement that must be satisfied before the July 1 deadline is within the discretion of the Board, as the agency charged with the administration of the licensure of dentists.

Finally, you ask whether the Board may license dentists who are licensed in other jurisdictions and whose applications for licensure by endorsement were postmarked and received after July 1, 1995. Under well-accepted principles of statutory construction, 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. The grant of authority to the Board in § 54.1-103(C) to recognize “licenses ... issued by other states, the District of Columbia, or any territory or possession of the United States as full or partial fulfillment of qualifications for licensure” was withdrawn by the General Assembly, effective July 1, 1995, by its amendatory language in § 54.1-2710. Therefore, it is my opinion that the Board may not license dentists who are licensed in other jurisdictions and whose applications for licensure by endorsement were postmarked and received after July 1, 1995.

Section 2.3(A) of the Board’s regulations provides for licensure by endorsement for dentists: “An applicant for dental licensure by endorsement shall:
"1. Be a graduate and holder of a diploma from an accredited or approved dental school recognized by the Commission on Dental Accreditation of the American Dental Association;

"2. Have successfully completed a clinical licensing examination substantially equivalent to that required by Virginia;

"3. Hold a current, unrestricted license to practice dentistry in another state, territory, District of Columbia or possession of the United States and has continuous clinical, ethical, and legal practice for five out of the past six years immediately preceding application for licensure. Active patient care in armed forces dental corps, state or federal agency, and intern or residency programs may substitute for required clinical practice;

"4. Be certified to be in good standing from each state in which he is currently licensed or has ever held a license;

"5. Have not failed any clinical examination accepted by the board, pursuant to § 54.1-2709 ... within the last five years;

"6. Be of good moral character;

"7. Have successfully completed Part I and Part II of the examinations of the Joint Commission on National Dental Examinations prior to making application to this board;

"8. Pass an examination on the laws and the regulations governing the practice of dentistry in Virginia; and

"9. Have not committed any act which would constitute a violation of § 54.1-2706 ... and is not the respondent in any pending or unresolved board action or malpractice claim.” 11:9 Va. Regs. Reg. VR 255-01-1, at 1443, 1448 (1995).

Section 54.1-2710 provides, in part: “Notwithstanding the provisions of subsection C of § 54.1-103, it shall be unlawful for any person to practice dentistry or to receive a license from any commissioner of the revenue for the revenue of practice dentistry, unless he has passed the examination and obtained a license.” (Emphasis added.) See Ch. 608, 1995 Va. Acts Reg. Sess. 942; Ch. 627, id. at 979 (adding emphasized language); see also Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); Boyd v. Commonwealth, 216 Va. 16, 215 S.E.2d 915 (1975); Richmond v. Sutherland, 114 Va. 688, 77 S.E. 470 (1913) (presumption normally arises that change in law was intended when new provisions are added to prior legislation by amendatory act).

The validity of § 2.3 of the Board’s regulations is not affected by the fact that the General Assembly had enacted a statutory provision, due to take effect in the future, to override the regulation before it became effective. Although the Board could have chosen to implement the General Assembly’s policy by voting to withdraw § 2.3 before it went into effect, the Board chose not to do so. The General Assembly could have overridden § 2.3 by a four-fifths majority vote of its members to include an emergency clause or a clause specifying an effective date, but it did not.

Article IV, § 13 of the Constitution of Virginia (1971) provides that “all laws enacted at a regular session ... shall take effect on the first day of July following the adjournment of the session of the General Assembly at which it has been enacted; ... unless in the case of an emergency (which emergency shall be expressed in the body of the bill) the General Assembly shall specify an earlier date by a vote of four-fifths of the members voting in each house ...”. Section 1-12(A) and (D) contains substantially similar language.


City of Norfolk v. Kohler, 234 Va. 341, 362 S.E.2d 894 (1987) (prior city charter provision guaranteeing that deputy director of city library could not be dismissed without cause created substantive right unaffected by amendment adopted after she was hired); cf. Phipps, Adm'r v. Sutherland, 201 Va. 448, 453, 111 S.E.2d 422, 426 (1959) (§ 1-16 prohibits retroactive application of statute affecting vested interest or contractual rights, but not of one affecting merely procedural matters).
PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS - HEALTH CARE DECISIONS ACT.

Private health care provider may rely on written advance directive of mentally competent inmate to refuse certain medical treatment, even though inmate later may become mentally incompetent. Federal law has no impact on inmate's refusal to be admitted to private hospital for inpatient care subsequent to inmate's receiving emergency care in private hospital's emergency room. Aside from federal and state constitutional and statutory rights, patient also may have rights under accredited hospital policies on withholding of life-support treatments and ethical review procedures.

February 27, 1995

The Honorable Joseph B. Benedetti
Member, Senate of Virginia

You ask several questions regarding the right of inmates in state correctional institutions to refuse medical treatment under the provisions of the Health Care Decisions Act, Article 8, Chapter 29 of Title 54.1, §§ 54.1-2981 through 54.1-2993 (the "Virginia Act"), and the Emergency Medical Treatment and Active Labor Act, 42 U.S.C.A. § 1395dd (West 1992 & Supp. 1994) (the "Federal Act").

You relate that an inmate in a state correctional facility refused all forms of parenteral (injectable) medication and invasive medical treatment at an emergency room of a private hospital for two episodes of myocardial infarction, and that the refusal to accept such medical treatment was based on religious and personal beliefs. You also relate that after the inmate's condition was stabilized in the emergency room, the inmate refused admission to either the private hospital as an inpatient or the correctional unit in a state hospital, and insisted on returning to the correctional institution. Finally, you relate that the inmate executed an advance medical directive pursuant to the Virginia Act refusing resuscitative measures. A psychiatrist examined and determined the inmate to be mentally competent to make such medical decisions.
You first ask whether a private hospital emergency room where an inmate may be taken for emergency medical treatment may rely on an advance directive made pursuant to the Virginia Act.

In a recent case, the Supreme Court of the United States upheld the rights of inmates in state correctional institutions to refuse medical treatment, affirming that inmates have a liberty interest in the right to refuse injections, but with a limitation should an inmate with a mental disorder present a potential for disruption in a normal prison environment and harm to himself and others if not treated. Both the Virginia Act and the Federal Act reinforce the right of an inmate to refuse certain medical treatment.

The Virginia Act is concerned with the capability of a competent patient to refuse future life-saving medical treatments. Such a refusal may be communicated through either a written or an oral advance directive. The Virginia Act assures that an oral directive will be sufficient by providing:

Any competent adult who has been diagnosed by his attending physician as being in a terminal condition may make an oral advance directive to authorize the providing, withholding or withdrawing of life-prolonging procedures.... An oral advance directive shall be made in the presence of the attending physician and two witnesses.

In the instance you relate, a myocardial infarction may be deemed to be a terminal event; therefore, the inmate is assured under the Virginia Act that an oral refusal of treatment made at the time the medical treatment is offered, and thereafter should the inmate become mentally incompetent, is effective.

The Virginia Act further provides:

The provisions of this article shall not authorize providing, continuing, withholding or withdrawing of treatment if the provider of the treatment knows that such an action is protested by the patient. No person shall authorize treatment, or a course of treatment, pursuant to this article, that such person knows, or upon reasonable inquiry ought to know, is contrary to the religious beliefs or basic values of the patient unable to make a decision, whether expressed orally or in writing.

Therefore, I am of the opinion that a private health care provider may rely on an inmate's written advance directive, even though the inmate later may become mentally incompetent. The fact that the inmate is incarcerated in a state correctional institution does not create an exception to such right of refusal.

You next ask whether the Federal Act would have any impact on an inmate's refusal to be admitted to a private hospital for inpatient care and an inmate's desire to be
returned to the correctional facility. The Federal Act is no less deferent than the Virginia Act to such refusals by a competent patient:

A hospital is deemed to meet the [stabilization] requirement ... with respect to an individual if the hospital offers the individual the further medical examination and treatment ... and informs the individual ... of the risks and benefits to the individual of such examination and treatment, but the individual ... refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual’s ... written informed consent to refuse such examination and treatment.\[4\]

A hospital is deemed to meet the [stabilization] requirement ... with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with [the restriction on transfers until a patient is stabilized, if the transfer is an appropriate transfer for provision of appropriate medical treatment at another medical facility that has available space and qualified personnel, and the patient accepts the transfer] and informs the individual ... of the risks and benefits to the individual of such transfer, but the individual ... refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual’s ... written informed consent to refuse such transfer.\[5\]

Therefore, I am of the opinion that the Federal Act does not impact on an inmate’s refusal to be admitted to a private hospital for inpatient care when the inmate has been taken to the private hospital’s emergency room for emergency care and refuses admission.\[6\]

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2. Section 54.1-2983.
3. Section 54.1-2986(C).
5. Id. § 1395dd(b)(3).
6. I note that the Joint Commission on Accreditation for Healthcare Organizations requires, for purposes of accreditation, that every hospital have an ethics committee established to review “ethical issues arising in the care of patients and to provide education to caregivers and patients on ethical issues in health care.” Accreditation Manual for Hospitals, 1992, Patient Rights RI.1.1.6.1, at 104. The Joint Commission further requires that, once accredited, hospitals have “hospitalwide policies on the withholding of resuscitative services from patients and the foregoing or withdrawing of life-sustaining treatment.” Id. RI.2, at 105.

Therefore, aside from rights under the Constitution and statutes of the United States and of the Commonwealth of Virginia, a patient also may have rights under the receiving hospital’s policies on the withholding of life-support treatments and ethical review procedures. I assume that the ethics committee required for certification also has available the ready consultation of an attorney for the hospital, who could render appropriate legal advice on issues pertaining to a particular case, such as the issue in your letter.
PROFESSIONS AND OCCUPATIONS: MEDICINE AND OTHER HEALING ARTS — PHARMACY — DRUG CONTROL ACT - PERMITTING OF PHARMACIES.

For-profit subsidiary corporations, wholly owned by general hospital operated by nonprofit tax-exempt hospital corporation, will not be engaging in unlawful practice of medicine or in unlawful practice of pharmacy by paying salaries of licensed physicians and pharmacists employed by them, as long as physicians exercise exclusive control over decisions requiring professional medical judgment, and pharmacists exercise independent professional judgment in dispensing drugs.

May 22, 1995

The Honorable Jackie T. Stump
Member, House of Delegates

You ask whether the formation by a nonprofit, tax-exempt hospital corporation of two for-profit subsidiary corporations for the purposes of employing physicians and operating a retail pharmacy would violate any of the provisions of Title 54.1 of the Code of Virginia pertaining to the practice of either medicine or pharmacy.

You relate that a nonstock, nonprofit corporation operates a general hospital in Southwest Virginia. The hospital serves counties with widely dispersed populations, and a relatively high percentage of the patients in these counties are indigent or their medical services are paid by government programs. You state that efforts to recruit physicians—in particular, specialists—have been hindered due to the hospital’s rural location.

Under the proposed arrangement, the hospital would form a wholly owned for-profit subsidiary corporation ("physician subsidiary") to employ one or more physicians, licensed by the Commonwealth to practice medicine, as full-time members of its medical staff. You state that the physicians would be employees of the physician subsidiary, which would be controlled by a board of directors that may consist of one or more members of the board of directors of the hospital, as well as members from the community at large. The physician subsidiary would bill patients for the physicians’ services and would pay the physicians’ salaries. If so directed by the board of the physician subsidiary, the hospital would receive dividends from the physician subsidiary should its revenues exceed operating costs.

Physicians employed by the physician subsidiary would exercise their independent professional judgment, and would be solely responsible for the medical care of patients and for the supervision of unlicensed technical employees administering diagnostic treatments and tests ordered by the physicians in accordance with hospital or subsidiary protocols.

You also relate that a separate for-profit subsidiary corporation ("pharmacy subsidiary") would be established to own and operate a retail pharmacy to meet the needs of
both the hospital’s patients and the general public. The pharmacy subsidiary would employ a pharmacist or pharmacists, licensed by the Commonwealth, to practice pharmacy. An independent board of directors would be appointed to direct the activities of the pharmacy subsidiary, although one or more of the members also may be members of the hospital’s board of directors. I assume the pharmacy subsidiary would bill patients for pharmacy services and would retain all sums collected. If so directed by the board of the pharmacy subsidiary, the hospital would receive dividends from the pharmacy subsidiary should its revenues exceed operating costs.¹

Articles 1 through 6, Chapter 29 of Title 54.1, §§ 54.1-2900 through 54.1-2973, define the practice of medicine and other specialties regulated by the Board of Medicine, and establish eligibility requirements for licensure in the Commonwealth. Generally, “practice of medicine or osteopathic medicine” means the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method.”² Sections 54.1-2902 and 54.1-2929 make it unlawful to practice medicine without a license. Section 54.1-111(A)(1) also provides that it is “unlawful for any person, partnership, corporation or other entity” to practice “a profession or occupation without holding a valid license as required by statute or regulation.”³

Prior opinions of the Attorney General conclude that a nonprofit hospital corporation and a foundation organized as a nonstock, nonprofit corporation that has no members may employ physicians to provide medical care and not be deemed to be practicing medicine unlawfully, as long as the physicians’ exercise of professional judgment is not controlled or influenced in any way by the corporations.⁴

You indicate that the proposed employment arrangement between licensed physicians and the physician subsidiary will give the physicians exclusive control over decisions requiring professional medical judgment. Therefore, even though licensed physicians would be employees of the physician subsidiary, it is my opinion that the subsidiary would not be engaging in the unlawful practice of medicine merely by paying the salaries of those physicians.

Chapter 33 of Title 54.1, §§ 54.1-3300 through 54.1-3319, defines the practice of pharmacy, establishes eligibility requirements for licensure in the Commonwealth, and details unprofessional conduct that may subject a licensee of the Board of Pharmacy to discipline. Section 54.1-3300 includes the following definition:

“Practice of pharmacy” means the personal health service that is concerned with the art and science of selecting, procuring, recommending, administering, preparing, compounding, packaging and dispensing of drugs, medicines and devices used in the diagnosis, treatment, or prevention of disease, whether compounded or dispensed on a prescription or otherwise legally dispensed or distributed, and shall include the proper and safe storage and distribution of drugs, the maintenance of proper records and the
responsibility of providing information concerning drugs and medicines and
their therapeutic values and uses in the treatment and prevention of disease.

Section 54.1-3310 makes it unlawful to practice pharmacy without a license.

Section 54.1-3432 states that "[e]very pharmacy shall be under the personal super-
vision of a pharmacist on the premises of the pharmacy." In § 54.1-3434, the General
Assembly expressly anticipates that a pharmacist-in-charge may be employed by a phar-
macy owned by a legal corporation or partnership. That section permits such an arrange-
ment, as long as the pharmacist-in-charge applies for a permit, provides requested inform-
ation and retains authority to exercise professional judgment in the dispensing of drugs.

I assume that the proposed employment arrangement between licensed pharmacists
and the pharmacy subsidiary will give the pharmacists exclusive control over decisions
regarding the dispensing of drugs. As long as licensed pharmacists exercise independent
professional judgment in the dispensing of drugs, it is my opinion that the pharmacy
subsidiary will not be engaging in the unlawful practice of pharmacy merely by paying
the salaries of those pharmacists.

I assume that the factual details are such that the proposed arrangement would not violate the
Practitioner Self-Referral Act, §§ 54.1-2410 through 54.1-2414, or applicable provisions of
§ 54.1-2962.1 (prohibiting solicitation or receipt of remuneration in return for patient referral) and
§ 54.1-2964 (disclosing interest or ownership in referral facilities and clinical laboratories). For
the purposes of this opinion, I also assume that the facts are such that the proposed arrangement
would be consistent with the physicians' obligations under § 1877 of the Social Security Act, which
1995). This federal statute prohibits a physician who has a financial relationship with an entity
from referring Medicare patients to the entity to receive any designated health services. See id.
§ 1395nn(a)(1)(A). A financial relationship may exist as an ownership or investment relationship
or in a compensation arrangement with an entity. See id. § 1395nn(a)(2). Compensation arrange-
ments exist when there is any arrangement in which payment of any kind, including a salary or
consulting fee, passes between a physician or a member of the physician's immediate family and
an entity, such as a hospital. See id. § 1395nn(h)(1).

Prior opinions of the Attorney General discuss in detail the statutes and court decisions pertaining

In Virginia, each health regulatory board has its own basic law and has developed regulations applicable to the professions
it regulates. Judicial decisions that pertain to a particular health profession are appropriately based
on statutes and regulations pertinent to the profession at issue. Because there are significant differences
among the statutes and regulations pertaining to each health profession, judicial decisions
based on a particular profession's basic law and regulations are not generalizable across professions. For example, in the case of Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Vet-
inary Association, et al., the Supreme Court of Virginia relied on specific regulations of the
Virginia Board of Veterinary Medicine to conclude that an S.P.C.A.'s operation of a full-service
veterinary clinic, despite employment of a fully licensed veterinarian, constituted the unlawful
practice of veterinary medicine. 229 Va. 349, 329 S.E.2d 10 (1985). These regulations prohibited the registration of any animal facility unless the owner, partner or officer of the facility was a licensed veterinarian and, further, characterized as "unprofessional conduct" the forming, entering or being employed by a partnership or corporation to practice veterinary medicine in which any other partner or corporation officer is not a licensed veterinarian. Id. at 352-53, 329 S.E.2d at 12.

Since there are no similar statutory or regulatory provisions pertaining to the Board of Medicine or the Board of Pharmacy, the Supreme Court decision affects only the Board of Veterinary Medicine. Further, as discussed in detail in a prior opinion, statutes prohibiting physician practice in connection with commercial or mercantile establishments were repealed in 1986. See 1992 Op. Va. Att'y Gen., supra note 3, at 151 n.1; see also Ch. 87, 1986 Va. Acts Reg. Sess. 114.

Similarly, the Virginia Supreme Court's decision in Ritholz v. Commonwealth was based on statutes pertinent to the practice of optometry, and did not involve the practice of medicine or pharmacy. 184 Va. 339, 35 S.E.2d 210 (1945).

Section 54.1-3434 requires that "[n]o person shall conduct a pharmacy without first obtaining a permit from the Board [of Pharmacy]." This statute requires that the application for the permit be "signed by a pharmacist who will be in full and actual charge of the pharmacy and who will be fully engaged in the practice of pharmacy at the location designated on the application." Further, § 54.1-3434 expressly anticipates that the pharmacy may have a corporate owner and requires that the pharmacist-in-charge be permitted to exercise independent professional judgment, by providing:

"The application shall show the corporate name and trade name and shall list any pharmacist in addition to the pharmacist-in-charge practicing at the location indicated on the application.

"If the owner is other than the pharmacist making the application, the type of ownership shall be indicated and shall list any partner or partners, and, if a corporation, then the corporate officers and directors. Further, if the owner is not a pharmacist, he shall not abridge the authority of the pharmacist-in-charge to exercise professional judgment relating to the dispensing of drugs in accordance with this act and Board regulations.

"The permit shall be issued only to the pharmacist who signs the application as the pharmacist-in-charge and as such assumes the full responsibilities for the legal operation of the pharmacy. This permit and responsibilities shall not be construed to negate any responsibility of any pharmacist or other person.

"Upon termination of practice by the pharmacist-in-charge, or upon any change in partnership composition, or upon the acquisition of the existing corporation by another person, the permit previously issued shall be immediately surrendered to the Board by the pharmacist-in-charge to whom it was issued, or by his legal representative, and an application for a new permit may be made ...."

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PROFESSIONS AND OCCUPATIONS: PAWNBROKERS.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC.

General Assembly intended pawned items to be tangible personal property. Motor vehicle is personal property that may be pawned; certificate of title, which constitutes written proof of indebtedness and evidences ownership of vehicle, is intangible property with no intrinsic and marketable value, and is not proper subject of pawn.
January 26, 1995

The Honorable Glenn R. Crotshaw
Member, House of Delegates

You ask whether § 54.1-4000 of the Code of Virginia prohibits a pawnbroker from advancing money either in return for the pledge and possession of a motor vehicle or in return for the certificate of title to a motor vehicle.¹

A motor vehicle clearly is not a “security” or a “written or printed evidence of indebtedness,” as contemplated by § 54.1-4000. “Personal property” is defined as “everything that is the subject of ownership, not coming under denomination of real estate,” and “all property other than real estate; as goods, chattels, money, notes, bonds, stocks and choses in action generally, including intangible property.”² Automobiles and other motor vehicles are classified as tangible personal property for purposes of taxation in Virginia.³ Therefore, it is my opinion that a motor vehicle is “personal property” within the meaning of § 54.1-4000, and may be a proper subject of pawn.⁴

A certificate of title is not so much an item of personal property as it is a document that is proof of ownership of a particular item of property. The phrase “certificate of title” is defined as “[d]ocument evidencing ownership; commonly associated with sale of motor vehicles.”⁵ Depending on whether recorded security interests—or liens—exist, a certificate of title also may constitute a written proof of indebtedness.⁶ A motor vehicle title cannot be considered to be a “valuable thing,” because such a document has no intrinsic value separate from the automobile or motor vehicle whose ownership the title evinces. Therefore, it is my opinion that a motor vehicle certificate of title is not a proper subject of pawn.

It is apparent from a review of Chapter 40 of Title 54.1, §§ 54.1-4000 through 54.1-4014, relating to pawnbrokers, that the General Assembly intended pawned items to be tangible personal property. For example, § 54.1-4008 limits pawnbrokers to charging “five percent per month on a loan of $100 or more, secured by a pledge of tangible personal property.”⁷ The term “tangible property” is defined as “[a]ll property which is touchable and has real existence (physical) whether it is real or personal.”⁸ The term “intangible property” has been defined as “such property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, copyrights and franchises.”⁹ To the extent a certificate of title is property, it is intangible property.¹⁰

¹Section 54.1-4000 establishes the parameters of the types of transactions in which licensed pawnbrokers may engage: “‘Pawnbroker’ means any person who lends or advances money or other things for profit on the pledge and possession of personal property, or other valuable things, other than securities or written or printed evidences of indebtedness, or who deals in the purchasing of personal property or other valuable things on condition of selling the same back to the seller at a stipulated price.”
Because I conclude that a motor vehicle clearly is personal property for the purposes of § 54.1-4000, it is not necessary to answer the question whether a motor vehicle is an “other valuable thing” under that section.

5BLACK’s LAW DICTIONARY, supra note 2, at 227.

Although certificates of title may have security interests recorded on them and may be held by a lender as collateral security, they are not “securities” in the traditional sense. The term “securities” is defined as “[s]tocks, bonds, notes, convertible debentures, warrants or other documents that represent a share in a company or a debt owed by a company or government entity.” Id. at 1354; cf. § 13.1-501(A) (defining “security”).

7See also § 54.1-4005 (pawned item may not be sold until it has been in pawnbroker’s possession for particular period of time and pawnbroker receives statement of ownership from pawnee); § 54.1-4009(A)(1) (pawnbroker must keep records that include description, serial number and statement of ownership of goods, article or thing pawned); § 54.1-4012 (property may not be disfigured or its identity destroyed while in pawn, nor may it be concealed for 48 hours after received).

8BLACK’s LAW DICTIONARY, supra note 2, at 1218.

9Id. at 809.

Although a motor vehicle certificate of title is itself not a proper subject of pawn, I can find nothing in Chapter 40 that prohibits a pawnbroker who advances money on pledge and possession of a motor vehicle from holding the certificate of title, in addition to the motor vehicle, and recording a security interest on the certificate.

PUBLIC SERVICE COMPANIES: GENERAL PROVISIONS.

PROPERTY AND CONVEYANCES: MANUFACTURED HOME LOT RENTAL ACT.

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

County governing body may enact ordinance prohibiting owner of manufactured home park to resell to his tenants water supplied and sold to park by county, thereby protecting county water system’s exclusive service area. Attorney General does not interpret language of county ordinance as to whether park owner is actually selling water purchased from county water system.

July 7, 1995

Mr. Thomas R. Robinett
County Attorney for Gloucester County

You ask whether § 56-1.2 of the Code of Virginia requires Gloucester County to permit the owner of a manufactured home park to resell to his tenants water supplied to the park by the county, notwithstanding a county ordinance making it “unlawful for any person to sell water purchased from the county water system.”

1
Title 56 governs public service companies and public utilities doing business in Virginia. Section 56-35 grants the State Corporation Commission (the "Commission") the power and duty to supervise, regulate and control such companies. Section 56-1.2 excludes from the terms "public utility, public service corporation or public service company," as defined in Title 56,2 "any person who owns or operates property and provides water to residents or tenants on the property," if (1) the person purchases the water from the county and (2) charges the tenants only that portion of charges for water permitted by § 55-248.45:1, i.e., no more than the amount actually charged the park owner.3

Section 56-1.2 grants no substantive rights. It merely removes generally from regulation of the Commission a landlord who purchases water from the county and provides the water to his tenants at a price not in excess of what the county charges the landlord. Section 56-1.2 contains no language indicating a legislative intent to exclude such landlords from local government regulation otherwise authorized by law.

Section 15.1-292(A) authorizes a locality to establish and operate waterworks, and § 15.1-292.2 authorizes a local governing body to "exercise its powers to regulate ... water service notwithstanding any anticompetitive effect." The regulations may include (1) "the establishment of an exclusive service area" for a system owned or operated by the county, (2) "the fixing of rates or charges for ... water service," and (3) "the prohibition, restriction or regulation of competition between entities providing ... water service."4

Subject to the general principle that the exercise of local regulatory power must be reasonable and nondiscriminatory, § 15.1-292.2 authorizes regulations establishing the county as the exclusive service area for a county water system and requiring all county users to purchase their water from the county system.5 Assuming a reasonable expectation that prohibiting resales will protect the county water system's exclusive service area, it is my opinion that the governing body of Gloucester County may enact an ordinance so providing.6

While such regulation may apply to the owner of a manufactured home park who is "reselling" water to his tenants, I take no position on whether the actions of the particular park owner in the situation you describe violate § 19-135 of the Gloucester County Code.7 Whether the owner of the park is actually "sell[ing] water purchased from the county" involves an interpretation of the language and the intent of § 19-135. This Office has a long-standing policy of not rendering opinions interpreting local ordinances. The reason for the policy is to avoid becoming involved in matters solely of local concern and over which the local governing body has control.8

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1See Gloucester County, Va., Code § 19-135 (1988).
2The exclusion encompasses the chapters in Title 56 regulating water companies generally—Chapters 1 (§§ 56-1 to 56-46.2), 10 (§§ 56-232 to 56-265), 10.1 (§§ 56-265.1 to 56-265.9),
and 10.2:1 (§§ 56-265.13:1 to 56-265.13:7). In 1993, the General Assembly enacted § 56-1.2 and amended § 13.1-620(F) and (G) of the Virginia Stock Corporation Act to provide that businesses excluded under § 56-1.2 are not required to incorporate as public service companies. See Ch. 265, 1993 Va. Acts Reg. Sess. 293, 294.

3Section 55-248.45:1 prohibits a manufactured home park owner "who purchases from a publicly regulated utility any ... utility service for resale to a resident" from charging a resident an amount in excess of the amount actually charged the park owner. This section is included in the Manufactured Home Lot Rental Act, §§ 55-248.41 to 55-248.52, which sets out the rights and obligations of landlords, owners and tenants in manufactured home parks.

4Section 15.1-292.2.


4See 64 Am. Jur. 2d Public Utilities § 42, at 580 (1972) (public service corporation may deny service for resale where it has regularly promulgated a regulation that service supplied by it shall not be resold).

5You state that all of the tenants in the manufactured home park are served through a master water meter, with the owner billed for the water the tenants use. The owner has installed a separate water meter for each tenant home and plans to collect from each tenant for his individual use. The owner himself will continue to pay the bill for the full amount charged to the master water meter.


RELIGIOUS AND CHARITABLE MATTERS; CEMETERIES: CEMETERIES.

Commissioner of revenue in each locality where portion of cemetery lies is responsible for regulating company that operates cemetery, regardless of location of company’s principal place of business.

January 18, 1995

The Honorable Charles D. Crowson Jr.
Commissioner of the Revenue for the City of Newport News

You ask whether a commissioner of the revenue is responsible for enforcement of the provisions of Article 3.2, Chapter 3 of Title 57, §§ 57-35.11 through 57-35.35 of the Code of Virginia ("Article 3.2"), and the examination of the accounts of cemetery companies under the provisions of § 57-35.19, when both the cemetery company’s principal place of business and a majority of the land that comprises the cemetery is located in another Virginia locality.

Article 3.2 provides for the regulation of companies that operate cemeteries within the Commonwealth. Section 57-35.11:1 requires such companies to register with and provide certain information to the Division of Consumer Affairs within the Department of Agriculture and Consumer Services. In addition to the registration requirement,
§ 57-35.11:1 provides that the Division of Consumer Affairs "shall notify the commissioner of revenue for the jurisdiction in which the cemetery is located of the registration and inform the commissioner of his duties under this article." Section 57-35.11 defines the term "commissioner of revenue" as "the commissioner of revenue of the city or county where the cemetery is located."

Because of the definition of the term "commissioner of revenue" in § 57-35.11, the responsibility and duty of the commissioner of the revenue under Article 3.2 is that of "the commissioner of revenue of the city or county where the cemetery is located." The General Assembly did not otherwise limit the number of commissioners of the revenue who may act pursuant to these statutory duties and exercise the statutory authority with regard to a cemetery company.

Although the definition in § 57-35.11 does not define the term "commissioner of revenue" in the plural, the definitions contained in § 57-35.11 do not otherwise address a situation where a cemetery is located in more than one Virginia locality. It is a general rule of statutory construction that words in a statute are to be given their usual, commonly understood meaning. When the language of a statute is clear and unambiguous, rules of statutory construction are not required.

Therefore, when a portion of a cemetery is located in one locality and the remaining portion in another locality, regardless of the location of the cemetery company's principal place of business, it is my opinion that the responsibilities and duties created by Article 3.2 are those of the commissioner of the revenue in each locality. I am not aware of any statutory authority to support an allocation of those responsibilities and duties on the basis of such considerations as receipt of tax revenues, location of the cemetery company's principal place of business or location of the majority of the land comprising a cemetery.


RULES OF SUPREME COURT OF VIRGINIA: THE SUPREME COURT.

ELECTIONS: FEDERAL, COMMONWEALTH AND LOCAL OFFICERS - REMOVAL OF PUBLIC OFFICERS FROM OFFICE.

Local elected official convicted of felony may continue to hold office pending filing and review of petition for rehearing in Supreme Court of Virginia, following denial of petition for appeal. Once Court issues mandate, official has no further avenue of appeal of felony conviction and must forfeit office.
February 21, 1995

The Honorable Clarence E. Phillips
Member, House of Delegates

You ask whether a local elected official convicted of a felony may continue to hold office pending the filing and review of a petition for rehearing in the Supreme Court of Virginia pursuant to Rule 5:20 of the Rules of Supreme Court of Virginia, following the denial of a petition for appeal.

You relate that a member of a board of supervisors has been convicted of a felony. The Petition for Appeal of the conviction was denied by the Supreme Court of Virginia. You relate that the board member has indicated his intention to file a petition for rehearing of the Supreme Court's denial pursuant to the provisions of Supreme Court Rule 5:20.¹

I can find no Virginia court decisions or prior opinions of the Attorney General that define or expressly explain the language contained in § 24.2-231 requiring that "all rights of appeal" be terminated before the forfeiture of office provision takes place.² Prior opinions of the Attorney General address § 24.1-79.3, the predecessor to § 24.2-231, although none specifically defines the phrase "all rights of appeal."³ A prior opinion of the Attorney General concludes that former § 24.1-79.3 is applicable to a member of a county board of supervisors.⁴

The words contained in a statute, however, are to be given the effect of their plain meaning when there is no ambiguity.⁵ The plain and unambiguous meaning of § 24.2-231 is that the forfeiture of office provision is not invoked until all rights of appeal have ended for a public official convicted of a felony. The conclusion of an appeal of conviction in the Supreme Court of Virginia is marked by the issuance of a mandate by that Court.⁶

Until a mandate of the Virginia Supreme Court has been issued, a criminal defendant may retain a cognizable right to appeal the conviction. Whether to grant a rehearing, as well as when to issue a mandate, are decisions to be made by the Supreme Court. Until the Court makes such decisions, however, a criminal defendant will have a cognizable right of appeal available. Should the Court grant the rehearing, the appeal will progress through briefing, arguing and decision, ending finally in the issuance of a mandate by the Court.⁷ When the Court issues its mandate, a criminal defendant has no further avenue of direct appeal of the felony conviction, and the forfeiture provision of § 24.2-231 will take effect.

Therefore, I am of the opinion that a local elected official convicted of a felony may continue to hold office pending the filing and review of a petition for rehearing in the Supreme Court of Virginia, following the denial of a petition for appeal.
Rule 5:20 provides that upon the denial of a petition for appeal, "[c]ounsel for the appellant may, within 14 days after the date of this notice, file ... a petition for rehearing" with the clerk of the Supreme Court. When the petition for rehearing is granted, the appeal will move forward as though the original petition for appeal had been granted. See VA. SUP. CT. R. 5:39. When the rehearing is denied, however, the Supreme Court shall thereafter "promptly" issue its mandate. Id. R. 5:38(a).

Section 24.2-231 provides that an officer "who is convicted of a felony and for whom all rights of appeal have terminated, shall by such final conviction forfeit his office or post and thereafter may not act therein under his previous election or appointment." (Emphasis added.)


4"When there can be no further proceedings in this Court, the clerk of this Court shall forward its mandate promptly to the clerk of the court or commission in which the case originated and to the clerk of the Court of Appeals if the case has been heard by that court." VA. SUP. CT. R. 5:38(a).

5See id. R. 5:23 to 5:38.

TAXATION: LICENSE TAXES.

Contractor must include receipts from work performed in locality in which no license tax was paid when reporting gross receipts to town where contractor has principal place of business. Town may not tax contractor who has principal place of business in another Virginia locality that may or may not impose business license tax, unless revenue from business performed within town exceeds $25,000. Town may impose license tax on contractor engaged in business within town but with no definite place of business within Commonwealth, even if gross receipts attributable to work done within town does not exceed $25,000 annually.

January 20, 1995

The Honorable Wm. Roscoe Reynolds
Member, House of Delegates

You present three hypothetical instances in which a contractor has a place of business in one locality but also does business in other localities within the Commonwealth. In each of the three hypothetical situations you present, a contractor earns revenue from work done within the Town of Stuart, as well as from work done in other localities within the Commonwealth. You ask in each instance which locality or localities may impose a business license tax on the contractor and what is the measure of the gross receipts in each locality.
In your first hypothetical situation, the contractor's only office is in the Town of Stuart. Under § 58.1-3715 of the Code of Virginia, any other locality in which the contractor does business in excess of $25,000 per year also may impose a license tax on the contractor. Section 58.1-3715 also authorizes the contractor in this situation to deduct from the gross receipts reported in the Town of Stuart an amount equal to "the amount of business done in such other county, city or town in which a license tax is paid." (Emphasis added.)

It is clear from the statutory language that if a license tax is not paid in the other Virginia locality, a deduction is not permitted. Therefore, if the contractor does not pay a license tax in another Virginia locality in which he works, the gross receipts reported in the Town of Stuart would include the receipts from work done in the other Virginia locality.¹

In your second hypothetical situation, the contractor has no place of business in the Town of Stuart but does have a place of business in another locality within the Commonwealth. Under these facts, § 58.1-3715 authorizes the Town of Stuart to impose a business license tax on the contractor if gross receipts from work done in the town exceed $25,000 per year, regardless of whether the Virginia locality in which the contractor's place of business is located imposes a license tax on the contractor. It is my opinion that neither the special situs provisions of § 58.1-3715 nor the general situs provisions of § 58.1-3708(A) authorize the Town of Stuart to tax a contractor whose gross receipts from within the town do not exceed $25,000.²

Under the general situs provisions contained in § 58.1-3708(A), a contractor would not have situs in a locality in which he did not have a place of business, and, therefore, such a locality would have no authority to impose a business license tax on the contractor. This is true even though the locality in which the contractor's place of business is located does not levy a business license tax.³ The specific provisions of § 58.1-3715 override the general situs rule of § 58.1-3708(A) by providing, in effect, that a contractor has situs in any locality within the Commonwealth in which the amount of revenue received for business performed in that locality exceeds $25,000 a year, even though the contractor has no place of business in the locality. See 1993 Op. Va. Att'y Gen. 228, 230-31 (specific statute establishing situs for business license tax overrides general situs provisions of § 58.1-3708).

I do not, however, interpret § 58.1-3715 as otherwise overriding the basic situs requirement that a locality is without authority to impose a license tax on a contractor with no place of business or office in the locality if that contractor has a place of business in another locality in the Commonwealth. It is my opinion that the exception provided in § 58.1-3715 is confined to its terms. Accordingly, if a contractor does not have a place of business in the Town of Stuart, and, further, if the contractor's receipts from business done within the town do not exceed $25,000 per year, the town has no authority to impose a business license tax on the contractor, even if the locality in the Commonwealth
in which the contractor's business is located does not impose a business license tax on the contractor.\(^4\)

Your third hypothetical situation is identical to the second except that the contractor has no place of business in any locality within the Commonwealth. Section 58.1-3715 does not specifically address a situation in which a contractor does not have a principal place of business within the Commonwealth. Section 58.1-3708(C), however, does address such a situation and would permit the town to impose a license tax on the contractor if the contractor is engaged in business within the town. Under § 58.1-3708(C), only the gross receipts attributable to work done within the Town of Stuart would be subject to the town license tax.

Whether a contractor is engaged in business within a locality is a question of fact for determination by the appropriate local tax official.\(^5\) The Supreme Court of Virginia has interpreted “engaged in business” as involving “a continuous and regular course of dealing, rather than an irregular or isolated transaction.”\(^6\) While I conclude that, under the second hypothetical situation you present, a locality may not impose a license tax on a contractor whose gross receipts from work done in the locality do not exceed $25,000 a year, it is my opinion that the $25,000 threshold of § 58.1-3715 is not controlling in determining whether a contractor is engaged in business in the town for purposes of § 58.1-3708(C).

Subsections A and C of § 58.1-3708 are intended to address two different factual situations and operate to bring about two different results. Under § 58.1-3708(A), receipts from work done in a locality in which the person does not have a place of business are not exempt from taxation but are taxable in the locality in which the person has a place of business. Under § 58.1-3708(C), however, the person does not have a place of business within the Commonwealth, and the gross receipts from work done in one locality are not subject to taxation in another locality. If the $25,000 threshold of § 58.1-3715 applies to the taxation of contractors under § 58.1-3708(C), the effect is to exempt from taxation the gross receipts of contractors from business done in any locality if the amount of the receipts does not exceed $25,000 a year. In fact, a contractor could do business within numerous localities within the Commonwealth and, provided the amount of gross receipts within any one of the localities does not exceed $25,000, could avoid the payment of a license tax in any locality within the Commonwealth.

In my opinion, such a result is contrary to the purpose of § 58.1-3715. The purpose of § 58.1-3715 is not to exempt a portion of a contractor’s gross receipts from taxation. Rather, the purpose of the statute is to apportion the gross receipts of a contractor among the localities in which the contractor does business, with the $25,000 threshold prompting the apportionment. If this threshold is not met, the gross receipts of less than $25,000 are not exempt from license taxes but are included in the gross receipts reportable in the locality in which the contractor has his place of business.
To conclude that no locality may tax the gross receipts of a contractor who has no office in the Commonwealth unless the $25,000 threshold is met in that locality would defeat the purpose of § 58.1-3708(C). Such a conclusion would, in effect, convert the apportionment provision in § 58.1-3715 into an exemption provision. It also would create inequity between contractors who have an office and those who perform work without maintaining an office. It is my opinion that the General Assembly did not intend such a result. Accordingly, I am of the opinion that the Town of Stuart may impose a license tax on a contractor who is engaged in business within the town but who does not have a definite place of business within the Commonwealth, even if the amount of business done within the town does not exceed $25,000 a year.7

1For example, a contractor has his only place of business in the Town of Stuart but does work in three additional localities within the Commonwealth. His total gross receipts for the year are $170,000: $50,000 is from work done in the Town of Stuart; $50,000 is from work done in a locality that imposes a license tax on contractors; $50,000 is from work done in a locality that does not impose a license tax; and $20,000 is from work done in a fourth locality. The amount of gross receipts reportable in the Town of Stuart would be $120,000: $50,000 for the work done in the Town of Stuart; $50,000 for the work done in the locality that does not impose a license tax; and $20,000 for the work done in the fourth locality, since under § 58.1-3715, that locality cannot impose a license tax on the contractor. The $50,000 from work done in the locality that imposes a license tax on the contractor is deducted from the amount reportable in the Town of Stuart. I note that, if the amount of business done in another locality that imposes the tax results in gross receipts exceeds $25,000, the full gross receipts from work done in that other locality are reportable in that locality, not only gross receipts in excess of $25,000. See Op. Va. Att’y Gen.: 1982–1983 at 555; 1974–1975 at 526, 527. Also, § 58.1-3714 authorizes a credit against any county license tax for license taxes paid in a town situated within that county.

2See, however, the discussion under the third hypothetical situation for the effect of the $25,000 threshold when the contractor has no place of business within the Commonwealth.

3See 1974–1975 Op. Va. Att’y Gen. 463, 466 (fact that jurisdiction in which tax situs of business is located does not impose tax cannot operate to subject that business to taxation by jurisdiction where there is no tax situs). Another part of the 1975 opinion suggests that a contractor who is not subject to a business license tax in the locality in which his business is located is subject to the tax in any locality in which he is doing business, even if the gross receipts in the jurisdiction do not exceed $25,000. Id. In my opinion, that conclusion is contrary to the language and the intent of § 58.1-3715. Therefore, to the extent that opinion implies that a contractor not subject to a business license tax in the locality of his principal place of business is subject to the tax in any locality in which he is doing business, even if the gross receipts in that locality do not exceed $25,000, it is overruled.


6Krauss v. City of Norfolk, 214 Va. 93, 95, 197 S.E.2d 205, 206 (1973) (quoting Young v. Town of Vienna, 203 Va. 265, 267, 123 S.E.2d 388, 390 (1962)).

7I do not consider in this opinion a situation in which a contractor has no place of business within the Commonwealth but has a place of business, and is subject to a license tax, in a jurisdiction outside the Commonwealth. I note, however, that in such a situation, consideration must be given to whether a license tax is a burden on interstate commerce, in violation of the Commerce
Clause of the Constitution of the United States. The Commerce Clause does not prohibit a gross receipts tax on a foreign corporation if the corporation has a sufficient nexus in the taxing jurisdiction, and if the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Short Brothers, Inc. v. Arlington County, 244 Va. 520, 524, 423 S.E.2d 172, 174-75 (1992).

TAXATION: LICENSE TAXES.

County may assess license tax on full gross receipts of contractor whose place of business is in town within county and whose receipts from work done in county and outside town boundaries exceed $25,000 annually.

January 20, 1995

Mr. Paul S. McCulla
County Attorney for Fauquier County

You ask whether a county may require a contractor whose principal place of business is in a town located within the county and who pays a town license tax to pay a county license tax on revenues from work done in the county and outside the boundaries of the town.

Section 58.1-3703(A) of the Code of Virginia provides that a locality may levy a license tax on the gross receipts of any person, firm or corporation engaged in business within the locality. Section 58.1-3708(A) provides that, "[e]xcept as otherwise provided by law," the situs for the license tax is the county, city or town "in which the person so engaged has a definite place of business or maintains his office." If the person's place of business is in a town, § 58.1-3711(A) limits the authority of the county in which the town is located to assess a license tax on the person.

If a person is engaged in the contracting business, § 58.1-3715 authorizes a locality in which a contractor has no place of business to require the contractor to pay a business license tax if the gross receipts earned in the locality exceed $25,000 a year. Under § 58.1-3715, the locality in which the contractor's place of business is situated may not tax the receipts taxed by the other locality. Moreover, § 58.1-3714 specifically provides that when both a county and a town within the county impose a license tax on a contractor, the contractor is entitled to a credit against the county tax for the taxes paid to the town.

It is my opinion that the specific proration provisions relating to contractors in §§ 58.1-3714 and 58.1-3715 override the general limitation in § 58.1-3711 on the
authority of a county to tax a business located in a town within the county. Accordingly, if a contractor's place of business is in a town within a county, and if the contractor's receipts from work done in the county and outside the boundaries of the town exceed $25,000 a year, the county may assess a license tax on the contractor.

This conclusion is consistent with the intent expressed in § 58.1-3715, which is to allow any county, city or town to tax a contractor whose receipts from work done in the locality exceed $25,000. Moreover, to conclude otherwise would render ineffective the provision in § 58.1-3714 allowing a contractor a credit on the license taxes due the county for the amount paid to the town, since the county would be without power to impose a license tax.


2The full gross receipts from work done in the county but outside the town's boundaries are reportable in the county, not only gross receipts in excess of $25,000. See 1982-1983 Op. Va. Att’y Gen. 555.

3An alternate construction of the statutes is that §§ 58.1-3714 and 58.1-3715 apply when the contractor’s principal office is not located in the town, and § 58.1-3711(A) applies when the contractor’s principal office is in the town. For example, a contractor’s place of business is in town A which is located in county A. The contractor also does business in town B which is located in county B. Sections 58.1-3714 and 58.1-3715 apply in town B and county B, but § 58.1-3711(A) applies in town A and county A. The result of this construction would be that county A would be excluded from the jurisdictions authorized to impose a license tax on the contractor because the contractor’s place of business is in a town within county A. No language in the statutes directs this conclusion, and, in my opinion, such a conclusion would be contrary to the intent of § 58.1-3715.

TAXATION: LICENSE TAXES.

Gross receipts are not subject to tax when taxpayer acts as agent or fiduciary in receiving or disbursing money for another person or entity. Company that serves as clients’ agent in management of investments, for which it receives management fees or commissions, has gross receipts only on fees and commissions it receives. Assets managed and invested by company remain funds of clients and should not constitute gross receipts of taxpayer entity. Assets of mutual fund and real estate investment trust are not subject to gross receipts tax upon relocation of their management company. Such company may be subject to local gross receipts tax only on fees it receives for services rendered in managing assets of fund and trust.

June 20, 1995

The Honorable Vincent F. Callahan Jr.
Member, House of Delegates
You ask whether the investment assets managed by a mutual fund management company and a mortgage real estate investment trust management company are considered to be the gross receipts of the management companies subject to a local business license tax on those receipts should the management companies ("Adviser") relocate to Fairfax County.

You relate that a fund is an investment company under the federal Investment Company Act of 1940 (the "mutual fund") and is organized under the laws of the State of Maryland. The mutual fund is engaged in the business of investing or reinvesting in securities, and qualifies as a regulated investment company under the Internal Revenue Code of 1986, as amended ("I.R.C."). To the extent earnings from the mutual fund are distributed to owners in accordance with applicable I.R.C. provisions, the owners, and not the mutual fund, are subject to tax on the distributed earnings.

You also relate that a real estate investment trust (the "REIT"), organized and operated to qualify as such under applicable sections of the I.R.C., is organized under the laws of the State of Maryland. The REIT is engaged in the business of investing or reinvesting in real estate mortgages.

Both the mutual fund and the REIT are managed by the Adviser, which is registered as an investment adviser under the Investment Company Act and organized under the laws of the District of Columbia. The Adviser plans to relocate its offices in Fairfax County, thereby changing its business situs to a Virginia location. The Adviser will relocate with its offices the evidences of ownership of the assets of both the mutual fund and the REIT, such as certificates, deeds of trust and other instruments. Pursuant to its contracts with the mutual fund and the REIT, the Adviser supervises the overall management of their affairs, providing investment advice and day-to-day management of their portfolios, subject to the authority of each of their boards of directors. The Adviser makes decisions to buy, sell or hold particular securities for the mutual fund and real estate mortgages for the REIT, and maintains records of their transactions in its office. The owners of the mutual fund and the REIT pay a management fee to the Adviser for its professional management of their affairs.

The term "gross receipts" has not been defined by the General Assembly in the context of the local business license. The Supreme Court of Virginia, however, has said that the term means the "whole, entire, total receipts" of a taxpayer. Gross receipts do not arise because a taxpayer merely handles funds in certain transactions. Rather, gross receipts arise when sales are made or services are rendered.

Under the authority of § 58.1-3701 of the Code of Virginia, on January 1, 1984, the Department of Taxation developed Guidelines for Local Business, Professional and Occupational License Taxes (the "BPOL Guideline(s)"). The BPOL Guidelines provide that "[a]ny person rendering a service for compensation in the form of a credit agency, an investment company, a broker or dealer in securities and commodities or a security
or commodity exchange is providing a financial service. The BPOL Guidelines also provide examples of “[t]hose engaged in rendering financial services,” including factors, security and commodity brokers, and stockbrokers. It is well-settled in Virginia that the interpretation given a statute by the administrative agency charged with its administration and enforcement is entitled to great weight. The General Assembly is presumed to be cognizant of such an administrative construction of a statute. The Department’s interpretation is entitled to deference and is an established principle of statutory construction.

Finally, prior opinions of the Attorney General conclude that a business does not have gross receipts when it (i) receives funds as advance payment from, or as reimbursement for the payment of expenses of, a client, or (ii) receives purchase money from a client to be held in an escrow account. The underlying principle is that gross receipts are not subject to a local gross receipts tax when the taxpayer acts as the agent or fiduciary for another in receiving and disbursing money on behalf of a person or entity other than the taxpayer.

A company serving strictly as an agent for its clients in the management of investments, and receiving management fees or commissions for such services, has gross receipts only to the extent of the fees and commissions it has received. The assets that are managed and invested by the company as an agent or fiduciary for its clients should not constitute gross receipts of the taxpayer entity. Such funds are not funds belonging to the company, but remain the funds of its clients.

Therefore, it is my opinion that the assets of the mutual fund and the REIT may not be subject to gross receipts tax by virtue of the relocation of their agent—the Adviser—to Fairfax County. The Adviser may be subject to the local gross receipts tax only on the fees received for services rendered in managing the assets of the mutual fund and the REIT.

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1It is unclear from your request whether a sole Adviser manages the investment assets or whether the assets are managed by different Advisers. Because the facts relative to the management activities of the mutual fund and the real estate investment trust are identical, I shall refer to a single Adviser in this opinion.

2The evidences of ownership of the assets, which actually represent the assets of the mutual fund and the REIT, are the property of the owners and not the Adviser. Because neither the mutual fund nor the REIT actually provides the management services and receives commissions and fees for such, neither would be subject to a local business license tax.


4A 1985 opinion has determined that the gross receipts of a “dealer” in securities include the total sales price of the securities. 1984-1985 Op. Va. Att’y Gen. 349, 350. The opinion recognizes the difference between a dealer and a broker, but does not address the characterization of receipts of a broker because the taxpayer in the opinion is determined to be a dealer. Id.

Section 58.1-3701 provides that "[t]he Department of Taxation shall promulgate guidelines defining and explaining the categories listed in subsection A of § 58.1-3706" concerning license tax rate limitations.

BPOL Guideline 3-2, at 17.111


Miller v. Commonwealth, 180 Va. at 36, 21 S.E.2d at 721.


TAXATION: LICENSE TAXES.

Locality may deny business license to individual operating sole proprietorship who fails to establish evidence of payment of delinquent taxes related to sole proprietorship; may not deny license to proprietor delinquent in payment of personal property taxes for property not used in business.

June 22, 1995

The Honorable Ray A. Conner
Commissioner of the Revenue for the City of Chesapeake

You ask whether the provisions of § 58.1-3700 of the Code of Virginia permit a locality that has adopted an ordinance pursuant to that section to deny a local business license to a sole proprietorship when the individual sole proprietor is delinquent in payment of personal property taxes for property that is not used in the business.

You relate that individuals conducting businesses as sole proprietorships are denied local business licenses when they owe delinquent personal property taxes on motor vehicles or other items of personalty that are not used in the individual’s business activities.

Section 58.1-3700 provides that the governing body of a locality “may require that no business license under [Chapter 37 of Title 58.1] shall be issued until the applicant has produced satisfactory evidence that all delinquent business license, personal property, meals, transient occupancy, severance and admissions taxes owed by the business to the county ... have been paid ....” (Emphasis added.) In 1993, the General Assembly deleted
the word "business" before the words "personal property," and added the phrase "by the
business." ¹

When new provisions are added to existing statutes by an amendatory act, a
presumption normally arises that a change in the law was intended.² When the language
of the statutory amendment is clear and unambiguous, effect must be given to the plain
and ordinary meaning of its provisions.³ The 1993 amendment to § 58.1-3700 clearly and
unambiguously provides that the delinquent taxes that form the basis for denying a busi-
ness license are business-related taxes; that is, a business license may be denied only
because of delinquent personal property taxes owed "by the business." ⁴ The personal
property, which is the subject of the delinquent taxes, must be business personal
property.

In Virginia, taxes may be levied, assessed and collected only in the mode provided
by express statutory provisions.³ Statutes imposing taxes are strictly construed, with any
reasonable doubt resolved against taxation.⁴ In addition, Dillon's rule of strict construc-
tion applies to the powers of local governing bodies, limiting such powers to those
conferred expressly by law or by necessary implication from such conferred powers.⁷

It is, therefore, my opinion that § 58.1-3700, by its plain language, limits the
denial of a business license only to an individual operating a sole proprietorship who fails
to establish that any delinquent taxes related to the business of the sole proprietorship
have been paid.

supra; 1989 at 153, 154.

TAXATION: LICENSE TAXES — RETAIL SALES AND USE TAX.

Processes of electroplating and electropainting that do not involve transformation of raw
material into product of substantially different character are not considered manufactur-
ing for purposes of local license tax exemption. State agency has determined that process
of electroplating is repair service.
April 11, 1995

The Honorable Mitchell W. Nuckles
Commissioner of the Revenue for the City of Lynchburg

You ask whether a certain process whereby a company receives items from customers, electrostatically plates or paints the items and returns them to the customer constitutes “manufacturing” so as to exempt the company from local license taxation under § 58.1-3703(B)(4) of the Code of Virginia.¹

You relate that electroplating is the process of passing current through the material to be applied, a solution or bath, and the item on which the material is to be plated. To increase conductivity, other chemicals that will ionize highly are added to the bath solution (e.g., sulfuric acid). Types of metal plating that may be applied are cadmium, zinc and tin.

You also relate that electrostatic painting is the process of applying a dry powder paint having an electrical charge opposing that of the component to be painted. The dry powder paint is purchased complete and ready to be used.

“Manufacturing” has not been defined by the General Assembly in the context of the local license tax.² The Supreme Court of Virginia has held, however, that three elements are necessary for a process to be considered manufacturing: “’(1) original material referred to as raw material; (2) a process whereby the raw material is changed; and (3) a resulting product which ... is different from the original raw material.’”³

Subsequently, in Solite Corporation v. King George County, the Virginia Supreme Court found that “’[t]he mere blending together of various ingredients, in the absence of a transformation into a product of substantially different character, is not manufacturing,’”⁴ and thus held that a rock and gravel processor was not a manufacturer.⁵ The Court also has held, however, that the Solite definition of “manufacturing” should be applied liberally, “’[b]ecause the public policy of Virginia is to encourage manufacturing in the Commonwealth.’”⁶

The process you describe does not involve a raw material that is changed in any manner. The process involves adding a charged coating to an already manufactured item. After the process has been completed, the item remains basically unchanged and is not transformed into a product of substantially different character, although it does have different qualities. The original product is not unusable by consumers. The plating process merely enhances the item without substantially changing the character of the end product.⁷

The Department of Taxation has developed guidelines that define a “repair service” as “[t]he repairing, renovating, cleaning or servicing of some article or item of
personal property for compensation."

Included in the list of those rendering a repair or other service are those who perform "nickel plating, chromizing and electroplating." Therefore, the Department has determined that the process of electroplating is a repair service rather than manufacturing. The interpretation given to a statute by the state agency charged with its administration is entitled to great weight.

Whether a business is a "manufacturer" for the purposes of § 58.1-3703(B)(4) is a factual determination to be made on a case-by-case basis by the commissioner of the revenue. In my opinion, however, none of the processes you describe would constitute manufacturing because the transformation does not result in a product of substantially different character.

Therefore, I am of the opinion that electroplating and electropainting processes do not constitute manufacturing within the meaning of § 58.1-3703(B)(4).

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1Section 58.1-3703(A) authorizes localities to impose a local license tax: "The governing body of any county, city or town may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town subject to the limitations provided in subsection B of this section."

Section 58.1-3703(B)(4) prohibits the imposition of a local license tax "[o]n a manufacturer for the privilege of manufacturing and selling goods, wares and merchandise at wholesale at the place of manufacture."


5Id. at 665, 261 S.E.2d at 538.


DEPARTMENT OF TAXATION, GUIDELINES FOR LOCAL BUSINESS, PROFESSIONAL AND OCCUPATIONAL LICENSE TAXES 22 (Jan. 1, 1984).

9Id. at 25.


12I note that House Bill No. 1868, introduced January 20 at the 1995 Session of the General Assembly, would have amended § 58.1-3703(B) by adding a new subdivision 18, providing an exemption from local license taxes for "any plating company if defined as a manufacturer by the U.S. government for income tax purposes through the Standard Industrial Classification Code, the
Virginia Department of Environmental Quality for reporting and licensing purposes, and the U.S. Environmental Protection Agency for reporting purposes." The bill, however, did not pass.

TAXATION: LICENSE TAXES — RETAIL SALES AND USE TAX.

Processes of pasteurization, homogenization, butterfat adjustment or vitamin fortification of, and addition of sugar and flavorings to, milk do not constitute manufacturing for purposes of local license tax exemption. Transformation of plain water into fruit-flavored liquid drink or sweetened tea through addition of flavored powders or powdered tea and sugar constitutes manufacturing for purposes of exemption from business license tax. Addition of water to orange juice concentrate is not manufacturing for purposes of assessing local business license taxes.

April 11, 1995

The Honorable Mitchell W. Nuckles
Commissioner of the Revenue for the City of Lynchburg

You ask whether certain processes, including the pasteurization, homogenization and vitamin fortification of milk, the addition of flavorings to milk, and the addition of water to concentrated orange juice, flavored powders and powdered tea, constitute “manufacturing” so as to be exempt from local license taxation under § 58.1-3703(B)(4) of the Code of Virginia.¹

You relate that a company offers a variety of dairy and nondairy consumable products for sale. Sales are made at wholesale and at retail to affiliated and nonaffiliated customers. The company purchases some of its products complete and ready for resale while other products are subjected to various types of processes before sale.

You relate that one major product of the company which is subjected to a variety of processes is milk. The company receives milk from dairy farms in tanker trucks. Before the milk is unloaded, it is checked for antibiotics, standard plate count, titratable acidity and taste analysis. Once the milk is unloaded, it is ready for processing. The milk goes through several processing steps before it is ready for packaging and distribution. Processing includes the pasteurization, homogenization, butterfat adjustment and vitamin fortification of the milk.

“Manufacturing” has not been defined by the General Assembly in the context of the local license tax.² In Richmond v. Dairy Company,³ however, the Supreme Court of Virginia held that the process of pasteurization of milk and the production of buttermilk do not constitute manufacturing in the context of the local license tax. This case is the only decision of the Supreme Court on the subject matter of your request. In addition,
the General Assembly is presumed to be aware of the construction of statutes by the courts. The General Assembly’s modification or nonmodification of such statutory construction demonstrates its own legislative intent. The General Assembly has considered amendments to § 58.1-3703(B) to add exemptions from local license taxes; however, it has not amended that statute to exempt from local license tax the milk processes you describe. Therefore, the decision of the Supreme Court in that case remains the law on the subject.

The fact that milk now is also homogenized and fortified with vitamins does not alter or modify the basis of the decision in Richmond v. Dairy Company. In that case, the Court wrote:

Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary . . . . There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'

It is clear that under this standard, homogenization, butterfat adjustment and vitamin fortification of milk, like pasteurization, do not change the “characteristic form, appearance, taste and use of milk.” Consequently, under the Supreme Court’s definition of “manufacturing,” such processes do not amount to manufacturing.

In a later decision, the Supreme Court of Virginia held that, for a process to be considered manufacturing, three elements are necessary: “(1) original material referred to as raw material; (2) a process whereby the raw material is changed; and (3) a resulting product which . . . is different from the original raw material.” Subsequently, in Solite Corp. v. King George County, the Supreme Court found that “[t]he mere blending together of various ingredients, in the absence of a transformation into a product of substantially different character, is not manufacturing,” and thus held that a rock and gravel processor was not a manufacturer. The Court also has held, however, that the Solite definition of “manufacturing” should be applied liberally, “[b]ecause the public policy of Virginia is to encourage manufacturing in the Commonwealth.”

While prior opinions of the Attorney General address whether specific businesses are manufacturers within the local license tax exemption, none is closely related to the business activities about which you inquire. Although the determination of whether a business is a “manufacturer” for the purposes of § 58.1-3703(B)(4) is a factual determination to be made on a case-by-case basis by the commissioner of the revenue, none of the milk processes you describe would, in my opinion, constitute manufacturing, because the processing does not transform the milk into a product of substantially different character.
The General Assembly has not defined "manufacturing," and the Supreme Court decisions provide the only guidance on the matter. Consequently, following the Court's definition, I am of the opinion that neither the pasteurization, homogenization, butterfat adjustment or vitamin fortification of milk, nor the addition of sugar and flavorings to milk constitutes manufacturing within the meaning of § 58.1-3703(B)(4).

The addition of water to flavored powders and powdered tea, however, has the three required elements to be considered manufacturing contained in Prentice v. City of Richmond. You describe a process whereby water, as the raw material, is changed from plain water into either a fruit-flavored liquid drink or sweetened tea through the addition of flavored powder or powdered tea and sugar. There is, therefore, a transformation of a raw product into a product of substantially different character as is required under the Solite definition of "manufacturing." Consequently, it is my opinion that the addition of flavored powders and powdered tea and sugar to water constitutes manufacturing for the purposes of the exemption from the business license tax found in § 58.1-3703(B)(4).

The addition of water to orange juice concentrate, however, does not contain the three required elements to be considered manufacturing, because it does not amount to the transformation of a raw product into a product of substantially different character. The addition of water to concentrate is merely a blending together of the orange juice concentrate and water that had been removed so as to restore the juice to its original consistency. I am, therefore, of the opinion that the addition of water to orange juice concentrate is not manufacturing for the purposes of assessing local business license taxes.

1Section 58.1-3703(A) authorizes localities to impose a local license tax: "The governing body of any county, city or town may levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein within the county, city or town subject to the limitations provided in subsection B of this section."

Section 58.1-3703(B)(4) prohibits the imposition of a local license tax "[o]n a manufacturer for the privilege of manufacturing and selling goods, wares and merchandise at wholesale at the place of manufacture[.]"


3156 Va. 63, 157 S.E. 728 (1931).


6House Bill No. 1868, introduced January 20 at the 1995 Session of the General Assembly, would have added a new subdivision 18 to § 58.1-3703(B) to exempt from local license tax certain types of "plating" companies. The bill did not pass.
TAXATION: MISCELLANEOUS TAXES - TRANSIENT OCCUPANCY TAX — RETAIL SALES AND USE TAX.

COUNTIES, CITIES AND TOWNS: POWERS OF CITIES AND TOWNS.

PROPERTY AND CONVEYANCES: VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT.

Apartment building/complex is not considered facility that provides nightly accommodations for transients. City of Fall Church is not authorized to impose transient room rentals tax on apartment facilities. City may not enact tax by charter that is prohibited by laws of Commonwealth.

August 4, 1995

The Honorable Harold L. Miller
Commissioner of the Revenue for the City of Falls Church

You ask several questions regarding the transient room rental tax imposed by the City of Falls Church.\(^1\)
You relate that the Falls Church Code imposes a tax of five percent of the total amount of room rental paid by a “transient to any lodging facility.” The City Code defines “transient” as a person who, for a period of not more than thirty-one consecutive days, “obtains lodging or the use of any space in any lodging facility,” and “lodging facility” as “[a]ny public or private hotel, inn, apartment, hostelry, tourist home or house, motel, rooming house or other lodging place ... offering lodging for four (4) or more persons at any time.”

You state that a taxpayer questions the application of the tax. The taxpayer operates an apartment facility in the city consisting of 576 one- and two-bedroom units. Each unit has a living, sleeping and eating area, plus a kitchen. Many units are unfurnished. All tenants must submit an application, post a security deposit, and undergo a credit review. Tenants must give a minimum of thirty days’ written notice before vacating an apartment.

You ask whether the taxpayer is subject to the tax on units rented for fewer than thirty-one days. You also ask whether § 58.1-3840 of the Code of Virginia authorizes the city to impose a “transient room rentals” tax on apartment houses.

This Office has a long-standing policy of declining to render opinions interpreting local ordinances. The reason for application of the policy is to avoid becoming involved in matters solely of local concern and over which the local governing body has control. Resolution of whether the city ordinance applies to the particular taxpayer under the facts presented requires interpretation of the city ordinance. Therefore, I confine my response to the broader general question of whether § 58.1-3840 authorizes a “transient room rentals” tax on the rental for fewer than thirty-one days of units in apartment houses.

Section 58.1-3840 does not define “transient room rentals.” Two other statutes, §§ 58.1-3819 and 58.1-603(4), authorize the same type of tax and provide guidance on what the General Assembly ordinarily intends by such language.

Section 58.1-3819 authorizes counties to levy a “transient occupancy tax” on “hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms rented out for continuous occupancy for fewer than thirty consecutive days.” Section 58.1-3819 further provides that the tax imposed by the county “shall not apply to rooms or spaces rented and continuously occupied by the same individual ... for thirty or more days in hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms.” (Emphasis added.)

Section 58.1-603(4) imposes a state retail sales tax on “the sale or charges for rooms, lodgings or accommodations furnished to transients as set out in the definition of ‘retail sale’ in § 58.1-602.” Section 58.1-602 defines “retail sale” as
(i) the sale or charges for any room or rooms, lodgings, or accommodations furnished to transients for less than ninety continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration.

When there is doubt as to the meaning or scope of laws imposing a tax, such laws are to be construed against the government and in favor of the citizens. This rule of narrow construction does not, however, override the primary goal of statutory construction, that is, to give effect to the intent of the legislature.

In my opinion, neither legislative intent nor the express language of §§ 58.1-602 and 58.1-3819, as strictly construed, would support a conclusion that the concept of transient room rentals includes rentals in an apartment complex, as that type of facility is traditionally viewed. The absence of language in § 58.1-3840 similar to the language in §§ 58.1-602 and 58.1-3819 does not, in my opinion, evidence a legislative intent to extend the concept of transient room rentals for taxes imposed by a city or town.

Sections 58.1-602 and 58.1-3819 illustrate that the concept of transient room rentals has two related requirements. First, the facility itself must be of the type that normally rents space on a transient occupancy basis. This requirement is seen in §§ 58.1-602 and 58.1-3819 by the enumerations of the various types of facilities. In addition, the occupancy of the room or space in each particular instance must be on a transient occupancy basis, i.e., for not more than a certain number of days. While a facility that satisfies the first requirement may be precluded from applying the tax in an instance that does not satisfy the second requirement, it does not follow that a facility that does not satisfy the first requirement becomes subject to the tax in those instances that satisfy the second requirement.

The facilities enumerated in §§ 58.1-602 and 58.1-3819 do not constitute an exclusive list of facilities subject to a transient room rental tax under those statutes or under § 58.1-3840. The enumerated facilities, however, have the common characteristic of providing nightly accommodations for transients, i.e., for those “[p]assing through from one place to another.” An apartment building or complex lacks this characteristic. In fact, an apartment generally is considered a person’s dwelling, although it may be only for a brief period of time. Because of this basic difference in nature, a strict construction of § 58.1-3840 directs the conclusion that a city is without authority to impose a transient room rental tax on apartment facilities.

You ask also whether, if the city may not impose the tax under § 58.1-3840, it nevertheless may do so under its charter and the provision in § 15.1-841 authorizing a municipal corporation to raise revenue “by taxes and assessments on property, persons and other subjects of taxation, which are not prohibited by law.”
Section 58.1-605(A) prohibits any locality from imposing a local general sales tax “except as authorized by this section.” The transient room rental tax authorized by § 58.1-3840 applies “notwithstanding” the prohibition in § 58.1-605(A). Unless the tax on transient room rentals is within the authority granted in § 58.1-3840, however, such a tax would be prohibited by § 58.1-605(A).14

Since I conclude that § 58.1-3840 does not authorize a transient room rentals tax on apartment facilities, § 58.1-605(A) also prohibits the tax. Both § 15.1-841 and the charter for the City of Falls Church15 expressly provide that, despite the grant of general taxing power, the city may enact no tax that is prohibited by the laws of the Commonwealth.

1Section 58.1-3840 of the Code of Virginia provides that, “[t]he provisions of Chapter 6 (§ 58.1-600 et seq.) of [Title 58.1, comprising the Virginia Retail Sales and Use Tax Act,] to the contrary notwithstanding,” any city having general taxing powers established by charter under § 15.1-841 may impose an excise tax on “transient room rentals.” The city has general taxing powers under of its charter (Ch. 323, § 2.02, 1950 Va. Acts 501, 502-03), and has enacted ordinances imposing a tax on transient room rentals (FALLS CHURCH, VA., CODE §§ 33-36 to 33-45 (1992)).

2FALLS CHURCH, VA., CODE, supra § 33-37.
3Id. § 33-36.
4While the term “lodging” may mean “[a] place to live,” it also may be interpreted to mean “[s]leeping accommodations” or “[r]ented rooms.” THE AMERICAN HERITAGE DICTIONARY 740 (2d c. ed. 1985).
6Section 58.1-603 is part of the Virginia Retail Sales and Use Tax Act, Chapter 6 of Title 58.1, §§ 58.1-600 to 58.1-639, to which the “notwithstanding” clause in § 58.1-3840 is applicable. See supra note 1.
7Regulations of the Department of Taxation provide that the language in § 58.1-602 defining “retail sale” as “any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration” means a place “similar” to those facilities expressly enumerated. Virginia Dep’t Tax’n, Virginia Retail Sales and use Tax Regulations § 630-10-48(A) (1985).
9Id.
10I do not read transient “room” rentals as being confined to facilities that rent only single rooms, as opposed to units consisting of more than one room. A facility composed of furnished apartments primarily rented on a nightly, weekly or monthly basis could fit within the enabling legislation. This is not, however, the facility you describe or the normal concept of an apartment complex. See 1984–1985 Op. Va. Att’y Gen. 359, 359 (term “hotel” or “motel” generally is not used to describe condominiums).
12THE AMERICAN HERITAGE DICTIONARY, supra note 4, at 1287. “In modern usage, transient usually refers to what literally remains only a short time, such as a guest at a hotel. It can also
mean inherently short-lived or impermanent, but the latter sense is more often expressed by
transitory.” Id.

13I am aware that § 55-248.5(4) of the Virginia Residential Landlord and Tenant Act,
§§ 55-248.2 to 55-248.40, excludes from that Act's governance “[o]ccupancy in a hotel, motel,
vacation cottage, boardinghouse or similar lodging held out for transients, unless let continuously
to one occupant for more than thirty days, including occupancy in a lodging subject to taxation as
provided in § 58.1-3819[.]” An argument may be made that by subjecting “nontransient” occu-
pancy in transient facilities to landlord-tenant law, the General Assembly intended to subject tran-
sient occupancy in nontransient facilities to the local transient occupancy tax. Considering that the
purpose of the Act is to clarify the rights and obligations of landlord and tenant to each other, I
find this evidence of legislative intent insufficient to override the rule of narrow construction
applied to legislation authorizing a locality to levy a tax.


15See supra note 1.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT
PROPERTY).

Exotic animals such as ostriches, giraffes, camels and monkeys do not fall within classifi-
cation of “farm animals” exempt from taxation. Any doubt whether such animals fall
within categories of exempt animals is to be resolved against allowing exemption. Deter-
mination is factual matter to be decided by local commissioner of revenue.

January 20, 1995

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You ask whether exotic animals, such as ostriches, giraffes, camels and monkeys,
are considered to be “farm animals” which are exempt from personal property taxation
pursuant to § 58.1-3505 of the Code of Virginia. The situation you present involves a
taxpayer who raises a number of different species of exotic animals, including ostriches,
emus, llamas, camels, wallabies, walleroos, several different species of monkey, a giraffe
and other species of animal.

Section 58.1-3505(B) authorizes the governing body of a county to adopt an ordi-
nance exempting in whole or in part, or providing a different tax rate on, certain farm
animals enumerated in § 58.1-3505(A)—horses, mules and other kindred animals, cattle,
sheep and goats, hogs and poultry. Section 58.1-3503(A)(1)-(5). Article X, § 6(f) of the
Constitution of Virginia (1971) provides that “[e]xemptions of property from taxation ...shall be strictly construed.”
Under the statutory construction principle known as “expressio unius est exclusio alterius,” the legislature is presumed to have excluded everything not specifically enumerated in § 58.1-3505. Thus, any animal that does not fall within the categories specified in § 58.1-3505(A) does not qualify as a farm animal under the statute.

A prior opinion of the Attorney General determines that § 58-829.1:1, the predecessor statute to § 58.1-3505, does not include dogs within the meaning of farm animals:

Dogs, however, are not normally considered farm animals, and § 58.1-829.1:1(A) specifies horses, mules, cattle, sheep, goats, hogs and poultry as the only classes of farm animals to be exempted from taxation.4

Although the determination of whether animals such as ostriches, giraffes, camels and monkeys fall within the exempt categories contained in § 58.1-3505(A) is a factual matter to be decided by the local commissioner of the revenue, it is my opinion that “exotic animals” such as giraffes, ostriches, camels and monkeys do not fall within the exempt classifications of farm animals in § 58.1-3505(A).6

1Expression of one thing means exclusion of another.
3Section 58.1-3506(A)(21) provides for a separate classification for taxation purposes for wild or exotic animals. “Wild animals” are defined as “any animals which are found in the wild, or in a wild state, within the boundaries of the United States, its territories or possessions.” Id. “Exotic animals” are defined as “any animals which are found in the wild, or in a wild state, and are native to a foreign country.” Id. The fact that the animals in question fall within these definitions is another indication that the General Assembly did not intend them to be included within the meaning of “farm animals” under § 58.1-3505.
6Exemptions from taxation are to be narrowly construed, and any doubt is to be resolved against allowing the exemption. See Va. Const. art. X, § 6(f) (1971); see also Commonwealth v. Wellmore Coal, 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984). When, as in § 58.1-3505(A), the statute clearly enumerates the categories of exempt animals, and the animals in question clearly do not fall within those classifications, any doubt is to be resolved against allowing the exemption.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. — TAX EXEMPT PROPERTY.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

1992 amendment expanding separate classification of certain equipment purchased by firms engaged in cogeneration of steam or electricity, which is taxed at rate that does not exceed locality’s tax rate applicable to machinery and tools, does not violate constitutional
requirement for uniformity in property taxation, and is within General Assembly's power to classify property for local taxation purposes.

March 17, 1995

The Honorable Riley E. Ingram
Member, House of Delegates

You ask whether a 1992 amendment to § 58.1-3506(A)(7) of the Code of Virginia,\(^1\) which added the second sentence in subdivision A 7 establishing certain equipment used in the cogeneration of steam or electricity as a separate class of tangible personal property for local tax purposes,\(^2\) exceeded the General Assembly's constitutional authority.

You note that Article X, § 1 of the Constitution of Virginia (1971) establishes a general rule that all property shall be taxed, except as otherwise provided in the Constitution. Section 1 further gives the General Assembly the authority to "define and classify" subjects of taxation. You further note that Article X, § 6(a) establishes certain classes of property that are exempt from all taxation. Subsections (b) through (i) of Article X, § 6 empower the General Assembly to exempt or partially exempt certain other classes of property. Subsection (i) was added by a constitutional amendment ratified by the voters at the general election held November 4, 1980. That amendment states:

The General Assembly may by general law allow the governing body of any county, city, or town to exempt or partially exempt from taxation any generating equipment installed after December thirty-one, nineteen hundred seventy-four, for the purpose of converting from oil or natural gas to coal or to wood, wood bark, wood residue, or to any other alternate energy source for manufacturing, and any co-generation equipment installed since such date for use in manufacturing.\(^3\)

Finally, you note that Article X, § 6(f) requires that exemptions of property from taxation established or authorized by Article X, § 6 shall be strictly construed.

The general requirement in Article X, § 1 that all property be taxed, when read together with the rule of strict construction of exemptions in Article X, § 6(f), makes it clear that the General Assembly may not expand the tax exemptions authorized in the Constitution, except in those instances when the constitutional language specifically provides for such expansion. The 1992 amendment to § 58.1-3506(A)(7) changes the definition of generating and cogeneration equipment that is declared to be a separate classification of tangible personal property for purposes of local taxation, to include "such equipment purchased by firms engaged in the business of generating electricity or steam, or both."\(^4\) That amendment to § 58.1-3506(A)(7) does not, however, purport to expand the permitted scope of the cogeneration property tax exemption in Article X, § 6(i).\(^5\)
Designation of a particular type of personal property as a separate classification for tax purposes is not equivalent to exempting that type of property from taxation altogether. Article X, § 1 expressly reserves to the General Assembly the power to define and classify taxable subjects. The Supreme Court of Virginia has upheld the exercise of this power. Once placed in a separate statutory classification, tangible personal property of a particular type may be taxed at a different rate from other classes of personal property, without violating the constitutional requirement for uniformity in property taxation. Under the classification scheme the General Assembly has adopted in § 58.1-3506, the generating equipment and cogeneration equipment classified under § 58.1-3506(A)(7) must be taxed by a locality at a rate that does not exceed that locality’s tax rate applicable to machinery and tools. This classification scheme does not authorize the locality to exempt generation and cogeneration equipment purchased by firms engaged in the business of generating electricity or steam from taxation altogether.

Therefore, it is my opinion that the 1992 amendment to § 58.1-3506(A)(7), which added the second sentence to subdivision A 7 establishing certain equipment used in the cogeneration of steam or electricity as a separate class of tangible personal property for local tax purposes, is within the power of the General Assembly to classify property for local taxation purposes.

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1 Section 58.1-3506 provides:

    “A. The items of property set forth below are each declared to be a separate class of property and shall constitute a classification for local taxation separate from other classifications of tangible personal property provided in [Chapter 35 of Title 58.1]:

    * * *

    “7. Generating equipment purchased after December 31, 1974, for the purpose of changing the energy source of a manufacturing plant from oil or natural gas to coal, wood, wood bark, wood residue, or any other alternative energy source for use in manufacturing and any cogeneration equipment purchased to achieve more efficient use of any energy source. Such generating equipment and cogeneration equipment shall include, without limitation, such equipment purchased by firms engaged in the business of generating electricity or steam, or both[.]

    * * *

    “B. The governing body of any county, city or town may levy a tax on the property enumerated in subsection A at different rates from the tax levied on other tangible personal property. The rates of tax and the rates of assessment shall ... (ii) for purposes of subdivision] ... A 7 ... not exceed that applicable to machinery and tools[.]”


3 To implement Article X, § 6(i), the General Assembly has adopted § 58.1-3662, which states: “Generating equipment installed after December 31, 1974, for the purpose of converting from oil or natural gas to coal or to wood, wood bark, wood residue, or to any other alternate energy source for manufacturing, and any cogenerating equipment installed since such date for use in manufacturing, are hereby declared to be a separate class of property and shall constitute a classification for local taxation separate from other classifications of tangible personal property. The governing body of any county, city or town may, by ordinance, exempt or partially exempt such property from local taxation, and such ordinance shall become effective on January 1 of the year following the year of adoption.”
The 1992 amendment to § 58.1-3506(A)(7) was proposed in response to a 1991 opinion of the Attorney General concerning the proper local tax treatment of a firm dealing exclusively in cogeneration (the combined production of electrical power and thermal energy). See 1991 Op. Va. Att’y Gen. 296. Because § 58.1-3506(A)(7) previously referred to generating equipment to change the energy source of a manufacturing plant to an alternative energy source for use in manufacturing, the 1992 amendment has the effect of including the generation of electricity or steam within the term “manufacturing,” for purposes of this particular statutory classification. In so doing, the 1992 amendment to § 58.1-3506(A)(7) overrides the conclusion of the 1991 opinion to the Hopewell Commissioner of the Revenue. The further addition of the second enacting clause in the 1992 act, stating “[t]hat this act is declaratory of existing law,” indicates that the General Assembly did not consider that opinion to correctly reflect its statutory intent when it originally adopted § 58.1-3506(A)(7). 1992 Va. Acts, supra note 2, at 1002.


See id. at 206, 228 S.E.2d at 115.

The term “classification” “is a word of art [as used in the Virginia tax structure] with special import, connoting a division into separate classes.” Id. at 204, 228 S.E.2d at 115. It is not used in the definitional sense.

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. - SITUS FOR TAXATION.

MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES.

Local tax official determines domicile of student on case-by-case basis, considering all relevant facts. Student domiciled in Virginia but attending out-of-state institution remains subject to personal property tax on his vehicle in Virginia jurisdiction where he is domiciled. Situs for taxation of vehicle owned by student’s parent is locality where vehicle is normally parked or garaged.

March 2, 1995

The Honorable Catherine V. Ashby
Commissioner of the Revenue for Loudoun County

You ask three questions regarding personal property taxes and local licensing fees on the vehicles of students attending institutions of higher education. You first inquire regarding the establishment of domicile of a student attending an institution of higher education. You next ask whether a student domiciled in Virginia who attends an out-of-state institution is subject to personal property tax on his vehicle in Virginia. Finally, you ask what establishes the situs of a vehicle if a parent, rather than the student, owns the vehicle.
Section 58.1-3511(A) of the Code of Virginia\(^1\) establishes the situs of tangible personal property for purposes of local personal property taxation. As a general rule, property is taxable in the jurisdiction in which the property is located on tax day, rather than in the jurisdiction in which the owner is domiciled. See id. The situs of certain mobile property, such as motor vehicles, is the jurisdiction in which the property is normally parked or garaged. Id. Section 58.1-3511(A) provides three instances in which the domicile of the owner, rather than where the vehicle is normally parked or garaged, controls situs: (1) when it cannot be determined where the vehicle is normally parked or garaged; (2) when the owner is domiciled in another state and pays a personal property tax on the same vehicle in the state of his domicile; and (3) when the vehicle is owned by a student attending an institution of higher education. Section 46.2-752(A)(9) establishes the same situs for the imposition of local licensing fees on motor vehicles.

You ask first what governs the domicile of a student attending an institution of higher education. Domicile is composed of two elements: physical residence in a geographic location and an intent to remain there.\(^2\)

Neither § 58.1-3511(A) nor § 46.2-752 establishes the domicile of a student. Rather the local tax official determines the domicile of a student on a case-by-case basis, considering all of the relevant facts.\(^3\) While it is generally presumed that a student does not intend to establish domicile in the locality in which he is attending school, factors may support a determination that a student has changed his domicile to the locality.\(^4\)

You next ask whether a student who is domiciled in Virginia but attends an out-of-state institution is subject to personal property tax on his vehicle. Under the common law doctrine of *mobilia sequuntur personam*,\(^5\) the situs for the taxation of movable personal property is the domicile of the owner.\(^6\) While § 58.1-3511(A) changes this common law rule for most tangible personal property, the statute expressly retains the rule when the property is a vehicle owned by a student attending an institution of higher education. It is my opinion that the common law rule applies, regardless of whether the vehicle is physically located within or without the state on tax day and regardless of whether the vehicle is normally parked or garaged within or without the state.\(^7\) Accordingly, a student who is domiciled in Virginia but attends an out-of-state institution remains subject to personal property tax on his vehicle in the Virginia jurisdiction in which he is domiciled.\(^8\)

Finally, you ask what establishes the situs of the vehicle when a parent, rather than the student, owns the vehicle. Under the general situs provisions of § 58.1-3511(A), a vehicle is subject to taxation in the jurisdiction in which it is normally parked or garaged. By the clear language of § 58.1-3511(A), domicile determines situs only "in the event the owner of the motor vehicle is a student attending an institution of higher education." (Emphasis added.) Therefore, it is my opinion that if the vehicle is owned by the parent, the situs for taxation will be the locality in which the vehicle is normally parked or garaged.
Section 58.1-3511(A) provides: “The situs for the assessment and taxation of tangible personal property, merchants’ capital and machinery and tools shall in all cases be the county, district, town or city in which such property may be physically located on the tax day. However, the situs for purposes of assessment of motor vehicles, travel trailers, boats and airplanes as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked. Any person domiciled in another state, whose motor vehicle is principally garaged or parked in this Commonwealth during the tax year, shall not be subject to a personal property tax on such vehicle upon a showing of sufficient evidence that such person has paid a personal property tax on the vehicle in the state in which he is domiciled. In the event it cannot be determined where such personal property, described herein, is normally garaged, stored or parked, the situs shall be the domicile of the owner of such personal property. However, in the event the owner of the motor vehicle is a student attending an institution of higher education, the situs shall be the domicile of such student. Any person who shall pay a personal property tax on a motor vehicle to a county or city in this Commonwealth and a similar tax on the same vehicle in the state of his domicile may apply to such county or city for a refund of such tax payment. Upon a showing of sufficient evidence that such person has paid the tax for the same year in the state in which he is domiciled, the county or city may refund the amount of such payment.”


See Newport News v. Commonwealth, 165 Va. 635, 642, 183 S.E. 514, 516-17 (1936) (no controlling reason why doctrine of mobilia sequuntur personam should not apply to determine situs of floating property between two states, as well as between two localities within one state). Also, see footnote 8 for a possible limitation on imposing a tax on property not located within the state during any portion of the tax year.

This result may subject a student to double taxation on his vehicle if the out-of-state jurisdiction has statutory authority to impose a tax on the vehicle and does not provide an exception, as § 58.1-3511(A) provides, for those who pay a tax on the vehicle in their state of domicile. There is no constitutional barrier to the double taxation of property that has acquired a taxable situs in more than one state. See Citizens National Bank v. Durr, 257 U.S. 99, 109-10 (1921); Op. Va. Att’y Gen.: 1993 at 263, 264; 1990 at 264, 265. One exception is property permanently and continuously located outside the boundaries of a state for the entire taxable period. See Northwest Airlines v. Minnesota, 322 U.S. 292, 298-300 (1944).

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. - SITUS FOR TAXATION.

MOTOR VEHICLES: TITLING AND REGISTRATION OF MOTOR VEHICLES - STATE AND LOCAL MOTOR VEHICLE REGISTRATION.
Local tax official must consider and weigh all relevant facts in determining whether locality in which college or university student is registered to vote constitutes student's domicile for purposes of imposing motor vehicle license fees and personal property taxes. Person's domicile is matter of subjective intent known only to that person.

January 9, 1995

The Honorable Madison E. Marye
Member, Senate of Virginia

You ask whether the locality in which a student of a college or university is registered to vote constitutes such student's domicile for purposes of imposing motor vehicle license fees and personal property taxes. You ask also whether a registrar may conclude that such a student applicant is not domiciled in the registrar's jurisdiction if the student states that he pays motor vehicle license fees and personal property taxes in another jurisdiction.

Domicile is composed of two elements: physical residence in a geographic location and an intent to remain there. For voter registration purposes, the local registrar determines a person's domicile on the basis of objective criteria that either confirm or rebut the person's stated subjective intent. The local tax official determines the situs of a motor vehicle for local license and personal property taxation purposes, including, in the appropriate instance, the domicile of the owner of the vehicle.

A registrar may make any inquiry reasonably necessary to determine the qualification of an applicant to register and vote in the registrar's jurisdiction, including inquiries relating to the applicant's domicile. Section 24.2-101 provides that the payment of taxes is only one factor for the registrar to consider in determining domiciliary intent for purposes of voter registration. Likewise, this Office has concluded that voter registration is only one factor for a commissioner of the revenue to consider in determining domicile for purposes of subjecting a person's property to taxation.

To conclude that, for purposes of property taxation, a person establishes domicile by registering to vote in a locality, or that, for purposes of voter registration, a person establishes domicile by paying personal property taxes or license fees in a locality, misconstrues the concept of domicile. A person's domicile is essentially a matter of subjective intent known only to the person. While others may consider a person's actions as evidence of the person's domiciliary intent, it is important to recognize that the actions alone do not establish domicile. Thus, while registering to vote constitutes evidence of a person's domiciliary intent, a person does not establish domicile by registering to vote.
Likewise, a person does not establish domicile in a locality by paying personal property
taxes or license fees on a motor vehicle in the locality.

Domiciliary intent is a factual matter to be determined on a case-by-case basis by
considering and weighing all relevant facts. In making a determination under §§ 58.1-3511(A) and 46.2-752(A)(9) of the domicile of a student attending a college or university, a local tax official may, depending on the circumstances, place more or less weight on whether the student is registered to vote in the locality. A registrar also may place more or less weight on where the student pays motor vehicle license fees and personal property taxes and may, in fact, deem such to be a deciding factor in the ultimate determination of domicile. It is my opinion, however, that in neither case is the determination of domicile to be based solely on any one factor, but on a consideration and weighing of all relevant facts.

See Cooper's Adm'r v. Commonwealth, 121 Va. 338, 346-48, 93 S.E. 680, 682-83 (1917); 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 351-60 (1974) (discussing “residence” language in Article II, § 1 of 1971 Virginia Constitution). Professor Howard explains that, although the 1902 Constitution did not define “residence,” the Virginia courts consistently had equated residence with domicile for voting purposes. Id. at 351. In the 1971 revision, there was a concern that the concept of residency continue to be so interpreted. Id. at 351-52. The revisers wanted to avoid the redundancy in the language “residence and domicile,” and, therefore, defined “residence” as domicile. Id. at 352; see also REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 108 (1969).

3See 1971–1972 Op. Va. Att'y Gen. 165, 166; id. at 199, 200.; see also Auerbach v. Rettalata, 765 F.2d 350, 354 (2d Cir. 1985) (subjecting students as members of transient class to more searching inquiry to determine voter eligibility does not violate Equal Protection Clause of U.S. Constitution if students are not denied reasonable opportunity to establish residency).
6For example, if a student moves his voter registration from one locality to the locality in which he is attending school, this action may be strong evidence of an intent to abandon a previous domicile and to establish a new domicile. See Dotson v. Commonwealth, 192 Va. 565, 571-72, 66 S.E.2d 490, 493-94 (1951); see also Op. Va. Att'y Gen.: 1984–1985, supra note 3, at 363 (despite presumption that retains prior domicile, member of military may voluntarily change domicile to locality in which physically present by reason of military orders); 1971–1972, supra note 4 (student is not precluded from becoming resident of locality where attends school).
7You ask also whether there is any impediment to a change in §§ 58.1-3511(A) and 46.2-752(A)(9) to provide explicitly that the jurisdiction in which a student is registered to vote may impose license fees and personal property taxes on a motor vehicle owned by the student.
While I am aware of no express prohibition against such a change in the law, I am unable to assess potential legal challenges to legislation without specific legislation to review.

TAXATION: TANGIBLE PERSONAL PROPERTY - SPECIAL PROVISIONS FOR MOBILE HOMES — REAL PROPERTY TAX - REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE.

At 1995 reassessment of real property, commissioner of revenue must assess manufactured homes installed on land at same time real estate is assessed, using fair market value method. After completion of reassessment, commissioner must assess any manufactured home not previously assessed in locality and add value to previously charged land value.

April 7, 1995

The Honorable Joyce A. Fuller
Commissioner of the Revenue for Franklin County

You ask whether local assessments of the value of manufactured homes conducted pursuant to § 58.1-3522 of the Code of Virginia,¹ are to be made as of July 1, 1994, the effective date of the statute, or whether values previously assessed remain valid until the next general reassessment period.

You relate that reassessments in Franklin County are conducted every six years, pursuant to the provisions of § 58.1-3252,² and the county has scheduled a reassessment for 1995. In addition, Franklin County historically has used the fair market value method of assessing manufactured homes. This method normally results in an annual decrease in the value of most units. Section 58.1-3522 requires that assessments on manufactured homes be made at the same time as the real estate on which it is installed, by using the same methods applied to improvements assessed in accordance with Article 7, Chapter 32 of Title 58.1, §§ 58.1-3280 through 58.1-3294.

Section 58.1-3281 provides that each commissioner of the revenue shall ascertain annually all real estate in his locality, and before making out his land book, the commissioner shall assess the value of any building not previously assessed. “The value shall be added to the value at which the land was previously charged.” Id.

It is my opinion that if you have scheduled the reassessment of real estate in the locality for the 1995 tax year, any manufactured homes installed on the real property should be assessed at the same time. Such homes shall be assessed in the same manner and using the same methods as applied to improvements and buildings assessed in accordance with Article 7, Chapter 32 of Title 58.1.³ Any manufactured home installed in the
locality after the reassessment has been completed must be assessed under the provisions of § 58.1-3281.

1Section 58.1-3522 provides that “[m]anufactured homes ... shall be assessed at the same time as the assessment of the real property on which the manufactured home is installed. Such homes shall be assessed in the same manner and using the same methods applied to improvements and buildings which are assessed in accordance with Article 7 (§ 58.1-3280 et seq.) of Chapter 32 of [Title 58.1].”

2Section 58.1-3252 provides that “[a]ny county which ... has a total population of 50,000 or less may elect by majority vote of its board of supervisors to conduct its general reassessments at either five-year or six-year intervals.”

3See supra note 1.

TAXATION: TAXATION OF PUBLIC SERVICE CORPORATIONS.

Taxing property classified as machinery and tools, which is encompassed within the federal definition of “commercial and industrial property,” at rate of $20 per 100 of assessed value while taxing motor carrier tractors and trailers at rate of $4.25 per $100 of assessed value violates federal law. State tax rate on rolling stock of certificated motor vehicle carriers that does not exceed rate applied to “commercial and industrial property” does not violate federal law.

January 9, 1995

The Honorable Natalie Cather Miller
Commissioner of the Revenue for Frederick County

You ask whether the Frederick County taxing practice of assessing a personal property tax on motor transportation property at the rate of $4.25 per $100 of assessed value, a tax rate greater than that utilized for either the state rolling stock tax under §§ 58.1-2652 and 58.1-2658 or the local machinery and tools tax under § 58.1-3507 of the Code of Virginia, contravenes § 11503a(b)(3), a portion of the Interstate Commerce Act, as revised by § 31(a)(1) of the Motor Carrier Act of 1980.

You relate that Frederick County assesses the cab and chassis of all tractor-trailer trucks using the Hunter-McLean Truck Blue Book, and assesses the trailer of all tractor-trailers by the percentage of original cost method. Frederick County applies the county personal property tax rate of $4.25 per $100 to the assessed value of both the vehicles. When a motor carrier property taxpayer provides evidence to the county that such vehicles are subject to personal property taxes in any other state(s), the personal property tax on the vehicles is apportioned according to the requirements of the Virginia Code. The county machinery and tools tax rate is $2 per $100 of assessed value and the state rolling stock tax rate is $1 per $100 of assessed value.
It is a general rule of statutory construction that words in a statute are to be given their usual, commonly understood meaning. When the language of a statute is clear and unambiguous, rules of statutory construction are not required.

"The plain meaning of Section 31 [current § 11503a] is to prohibit discrimination against motor carrier transportation property vis-a-vis other commercial and industrial property generally." The district court found in Cochran that "much, indeed most, of the property within the Section 31 definition of 'commercial and industrial property' [was improperly] taxed by the State of Tennessee at a rate much lower than that assessed on motor carrier transportation property."

The definition in § 11503a(a)(4) of "commercial and industrial property" as property "devoted to a commercial or industrial use" is broad and encompassing. Tangible personal property classified as "machinery and tools" under § 58.1-3507(A) appears to be encompassed within the definition of "commercial and industrial property" in § 11503a(a)(4). Given the broad definition in § 11503a(a)(4), property classified as "machinery and tools" likely would be encompassed within the definition of "commercial and industrial property." The Frederick County personal property tax rate applied to the motor carrier property is higher than the machinery and tools tax rate for property that would be encompassed within the § 11503a(a)(4) definition of "commercial and industrial property." It is my opinion, therefore, that the taxation of property classified as machinery and tools, which is encompassed within the broad definition of "commercial and industrial property" contained in § 11503a(a)(4), at the rate of $2 per $100 of assessed value while taxing motor carrier tractors and trailers at the rate of $4.25 per $100 of assessed value violates the provisions of § 11503a(b)(3).

Section 58.1-2652(A) provides for the imposition of "[t]he state tax on the rolling stock of a railroad, a freight car company and a certificated motor vehicle carrier, doing business in this Commonwealth." Taxpayers that are certificated motor vehicle carriers are subject to the state rolling stock tax rate of $1 per $100 of assessed value and, pursuant to § 58.1-2658, are not subject to local property taxes. Since the rolling stock tax rate does not exceed the rate applied to "commercial and industrial property," that tax rate does not violate § 11503a(b)(3).

1A prior opinion of the Attorney General concludes that "[t]o satisfy the 'subject to taxation on an apportioned basis' requirement of § 58.1-3511(B), the common carrier need show only that the property in question has a tax situs in another jurisdiction as well as in Virginia." 1987-1988 Op. Va. Att’y Gen. 578, 587 (§ 58.1-3511(B) does not require proof of actual apportioned assessment of taxes or payment of such taxes in another state).


Ilid.

6A prior opinion of the Attorney General defines "machinery" as "a complex combination of mechanical parts," and "tool" as "an instrument of manual operation, that is, an instrument to be
used and managed by the hand instead of being moved and controlled by machinery."

1987–1988
Op. Va. Att’y Gen. 590, 591 (Department of Taxation interprets phrase “machinery and tools used in a manufacturing business” to include machinery and tools that are necessary in particular manufacturing business and are used in connection with operation of machinery actually and directly used in manufacturing process).

TAXATION: TAXATION OF PUBLIC SERVICE CORPORATIONS — LICENSE TAXES.

Public service corporations that conduct several separate business activities, which are ancillary to providing applicable utility service, are assessed public utility rate of one-half of one percent of total corporate gross receipts, consistent with statutory definition of “gross receipts.”

May 19, 1995

The Honorable J. Ronnie Minter
Commissioner of the Revenue for the City of Martinsville

You ask whether public service corporations in your locality that conduct several different types of business activities, including the sale of merchandise and repair services, in addition to providing public utilities, should be assessed the public utility rate for local license tax purposes on all of the business activities, or whether each business activity may be assessed at the rate applicable for such activities based on the locality’s ordinance.

Section 58.1-3703(B)(1) of the Code of Virginia provides that no local license tax shall be assessed “[o]n a public service corporation except as provided in § 58.1-3731 or as permitted by other provisions of law.” I am aware of no other provision that authorizes a local tax on public service corporations. When a statute is expressed in plain and unambiguous terms, whether general or limited, the legislature is assumed to mean what it plainly has expressed, and no room is left for construction. Section 58.1-3731, therefore, permits localities to impose a single tax at a single rate not to exceed one-half of one percent on all of the gross receipts of public service corporations.

As to the proper measurement of the gross receipts of a public service corporation which, in addition to selling utilities, engages in sales of merchandise and services, the Supreme Court of Virginia has said that “[t]he words ‘gross receipts’ mean ‘whole, entire, total receipts’” of a business. This definition is consistent with the definition of “gross receipts” contained in § 58.1-2600, a part of Chapter 26 of Title 58.1, which is the basis for state taxation of public service corporations. The General Assembly defines “gross receipts” in that section as “the total of all revenue derived in the Commonwealth,
including ... income from the provision or performance of a service or the performance of incidental operations not necessarily associated with the particular service performed, without deductions ...."

The same result is appropriate with respect to the local tax imposed pursuant to § 58.1-3731. The Supreme Court of Virginia has held that a city may not divide a business into two parts and tax each part of that business separately. In addition, the Court has ruled that a company will be classified as engaging in a single business activity if a substantial portion of the business it conducts consists of that activity. When a substantial portion of the business activity of a public service corporation is providing the applicable utility service, other separate business activities are merely ancillary to that purpose.

Accordingly, I am of the opinion that public service corporations that conduct several separate business activities should be assessed the public utility rate of one-half of one percent of the total gross receipts of the corporation, consistent with the definition of "gross receipts" contained in § 58.1-2600.

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1 The public utility rate is one-half of one percent of the gross annual receipts from sales to the ultimate consumer in the city. See VA. CODE ANN. § 58.1-3731.
2 For example, sales of merchandise are to be taxed at the retail merchant rate of "twenty cents per $100 of gross receipts" and repair services at the repair service rate of "thirty-six cents per $100 of gross receipts." Section 58.1-3706(A)(2), (4).
3 A prior opinion of the Attorney General clarifies that the exemption provided in § 58.1-3703(B)(1) is limited to motor vehicle carriers that have obtained a certificate of public convenience and necessity from the State Corporation Commission. 1987-1988 Op. Va. Att'y Gen. 578, 585.
4 Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).
5 Section 58.1-3731 authorizes localities "to impose a license tax ... on (1) telephone and telegraph companies, (ii) water companies and (iii) heat, light and power companies at a rate not to exceed one-half of one percent of the gross receipts of such company accruing from sales to the ultimate consumer in such county, city or town."
7 Hill v. City of Richmond, 181 Va. 744, 26 S.E.2d 48 (1943) (state classification of business as wholesale merchandise brokers is binding on city, which may not tax part of brokerage business that includes buying and selling on broker's own account and part devoted to selling merchandise on commission).
8 County of Chesterfield v. BBC Brown Boveri, 238 Va. 64, 380 S.E.2d 890 (1989) (business classified as manufacturer does not lose its tax status because it conducts some ancillary nonmanufacturing activities).
TAXATION: TAXATION OF PUBLIC SERVICE CORPORATIONS — LICENSE TAXES.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

CORPORATIONS: VIRGINIA STOCK CORPORATION ACT.

Charter tour bus company holding certificate of public convenience and necessity for special or charter party carrier does not operate such carriers over regular routes, and is not "certificated motor vehicle carrier" exempt from personal property taxation. Charter party carrier is not public service corporation for purposes of local license tax exemption, and is not exempt from such tax.

February 3, 1995

The Honorable Marsha Compton Fielder
Commissioner of the Revenue for the City of Roanoke

You ask whether a charter tour bus company that has a certificate of public convenience and necessity for a special or charter party carrier is exempt from the requirements of both obtaining a city business license and paying business personal property tax.

Article X, § 4 of the Constitution of Virginia (1971) segregates for local taxation "tangible personal property, except the rolling stock of public service corporations." This provision does not prohibit localities from taxing rolling stock. It merely permits rolling stock to be taxed by the state.1 Chapter 26 of Title 58.1, §§ 58.1-2600 through 58.1-2690, provides for "Taxation of Public Service Corporations." Section 58.1-2658 provides that “[n]o local property taxes shall be imposed upon the rolling stock of a certificated motor vehicle carrier.” The term "certificated motor vehicle carrier" is defined in § 58.1-2600 as “a common carrier by motor vehicle operating over regular routes under a certificate of public convenience and necessity issued by the [State Corporation] Commission.” (Emphasis added.)

Therefore, because a charter tour bus company holding a certificate of public convenience and necessity for a special or charter party carrier does not operate over regular routes, I am of the opinion that it is not a certificated motor vehicle carrier within the meaning of § 58.1-2600, and, therefore, is not exempt from personal property taxes under § 58.1-2658.

Section 58.1-3703(B)(1) provides that “[n]o county, city, or town shall levy any license tax” “[o]n any public service corporation except as provided in § 58.1-3731[2] or as permitted by other provisions of law[.]”

The term “public service corporation” is not defined for license tax purposes. Section 13.1-620(F), however, provides that “[w]hether or not classified elsewhere in the
Code as public service companies the following businesses are not required to incorporate as public service companies: ... charter party carriers, restricted parcel carriers [and] sight-seeing carriers[.]

A charter party carrier, therefore, is not required to incorporate as a public service corporation. In addition, charter party carriers are not considered public service corporations for purposes of assessment and taxation under Chapter 26 of Title 58.1. Consequently, it is my opinion that charter party carriers are not "public service corporations" for purposes of the exemption from local license tax imposed under § 58.1-3703(B)(1), and are not exempt from local license tax.

2The exception in § 58.1-3731 is not applicable to your request.

WELFARE (SOCIAL SERVICES): ADOPTION.

Attorney who represents birth mother is not prohibited from assisting her in locating prospective adoptive families. Attorney may not charge for such services; may only charge usual and customary fees for legal services relating to adoption proceedings.

February 10, 1995

The Honorable Bernard S. Cohen
Member, House of Delegates

You ask whether an attorney who represents a birth mother in Virginia is prohibited under the provisions of § 63.1-220.4 of the Code of Virginia from assisting that birth mother in locating prospective adoptive parents.

You advise that the assistance provided by the attorney includes obtaining for the birth mother copies of home studies, profiles and other information about prospective adoptive families that meet her criteria. The attorney charges a fee for legal services required by and related to the ultimate adoption proceeding, but does not charge a fee for assisting the birth mother locate potential adoptive families.

"In Virginia, the whole field of adoption is covered by legislative action ...."1 Virginia's laws governing adoption are contained in Chapter 11 of Title 63.1, §§ 63.1-220 through 63.1-238.02. Section 63.1-220.1 provides the authority for certain individuals and entities to place a child for adoption.2 A licensed child-placing agency is authorized to place a child for adoption; however, a private individual, other than the child's parent or legal guardian, is not specifically authorized to place a child for adoption. Under accepted rules of statutory construction, the mention of one item in a statute implies the exclusion of another.3 Therefore, an attorney in Virginia may not place a child for adoption without first obtaining a license as a child-placing agency.
Historically, persons or organizations other than licensed child-placing agencies, local boards of social services and birth parents have been precluded from activities that involved locating adoptive families and placing children eligible for adoption with those families. The 1989 Session of the General Assembly, however, simultaneously deleted the “unauthorized placement activity” definition from § 63.1-220, and enacted § 63.1-220.4. Section 63.1-220.4 establishes the scope of activities that any person or child-placing agency may engage in for a fee. The restrictions contained in this section do not include assisting the birth mother with the logistics of the adoption, but do preclude charging fees other than those specifically allowed. These activities anticipate that individuals other than child-placing agencies, local departments of social services and birth parents may be involved in activities surrounding the placement of a child for an adoption. Therefore, an individual, including an attorney, who may not be authorized to place a child for adoption, may be involved in activities related to the placement of a child for adoption; however, remuneration specifically is restricted to usual and customary fees for legal services.

Accordingly, I am of the opinion that an attorney who represents a birth mother is not prohibited from assisting that birth mother in locating prospective adoptive families. The attorney, however, may not charge for such services, but may only charge the usual and customary fees for legal services relating to the adoption proceedings.

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2Section 63.1-220.1 provides:
“A child may be placed for adoption by:
“1. A licensed child-placing agency;
“2. A local board of public welfare or social services;
“3. The child’s parent or legal guardian if the placement is a parental placement as defined in § 63.1-220; and
“4. Any agency outside the Commonwealth which is licensed or otherwise duly authorized to place children for adoption by virtue of the laws under which it operates.”


5Section 63.1-220.4 provides: “No person or child-placing agency shall charge, pay, give, or agree to give or accept any money, property, service or other thing of value in connection with a placement or adoption or any act undertaken pursuant to this chapter except ... (v) usual and customary fees for legal services in adoption proceedings.... Any person or agency violating the provisions of this section shall be guilty of a Class 5 felony. The Commissioner [of Social Services] is authorized to investigate cases in which fees paid for legal services appear to be in excess of usual and customary fees in order to determine if there has been compliance with the provisions of this section.”

WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT — CHILD WELFARE, HOMES, AGENCIES, ETC. — LOCAL BOARDS OF PUBLIC WELFARE.


Local department of social services may release personal information contained in CPS complaint and foster care records to data subject who has legitimate interest in such information or records, or to authorized agent of such person, upon presentation of proper identification. Requester, other than person who is data subject, must justify need for information, which must be directly connected to administration of public welfare program. Release of information is mandatory when personal information concerning data subject is contained in agency records. Department exercises discretion in deciding appropriateness of releasing child abuse and neglect information that does not pertain to requester. Department may refuse access to records by data subject against whom are pending criminal charges arising out of events that gave rise to CPS investigation involving same child.

May 19, 1995

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

You ask several questions regarding the disclosure of records and other information maintained by local departments of social services under the provisions of §§ 63.1-53 and 63.1-209 of the Code of Virginia.

You relate that a local department of social services (“local department”) conducted a child protective services (“CPS”) investigation. A child, who was the subject of the CPS investigation, was placed in foster care. A number of reports and records concerning the placement of the child and the qualifications of the foster care parents also were compiled. You also relate that proceedings involving this CPS complaint and foster care matter have been concluded for a considerable period of time.

The mother of the child has sent letters requesting that the complete record or agency file be released to her agent, who is a member of the National Child Abuse Defense Resource Center. The mother has requested that the complainant’s name be obliterated from the files. You also relate that the mother no longer has legal custody of the child. The mother has not directly contacted the local department because she believes there may be an outstanding indictment against her in connection with the CPS investigation.
You first ask whether the local department may disclose records of CPS complaints and foster care placements to the agent of a requester pursuant to §§ 63.1-53\(^1\) and 63.1-209.

A person who is the subject of a CPS investigation or a foster care placement may obtain access to personal information under § 2.1-382(A)(3) of the Privacy Protection Act of 1976.\(^2\) Section 63.1-248.6:1(C) provides, however, for an automatic stay of access when a criminal charge is filed “for the same conduct involving the same victim.” The Privacy Protection Act provides that an agency shall release personal information to a data subject\(^3\) or his authorized agent upon receiving a request and proper identification.\(^4\) Such request may be made by mail, if in writing and accompanied by the proper identification.\(^5\) Significantly, the Privacy Protection Act does not define “authorized agent.” The Act, however, provides that a data subject may be accompanied by any person(s) of his choosing, who must furnish reasonable identification.\(^6\)

The State Board of Social Services (“State Board”), pursuant to its authority under § 63.1-25, has promulgated regulations regarding the confidentiality of CPS records.\(^7\) These regulations allow a data subject to exercise his Privacy Protection Act rights and demand to see all personal information contained in the case record related to himself.\(^8\) The right of access to the information may be exercised directly by the individual or by any authorized agent designated in writing.\(^9\) Accordingly, the local department must require proper identification from the data subject or his authorized agent before granting access to information in a CPS case.

An authorized agent, therefore, may request information on behalf of a person who has a “legitimate interest” in such information or records. The local department, however, must ascertain that an agency relationship exists and the extent of that agency relationship.\(^10\) In the facts you describe, a written statement by the mother that another identified individual is her agent for purposes of receiving personal information ordinarily would be sufficient. Once the agent is identified for such purpose, she may request and receive personal information about the data subject contained in the CPS complaint and foster care placement records on behalf of a person having a legitimate interest in the information under §§ 63.1-53\(^11\) and 63.1-209\(^12\) to the same extent as the person who has the right of access.

You next ask whether the local department has discretion to determine that a person no longer has a legitimate interest in CPS records or other information that is reasonably necessary for the conduct of investigations or the provision of services.

Generally, all records and other information of the local department are confidential and shall not be disclosed except to persons having a “legitimate interest” as specified in §§ 63.1-53 and 63.1-209(A).\(^13\) Federal regulations also safeguard the confidentiality of CPS records and records of welfare programs.\(^14\) If a parent who is the subject of a CPS investigation requests records or other information regarding anyone other than
himself, such as his child, he must have a "legitimate interest" in the records or other information. Ordinarily, a parent has a "legitimate interest" in records and information pertaining to his minor child. An exception usually exists when parental rights have been terminated. Another exception may exist when the child has been removed from custody of the parent in connection with a CPS investigation. Moreover, subject to the same exceptions, a parent with legal custody of a minor child ordinarily may operate as the legal agent of the child for purposes of exercising the child's Privacy Protection Act rights.

CPS records and other information may be disclosed to any person having a "legitimate interest" in these records "when in the judgment of the local department of social services such disclosure is in the best interest of the child who is the subject of the records." Persons having a "legitimate interest" in CPS records of local departments include:

(i) any person who is responsible for investigating a report of known or suspected abuse or neglect or for providing services to a child or family which is the subject of a report ...;

(ii) child welfare or human services agencies of the Commonwealth or its political subdivisions when those agencies request information to determine the compliance of any person with a child protective services plan or an order of any court;

(iii) personnel of the school or child day program as defined in § 63.1-195 attended by the child so that the local department can receive information from such personnel on an ongoing basis concerning the child's health and behavior, and the activities of the child's custodian; or

(iv) a parent, grandparent, or any other person when such parent, grandparent or other person would be considered by the local department as a potential caretaker of the child in the event the department has to remove the child from his custodian.\[16\]

If the local department releases confidential information to a person who meets one or more of the above descriptions, the department is "presumed to have exercised its discretion in a reasonable and lawful manner."\[17\]

The State Board's regulations also authorize disclosure to the following individuals and organizations: (1) the appropriate Family Advocacy Program representative of the United States Armed Forces; (2) an agency having the legal or designated authority to treat or supervise a child who is the subject of a complaint; (3) a police or other law enforcement agency investigating a report of known or suspected child abuse or neglect; (4) a physician who has before him a child who he reasonably suspects may be abused
or neglected; a person legally authorized to place a child in protective custody; (5) a parent, guardian or other person who is responsible for the welfare of a child who is the subject of a complaint; (6) a guardian ad litem of the child subject to a complaint; (7) a court upon its finding that access to such records may be necessary for determination of an issue before the court (with the public excluded); (8) a grand jury; (9) any appropriate state or local agency responsible for CPS; and (10) any person engaged in a bona fide research project if the information is absolutely essential to the research purpose. The local department may disclose such information only when the disclosure is in the best interest of the child. If the local department believes the release of information would be contrary to the child’s best interest, the department must deny the request. When the local department denies a request for access to records or other information, the requester may petition the courts to secure a court order requiring release of the information.

In addition to the foregoing circumstances in which the local department may exercise its discretion, the department is required to release certain CPS information (1) to the local Commonwealth’s attorney when the department is required to make a report; (2) to the medical examiner’s office; (3) when a court mandates disclosure; (3) to the complainant; and (4) to data subjects under the Privacy Protection Act. These disclosures are required, and no agency discretion is involved.

Although a person may have a “legitimate interest” in some CPS records, he may not have a legitimate interest in the entire record. The local department may release records only to the extent the purpose of the requested release is directly connected to the administration of a public welfare program. The local department, therefore, should require the requester to justify his need for the information so that the department may determine whether granting access is appropriate.

In the circumstances you describe, the mother is entitled to receive all personal information held by the local department about her, as a data subject. Beyond this, the local department must determine if the mother has a “legitimate interest” in any CPS and foster care case record or information not pertaining to her. If she has a “legitimate interest” and it would be in the best interest of the child to release such information, then the local department, in its discretion, may release the information. It is conceivable that a person could have a “legitimate interest” in information contained in the CPS and foster care placement records even though the case is closed and the local department no longer is providing services to the family.

It is my opinion, therefore, that the local department has discretion to decide whether to release child abuse and neglect information to a requester, or the agent of a requester, who has a “legitimate interest” in such information. Release of such information is mandatory when personal information concerning a data subject is contained in agency records. Access to the records may be granted to the requester, or his or her agent, upon presentation of proper identification. If, however, criminal charges are pending against the data subject arising out of the events that gave rise to the CPS
investigation involving the same child, the local department may refuse to grant access to the records pursuant to § 63.1-248.6:1(C).

1Prior opinions of the Attorney General conclude that under § 63.1-53 a person who has a “legitimate interest” does not have the right of access to “records” unless it is for a purpose that relates directly to the administration of the public welfare program. 1972-1973 Op. Va. Att’y Gen. 318, 319; see also 1973-1974 id. at 211. Additionally, a prior opinion of the Attorney General interprets the applicability of the Privacy Protection Act of 1976 to protect the names of individuals who are collateral sources of information in child abuse and neglect investigations. 1985-1986 Op. Va. Att’y Gen. 225. The 1995 Session of the General Assembly amended § 63.1-248.6:1(A) to reflect that in appeals of adverse decisions in child abuse or neglect proceedings, the identity of the reporter and collateral witnesses, and information that might endanger the child, are prohibited from being disclosed. Ch. 7, 1995 Va. Acts Reg. Sess. 23, 27.


3“The term ‘data subject’ means an individual about whom personal information is indexed or may be located under his name, personal number, or other identifiable particulars, in an information system.” Section 2.1-379(3).

4Section 2.1-382(A)(3).

5Section 2.1-382(A)(4)(b)(ii).

6Section 2.1-382(A)(4)(e).


8Id. § 7(b)(1)(e)(1), at 52.

9Id. § 7(b)(1)(e)(2).

10See 1A M.J. Agency § 24 (1993). Any unauthorized disclosure of information from a CPS case is a criminal offense. See § 63.1-126; see also 45 C.F.R. § 1340.14(i) (1994) (state required to enact law making unauthorized disclosure of records criminal offense).

11The first sentence of § 63.1-53 provides: “All records and statistical registries of the State Department of Social Services and of the local boards and other information, which records, registries and information pertain to assistance and services provided any individual, shall be confidential and shall not be disclosed except to persons having a legitimate interest in persons specified hereinafter and in § 63.1-209.”

12Section 63.1-209(A) provides, in part:

“The records of all child-welfare agencies and persons received or placed out by them and the facts learned by them concerning such persons and their parents or relatives, shall be confidential information, provided ... that it may be disclosed to any person having a legitimate interest in the placement of any such person.

“The local department of social services may disclose the contents of records and information learned during the course of a child protective services investigation or during the provision of child protective services to a family, without a court order and without the consent of the family, to a person having a legitimate interest when in the judgment of the local department of social services such disclosure is in the best interest of the child who is the subject of the records....

* * *

“Whenever a local department of social services exercises its discretion to release otherwise confidential information to any person who meets one or more of these descriptions, the local department shall be presumed to have exercised its discretion in a reasonable and lawful manner.”

Richmond is not required to, but may, adopt zoning ordinance to provide single-family zoning treatment to adult group homes for 8 or fewer unrelated, aged, infirm or disabled persons same as is provided in homes in county operating under county manager plan that house mentally ill, mentally retarded, or developmentally disabled persons. Richmond Aids Ministry may not operate unlicensed adult care residence for 8 unrelated adults. Ministry must satisfy all statutory and regulatory requirements to obtain licensure as ACR; may receive such license without obtaining hospice license if it does not provide intravenous therapy to its residents, but must obtain hospice licensure prior to ACR licensure if it intends to care for residents requiring intravenous drug therapy.

January 9, 1995

The Honorable Franklin P. Hall
Member, House of Delegates

You ask three questions concerning a residential facility for victims of acquired immune deficiency syndrome ("AIDS") that the Richmond AIDS Ministry ("RAM") proposes to locate in the City of Richmond in an area zoned for single-family residential use under the city's zoning ordinance. First, you ask whether a group home serving eight unrelated adults who are not mentally handicapped, mentally retarded or developmentally disabled, as referred to in § 15.1-486.3 of the Code of Virginia, will qualify as a
permitted use in a neighborhood zoned single-family residential. You also ask whether the Department of Social Services lawfully may issue a license to RAM to operate such a facility prior to that facility's licensure as a hospice. Finally, you ask whether RAM may lawfully operate an unlicensed facility for eight unrelated adults in a single-family residential zone.

Section 15.1-486.3(A) requires all localities to treat residential facilities housing "no more than eight mentally ill, mentally retarded, or developmentally disabled persons ... with one or more resident counselors or other staff persons" as single-family residences under their zoning ordinances. Section 15.1-486.3(B) requires counties operating under the county manager plan of government to treat residential facilities housing "no more than eight aged, infirm or disabled persons ... with one or more resident counselors or other staff persons" as single-family residences under their zoning ordinances. A group home serving eight unrelated adults who do not meet this criteria obviously would not qualify under § 15.1-486.3(A) for treatment as a single-family residence insofar as zoning is concerned. Since the City of Richmond is not a county operating under the county manager plan, the city is not required by § 15.1-486.3(B) to provide single-family zoning treatment to all adult group homes for eight or fewer aged, infirm or disabled persons.

Nothing in § 15.1-486.3, however, prohibits the City of Richmond or any other locality from adopting a zoning ordinance that provides group homes for aged, infirm or disabled persons the same authorization to locate in residential zones that § 15.1-486.3(A) requires for such homes housing mentally ill, mentally retarded, or developmentally disabled persons. Whether the City of Richmond has done so in this instance is an issue on which I must respectfully decline to render an opinion.\(^1\)

The 1994 Session of the General Assembly enacted Chapter 943, which authorizes the "implementation of a certain program for persons living with AIDS."\(^2\) The legislation authorizes the Department of Social Services to issue an adult care residence ("ACR") (formerly known as "home for adults") license to a facility caring for HIV/AIDS patients when the facility meets certain requirements. The legislation provides a low-cost alternative for the care of HIV-infected persons. The legislation also authorizes the facility to provide intravenous therapy, but only by entering into an agreement with a home health agency to administer such care. Normally, a facility licensed as an ACR is not allowed to care for individuals who need intravenous therapy.\(^3\)

To acquire an ACR license under this legislation, RAM would have to comply with the seven requirements set forth in Chapter 943.\(^4\) The sixth requirement provides that the Department of Social Services may issue an ACR license when the facility has been licensed pursuant to Article 7, Chapter 5 of Title 32.1. The State Health Commissioner licenses hospice programs; there is no hospice "facility" licensure. Any medical care facility that wishes to provide inpatient hospice programs first must be licensed as a hospital or nursing home. Otherwise, a hospice program, providing only outpatient
care, may be licensed as a “freestanding” hospice program. Such a program may provide hospice care to an individual residing in an ACR. Indeed, the Department of Health has no licensure jurisdiction over the residence of an individual merely because that individual receives hospice care. The State Health Commissioner has authority over the hospice care program to assure quality of the services provided.\(^6\)

An ACR is specifically not a medical care facility.\(^7\) As a residential facility, it is licensed by the Commissioner of Social Services,\(^8\) and the State Board of Social Services considers the adequacy of the building and the staff, facility design, services provided to residents and the health and welfare of the residents.\(^9\) Chapter 943 would require RAM to implement an outpatient hospice program if it wanted to provide intravenous therapy as an exception to § 63.1-174.001(B)(3), and to have such program licensed by the Department of Health. Clearly, Chapter 943 requires such hospice licensure prior to the Department of Social Services’ issuing an ACR for that purpose.

RAM does not have to apply for an ACR license pursuant to the program established by Chapter 943. RAM may apply for an ACR license under the existing ACR licensing provisions in §§ 63.1-172 through 63.1-182.1. I am of the opinion that RAM may receive an ACR license without obtaining a hospice license if it does not intend to care for residents who require intravenous drug therapy. RAM must, however, satisfy all of the statutory and regulatory requirements for an ACR. I am also of the opinion that RAM must obtain hospice licensure before the Department of Social Services may issue an ACR license pursuant to Chapter 943 if it intends to care for residents who require intravenous drug therapy.

A license must be obtained for an ACR to house a combined total of four or more persons.\(^10\) Therefore, it is my opinion that RAM may not operate an unlicensed ACR for eight unrelated adults. Insofar as you ask whether the location of such a facility in a neighborhood zoned single-family residential would violate any ordinance of the City of Richmond, I must again decline to give an opinion requiring interpretation of the applicable city ordinances.\(^11\)

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1For many years, Virginia Attorneys General consistently have concluded that § 2.1-118 does not authorize the Attorney General to render opinions construing or applying local ordinances. See, e.g., Op. Va. Att’y Gen.: 1993 at 173, 176 n.1; id. at 151, 153 n.1; 1991 at 30, 31; 1977-1978 at 484; 1976-1977 at 17.


3See § 63.1-174.001(B)(3).


5See § 32.1-162.3.

6See § 32.1-162.3(D) (providing for State Health Commissioner’s inspection and examination of hospice’s activities and services to determine compliance with provisions of Article 7, Chapter 5 of Title 32.1 and regulations of State Board of Health, for purposes of issuance or renewal of hospice license).

7See § 63.1-172 (definition of “adult care residence”).
Upon request from Department of Social Services, commissioners of revenue must provide Department with names, social security account numbers, addresses and types of licenses of individuals who have business licenses on file in their offices. Commissioners are required to provide Department with information pertaining to holders of professional licenses identified by Department as noncustodial parents who are failing to support their children.

August 2, 1995

The Honorable Audrey T. Brooks
Commissioner of the Revenue for City of Fredericksburg

You ask whether § 63.1-274.6 of the Code of Virginia requires commissioners of the revenue to provide, upon request, to the Division of Child Support Enforcement, Department of Social Services, the names, social security account numbers, addresses and types of licenses of all individuals who have business licenses on file in the commissioners' offices.¹

You advise that a district manager of the Division of Child Support Enforcement Programs, Department of Social Services, has requested that you identify and locate individuals responsible for the support of their children for the purpose of enforcing an order for support. Furthermore, you advise that, pursuant to § 63.1-274.6, the district manager asked for the names, social security account numbers, addresses, and types of licenses of individuals who have business licenses on file with your office. Finally, you advise that your office does not have a compilation of such a listing, and, further, that you understand § 58.1-3 to prohibit you from providing such blanket information.²

Section 58.1-3 contains a broad prohibition on the disclosure of information obtained by a commissioner of the revenue in the course of his public duty. Unless there
is an express statutory exception, a commissioner may not disclose information about the transactions, property, income or business affairs of any taxpayer. That general rule applies, "[e]xcept in accordance with proper judicial order or as otherwise provided by law."  

The 1988 Session of the General Assembly, however, amended Chapter 13 of Title 63.1 by adding §§ 63.1-274.1 through 63.1-274.9. The stated intent of the General Assembly in Chapter 13 is "to promote the efficient and accurate collection, accounting and receipt of support for financially dependent children and their custodians, and to further the effective and timely enforcement of such support." In § 63.1-274.6, the General Assembly requires agencies and officers to supply the requested information, "notwithstanding any provision of law making such information confidential."  

When these two provisions are read together, there is no conflict between § 63.1-274.6 and § 58.1-3, because the information requested is authorized by law, i.e., § 63.1-274.6. Accordingly, it is my opinion that, upon request pursuant to § 63.1-274.6 by the Division of Child Support Enforcement, Department of Social Services, commissioners of the revenue shall provide the names, social security account numbers, addresses and types of licenses of all individuals who have business licenses on file in their offices.  

Unlike the provisions of The Virginia Freedom of Information Act, § 63.1-274.6 does not specifically identify the information that must be provided other than "all information on hand relative to the location, income and property of such responsible persons." In construing a statute, "statutory words must be given the meaning they have acquired from customary usage." In the absence of a statutory definition, ... a statutory term is given its ordinary meaning, given the context in which it is used." The use of the term "on hand" in § 63.1-274.6 is reasonably understood to mean information maintained by your office and accessible to you.  

Accordingly, it is my opinion that commissioners of the revenue are required to provide to the Department of Social Services information in their office files pertaining to the holders of professional licenses identified by the Department as noncustodial parents who are failing to support their children.

1Section 63.1-274.6 provides, in part, that "the Commissioner [of the State Department of Social Services] may request from state, county and local agencies all information and assistance as authorized by [Chapter 13 of Title 63.1]. All state, county and city agencies, officers and employees shall cooperate in the location of responsible persons who have abandoned or deserted, or are failing to support, children and their caretakers and shall on request supply the Department [of Social Services] with all information on hand relative to the location, income and property of such responsible persons, notwithstanding any provision of law making such information confidential."

2Section 58.1-3(A) provides that, "[e]xcept in accordance with proper judicial order or as otherwise provided by law, the Tax Commissioner or agent, clerk, commissioner of the revenue,
treasurer, or any other state or local tax or revenue officer or employee, or any former officer or
employee of any of the aforementioned offices shall not divulge any information acquired by him
in the performance of his duties with respect to the transactions, property, including personal prop-
erty, income or business of any person, firm or corporation.”

Section 58.1-3(B), however, provides that “[t]his section shall not be construed to prohibit a
local tax official from disclosing whether a person, firm or corporation is licensed to do business
in that locality.” (Emphasis added.) Therefore, § 58.1-3(B) allows disclosure of the names of
persons who are licensed to do business in that locality.

3Section 58.1-3(A).

4Id.


6Section 63.1-249.

7Chapter 21 of Title 2.1, §§ 2.1-340 through 2.1-346.1. The Virginia Freedom of Information
Act only requires release of documents maintained by an agency to a requester and does not
require the agency’s preparation of, or compilation of information from, documents in its
possession. See § 2.1-342(A).

Gen. 94, 96.

9Commonwealth v. Orange-Madison Coop., 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980);

WILLS AND DECESENTS’ ESTATES: DESCENT AND DISTRIBUTION —
ADMINISTRATION OF ESTATES.

Heirs at law include grand or great nieces and nephews who must be provided written
notice of qualification or probate by personal representative of decedent’s estate or
proponent of decedent’s will.

January 9, 1995

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

You ask whether grand or great nieces and nephews are to be considered heirs at
law and have to be provided written notification of qualification or probate by a personal
representative of a decedent’s estate or a proponent of a decedent’s will under the
provisions of § 64.1-122.2 of the Code of Virginia.

In ordinary usage, “heir at law” is defined as “[a]t common law, he who, after
his ancestor dies intestate, has a right to all lands, tenements, and hereditaments which
belonged to him or of which he was seised.”1 The term “heir at law” is held to be one
entitled by law to inherit by descent the real estate of a deceased person.2 Section 64.1-1
provides for the distribution of real estate of a person who dies intestate and, therefore,
establishes a decedent’s heirs at law in Virginia. Section 64.1-122.2(A)(2) requires a personal representative of a decedent’s estate or a proponent of a decedent’s will to provide written notice of qualification or probate to “[a]ll heirs at law of the decedent, whether or not there is a will.”

Included among a decedent’s heirs at law in Virginia are the decedent’s “brothers and sisters, and their descendants.” Great and grand nieces and nephews clearly are descendants of a decedent’s brothers and sisters. Accordingly, I am of the opinion that grand or great nieces and nephews, as heirs at law, are to receive the notice required by § 64.1-122.2.

3Section 64.1-1.
4See 1990 Op. Va. Att’y Gen. 92, 93 (term “descendant” refers to those who have issued from individual and include his children, grandchildren and their children to remotest degree).
<table>
<thead>
<tr>
<th>Name</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ambrogi, Lawrence R.</td>
<td>51</td>
</tr>
<tr>
<td>Armstrong, Ward L.</td>
<td>195</td>
</tr>
<tr>
<td>Ashby, Catherine V.</td>
<td>268</td>
</tr>
<tr>
<td>Behm, I. Vincent Jr.</td>
<td>91</td>
</tr>
<tr>
<td>Benedetti, Joseph B.</td>
<td>232</td>
</tr>
<tr>
<td>Brooks, Audrey T.</td>
<td>289</td>
</tr>
<tr>
<td>Brown, Douglas W.</td>
<td>61</td>
</tr>
<tr>
<td>Calhoun, Robert L.</td>
<td>77, 136</td>
</tr>
<tr>
<td>Callahan, Vincent F. Jr.</td>
<td>250</td>
</tr>
<tr>
<td>Carmichael, N. Everette</td>
<td>264</td>
</tr>
<tr>
<td>Carter, Robert R.</td>
<td>28</td>
</tr>
<tr>
<td>Chidester, Richard L.</td>
<td>180</td>
</tr>
<tr>
<td>Cohen, Bernard S.</td>
<td>279</td>
</tr>
<tr>
<td>Conner, Ray A.</td>
<td>253</td>
</tr>
<tr>
<td>Cox, M. Kirkland</td>
<td>203</td>
</tr>
<tr>
<td>Croshaw, Glenn R.</td>
<td>21, 238</td>
</tr>
<tr>
<td>Crouch, Joyce K.</td>
<td>33, 37, 155</td>
</tr>
<tr>
<td>Crowson, Charles D. Jr.</td>
<td>242</td>
</tr>
<tr>
<td>Deeds, R. Creigh</td>
<td>83</td>
</tr>
<tr>
<td>Dowd, Melissa Ann</td>
<td>74</td>
</tr>
<tr>
<td>Fielder, Marsha Compton</td>
<td>278</td>
</tr>
<tr>
<td>Foreman, Michael M.</td>
<td>59</td>
</tr>
<tr>
<td>Frey, John T.</td>
<td>103, 144</td>
</tr>
<tr>
<td>Fuller, Joyce A.</td>
<td>273</td>
</tr>
<tr>
<td>Goode, Virgil H. Jr.</td>
<td>95, 116, 123, 291</td>
</tr>
<tr>
<td>Griffith, Charles D. Jr.</td>
<td>69, 139</td>
</tr>
<tr>
<td>Guest, Raymond R. Jr.</td>
<td>88</td>
</tr>
<tr>
<td>Gwaltney, Joseph C.</td>
<td>114</td>
</tr>
<tr>
<td>Hall, Franklin P.</td>
<td>93, 189, 286</td>
</tr>
<tr>
<td>Hawkins, Charles R.</td>
<td>158</td>
</tr>
<tr>
<td>Houck, R. Edward</td>
<td>52</td>
</tr>
<tr>
<td>Hudson, W. Alvin</td>
<td>109</td>
</tr>
<tr>
<td>Ingram, Riley E.</td>
<td>265</td>
</tr>
<tr>
<td>James, Richard R.</td>
<td>121</td>
</tr>
<tr>
<td>Keating, Gladys B.</td>
<td>192</td>
</tr>
<tr>
<td>Kidd, Barnes Lee</td>
<td>130</td>
</tr>
<tr>
<td>Lewis, John Latané III</td>
<td>133</td>
</tr>
<tr>
<td>Marshall, Robert G.</td>
<td>164</td>
</tr>
<tr>
<td>Marye, Madison E.</td>
<td>270</td>
</tr>
<tr>
<td>Mathews, A.D. Sr.</td>
<td>224</td>
</tr>
<tr>
<td>May, Joe T.</td>
<td>72</td>
</tr>
<tr>
<td>McAfee, Timothy W.</td>
<td>106</td>
</tr>
<tr>
<td>McCabe, Robert J.</td>
<td>42</td>
</tr>
<tr>
<td>McCulla, Paul S.</td>
<td>100, 249</td>
</tr>
<tr>
<td>McDonnell, Robert F.</td>
<td>149</td>
</tr>
<tr>
<td>McSweeney, Patrick M.</td>
<td>146</td>
</tr>
<tr>
<td>Name</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Meadows, M. Bruce</td>
<td>170, 181</td>
</tr>
<tr>
<td>Meeks, W. Edward III</td>
<td>281</td>
</tr>
<tr>
<td>Melvin, Kenneth R.</td>
<td>41</td>
</tr>
<tr>
<td>Miller, Harold L.</td>
<td>260</td>
</tr>
<tr>
<td>Miller, Natalie Cather</td>
<td>274</td>
</tr>
<tr>
<td>Mims, William C.</td>
<td>1</td>
</tr>
<tr>
<td>Minter, J. Ronnie</td>
<td>276</td>
</tr>
<tr>
<td>Mullins, Norma E.</td>
<td>47</td>
</tr>
<tr>
<td>Napier, Douglas W.</td>
<td>44</td>
</tr>
<tr>
<td>Nuckles, Mitchell W.</td>
<td>254, 257</td>
</tr>
<tr>
<td>Parrish, Harry J.</td>
<td>2, 39, 225</td>
</tr>
<tr>
<td>Petty, William G.</td>
<td>22</td>
</tr>
<tr>
<td>Phillips, Clarence E.</td>
<td>97, 243</td>
</tr>
<tr>
<td>Phipps, Kennard L.</td>
<td>221</td>
</tr>
<tr>
<td>Reasor, Jackson E. Jr.</td>
<td>15</td>
</tr>
<tr>
<td>Reid, John S.</td>
<td>7</td>
</tr>
<tr>
<td>Reynolds, Wm. Roscoe</td>
<td>245</td>
</tr>
<tr>
<td>Roberts, John R.</td>
<td>111</td>
</tr>
<tr>
<td>Robinett, Thomas R.</td>
<td>240</td>
</tr>
<tr>
<td>Saunders, Gordon F.</td>
<td>11</td>
</tr>
<tr>
<td>Saunders, S.V.</td>
<td>46</td>
</tr>
<tr>
<td>Schewel, Elliott S.</td>
<td>160</td>
</tr>
<tr>
<td>Semonian, Edward</td>
<td>26</td>
</tr>
<tr>
<td>Shockley, Everett P.</td>
<td>141</td>
</tr>
<tr>
<td>Siegel, Daniel M.</td>
<td>66</td>
</tr>
<tr>
<td>Smith, J. Randolph Jr.</td>
<td>219</td>
</tr>
<tr>
<td>Stolle, Kenneth W.</td>
<td>118, 187</td>
</tr>
<tr>
<td>Stump, Jackie T.</td>
<td>235</td>
</tr>
<tr>
<td>Tucker, Henry T. Jr.</td>
<td>85</td>
</tr>
<tr>
<td>Turlington, E.L. Jr.</td>
<td>18</td>
</tr>
<tr>
<td>Tyler, Glen A.</td>
<td>57</td>
</tr>
<tr>
<td>Van Yahres, Mitchell</td>
<td>162</td>
</tr>
<tr>
<td>Vaughan, Robert P.</td>
<td>199</td>
</tr>
<tr>
<td>Waters, Gary W.</td>
<td>63</td>
</tr>
<tr>
<td>Wheat, James C. III</td>
<td>213</td>
</tr>
<tr>
<td>Wilkins, S. Vance Jr.</td>
<td>31</td>
</tr>
<tr>
<td>Woodrum, Clifton A.</td>
<td>4</td>
</tr>
<tr>
<td>Woods, Jane H.</td>
<td>205, 228</td>
</tr>
<tr>
<td>Zepkin, J.R.</td>
<td>34</td>
</tr>
</tbody>
</table>
ATTORNEY GENERAL AND DEPARTMENT OF LAW

ADMINISTRATION OF GOVERNMENT GENERALLY

Attorney General and Department of Law. Attorney General’s Office provides legal services in civil matters when there is no specific authorization for state entity to employ legal counsel ........................................ 213

Attorney General and Department of Law. Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement Act; all public funds must clear through Comptroller’s Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director’s salary without Governor’s approval. VRS must comply with Comptroller’s regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General . . . . . . . 213

Attorney General and Department of Law (criminal cases). 1995 statutory amendment will hold on-line communications entities or other cable networks culpable only when there is prior knowledge of transmission of computer-generated reproduction of sexually explicit digital image involving person under 18. Such entities have no affirmative legal duty to review such material in advance; are responsible only for actual knowledge of contents of materials they transmit ................................................ 136

Attorney General and Department of Law (official opinions of Attorney General). Attorney General does not interpret language of county ordinance as to whether park owner is actually selling water purchased from county water system ....................... 240

Attorney General and Department of Law (official opinions of Attorney General). Attorney General does not render opinions construing or applying local ordinances ...................... 286

Attorney General and Department of Law (official opinions of Attorney General). Attorney General has no power to invalidate statute ........................................ 164

Attorney General and Department of Law (official opinions of Attorney General). Attorney General is guided by doctrine that every presumption is to be made in favor of constitutionality of statute ......................................................... 170

Attorney General and Department of Law (official opinions of Attorney General). Attorney General should not declare statute unconstitutional unless certain beyond reasonable doubt that reviewing court would strike down statute ........................................ 164
### Administration of Government Generally

| Attorney General and Department of Law (official opinions of Attorney General). Attorneys General consistently have concluded that § 2.1-118 does not authorize Attorney General to render opinions construing or applying local ordinances | 286 |
| Attorney General and Department of Law (official opinions of Attorney General). Attorneys General historically have refrained from declaring statute unconstitutional unless its unconstitutionality is clear beyond reasonable doubt | 164 |
| Attorney General and Department of Law (official opinions of Attorney General). General Assembly is presumed to have acquiesced in long-standing opinions of Attorney General | 149 |
| Attorney General and Department of Law (official opinions of Attorney General). Legislature is presumed to have had knowledge of Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in Attorney General's view | 219, 225 |
| Attorney General and Department of Law (official opinions of Attorney General). 1973 opinion concluding that watershed improvement district is not subject to certain competitive bidding requirements of former § 11-17 is no longer valid. Competitive process requirements of current law apply generally to public bodies and are not limited to state agencies and water, sewer and sanitation authorities | 37 |
| Attorney General and Department of Law (official opinions of Attorney General). Office has long-standing policy of declining to render opinions interpreting local ordinances, to avoid becoming involved in matters solely of local concern and over which local governing body has control | 260 |
| Attorney General and Department of Law (official opinions of Attorney General). Opinions not rendered interpreting local ordinances. Reason for policy is to avoid becoming involved in matters solely of local concern and over which local governing body has control | 240 |
| Attorney General and Department of Law (official opinions of Attorney General). Propriety of circuit court's action on same question posed in official opinion request is not subject to Attorney General's review; must be treated as binding determination with regard to case before court | 15 |
| Attorney General and Department of Law (official opinions of Attorney General). Published opinions of Attorney General interpreting legislation are presumptively indicative of legislative intent | 219, 225 |
| Attorney General and Department of Law (official opinions of Attorney General). Section 2.1-118 does not authorize Attorney General to render opinions construing or applying local ordinances | 286 |
ADMINISTRATION OF GOVERNMENT GENERALLY (contd.)

Attorney General and Department of Law (official opinions of Attorney General). Three previously issued opinions do not accurately state current law addressing constitutionality of publicly transporting students to and from sectarian private schools ............. 149

Attorney General and Department of Law (official opinions of Attorney General). To extent 1990 opinion concludes that district court may allow private attorney employed by complainant to prosecute misdemeanor charge, when Commonwealth’s attorney or assistant is unable to do so, without express consent of Commonwealth’s attorney, it is overruled ........... 139

Attorney General and Department of Law (official opinions of Attorney General). To extent 1975 opinion implies that contractor not subject to business license tax in locality of his principal place of business is subject to tax in another locality in which he does business, even if gross receipts in that locality do not exceed $25,000, it is overruled ........... 245

Attorney General and Department of Law (official opinions of Attorney General). When Attorney General opines that statute violates Constitution, statute remains in force; Attorney General, in effect, is advising state agency to ignore statute ........................................ 164

Department of General Services - Division of Risk Management. General Assembly intended to provide constitutional officers with representation in actions not covered by Division of Risk Management’s tort liability insurance plan for constitutional officers; plan does not cover Commonwealth’s attorneys against whom disciplinary complaint has been filed with Virginia State Bar arising from discharge of official duties. Circuit court may, upon application made and good cause shown, order employment of attorney and payment of costs and legal fees, as appropriate for representation of Commonwealth’s attorney or assistant Commonwealth’s attorney against whom such disciplinary complaint has been filed ........ 69

Department of General Services - Purchases and Supply. Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement Act; all public funds must clear through Comptroller’s Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director’s salary without Governor’s approval. VRS must comply with Comptroller’s regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General ........ 213

Holidays and Special Days; Hours of Work, etc. Neither federal or state constitution nor state law requires public school divisions to refer to vacation period taken by public school students in late December of each year by secular terms; use of term “Christmas break” is not prohibited .................................................. 1
Holidays and Special Days; Hours of Work, etc. Recognizing Christmas Day and period surrounding it as official holidays in school calendar qualifies as permissible accommodation of religious practices ............................................ 1

Holidays and Special Days; Hours of Work, etc. Use of term “Christmas break” by county public schools to denote period of vacation taken by students in late December of each year, when schools customarily are closed is not prohibited ........................ 1

Personnel Administration. Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement Act; all public funds must clear through Comptroller’s Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director’s salary without Governor’s approval. VRS must comply with Comptroller’s regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General ................................. 213

Privacy Protection Act of 1976. Act protects names of individuals who are collateral sources of information in child abuse and neglect investigations ....................................... 281

Privacy Protection Act of 1976. Local department of social services may release personal information contained in CPS complaint and foster care records to data subject who has legitimate interest in such information or records, or to authorized agent of such person, upon presentation of proper identification. Requester, other than person who is data subject, must justify need for information, which must be directly connected to administration of public welfare program. Release of information is mandatory when personal information concerning data subject is contained in agency records. Department exercises discretion in deciding appropriateness of releasing child abuse and neglect information that does not pertain to requester. Department may refuse access to records by data subject against whom are pending criminal charges arising out of events that gave rise to CPS investigation involving same child ............................................... 281

State and Local Government Conflict of Interests Act. Corporation whose corporate officer is mayor or member of city council is prohibited from contracting with city’s public works department, unless exception to COI Act’s contract prohibitions applies .................. 2

Treasury, State Treasurer and Comptroller. Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget
and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement Act; all public funds must clear through Comptroller’s Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director’s salary without Governor’s approval. VRS must comply with Comptroller’s regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General.

Virginia Freedom of Information Act. Act does not authorize person to make continuing request for official records that are not in existence at time request is made.

Virginia Freedom of Information Act. Act provides citizen access to public records and to meetings of public bodies. General Assembly did not intend to expose to public scrutiny records of private corporations and businesses that contract with public bodies. Assembly did not intend for Act to apply to private corporation that receives public funds to pay for property, goods or services it provides, when corporation is not supported wholly or principally by public funds. Private corporation that has entered into management contract with Hotel Roanoke Conference Center Commission is not “public body” subject to Act.

Virginia Freedom of Information Act. Upon request from Department of Social Services, commissioners of revenue must provide Department with names, social security account numbers, addresses and types of licenses of individuals who have business licenses on file in their offices. Commissioners are required to provide Department with information pertaining to holders of professional licenses identified by Department as noncustodial parents who are failing to support their children.

**ADMINISTRATIVE PROCESS ACT**
(See COMMISSIONS, BOARDS AND INSTITUTIONS)

**ADOPTION**
(See WELFARE (SOCIAL SERVICES))

**AGRICULTURE, HORTICULTURE AND FOOD**

Slaughterhouses, Meat and Dressed Poultry - Virginia Meat and Poultry Products Inspection Act. Central kitchen of retail grocer prepares meals made from inspected product that are sold in grocer’s commonly owned retail outlets to customers for consumption in seating areas within outlets or for takeout, and are kept segregated from retail store’s inspected product; operations of kitchen do not involve slaughtering, canning, salting, packing or rendering of its meat products, and are not subject to continuous federal inspection. Central kitchen operation does not meet federal “retail store” exemption because kitchen is not place where products are sold to consumers; its operation is not exempt from continuous inspection because exemption applies only to operations at single retail establishments.
AGRICULTURE, HORTICULTURE AND FOOD (contd.)

Federal "restaurant" exemption is not limited to single establishment. Because retail grocer meets restaurant exemption, its central kitchen operation is exempt from continuous federal inspection .................................................... 7

Slaughterhouses, Meat and Dressed Poultry - Virginia Meat and Poultry Products Inspection Act. Retail establishments that do exclusively intrastate business in meat products are not similar to slaughtering, meat-packing, canning or rendering plant, and are not subject to federal inspection .................................................... 7

ALCOHOLIC BEVERAGE CONTROL ACT

Administration of Licenses. General Assembly intended concealed handgun permit holder to carry handgun only in area where possession is not specifically prohibited. Prohibition against carrying concealed handgun applies to any individual other than owner/sponsor or employees of business/event issued either on-, or on- and off-, premises license by ABC Board to sell or serve alcoholic beverages. Concealed handgun permit holder may carry concealed handgun into business licensed only to sell or serve alcoholic beverages in closed containers for off-premises consumption, unless specifically prohibited .................... 118

Administration of Licenses. Locality may not prohibit business licensed by ABC Board from selling alcoholic beverages on premises, because domain of control over alcoholic beverages is preempted by Commonwealth .............................................. 85

ATTORNEYS

(See also COMMONWEALTH'S ATTORNEYS; PROFESSIONS AND OCCUPATIONS: Attorneys; RULES OF SUPREME COURT OF VIRGINIA: Integration of the State Bar - Virginia Code of Professional Responsibility)

Attorney who represents birth mother is not prohibited from assisting her in locating prospective adoptive families. Attorney may not charge for such services; may only charge usual and customary fees for legal services relating to adoption proceedings .................... 279

Attorneys are not officers in sense that judge is officer, but are court officers and may be disciplined .................................................... 18

Court possesses inherent power to supervise conduct, both in and out of court, to point of reprimanding or removing attorney from office for misconduct .................... 18

Private attorneys may assist in prosecution of criminal case only with express consent of public prosecutor who must remain in continuous control of case .................... 139

Situations in which private attorneys are authorized to prosecute criminal charges are limited .................... 139
ATTORNEYS (contd.)

Use of "may" in statutory requirement for mailing of written notice to drawer that check has been refused does not limit permissible methods of mailing to use of registered mail, certified mail, or regular mail with sender retaining U.S. Postal Certificate of Mailing. Determination whether proof of mailing presented by plaintiff in action constitutes sufficient proof of mailing of such notice is factual matter to be made on case-by-case basis by trier of fact. Attorney's signature on certificate of mailing at bottom of written notice to drawer that above notice was mailed, postage prepaid, is representation by attorney, as officer of court subject to reprimand or removal from office for misconduct, that required mailing has been accomplished, and may be considered as sufficient proof by trier of fact that statutory notice has been mailed to drawer .......................................................... 18

When public prosecutor decides not to prosecute certain criminal charges, courts generally have no inherent authority to interfere with that decision by appointing private attorneys to prosecute such cases .......................................................... 139

AVIATION

Municipal and County Airports and Other Air Navigation Facilities. General Assembly has granted power of eminent domain to joint airport commission for safe and efficient operation of airport; has not granted commission power to relinquish, surrender or barter away that power. Absent legislative authority, commission may not surrender by court order its right to condemn tract of land required for public safety purposes ................................. 15

Municipal and County Airports and Other Air Navigation Facilities. 1960 joint airport agreement permits withdrawal by localities from joint airport authority at any time, provided that any obligation of any withdrawing localities shall remain outstanding until discharged. Members of withdrawing localities no longer may serve on authority. Authority will dissolve by operation of law if only one locality remains after other localities withdraw. Dissolution will occur by affirmative vote of majority of localities that formed authority, or by majority vote to amend 1960 agreement to provide for dissolution by amendment ................. 11

BAR, VIRGINIA STATE
(See RULES OF SUPREME COURT OF VIRGINIA: Integration of the State Bar)

CIVIL REMEDIES AND PROCEDURE

Actions. U.S. Postal Certificate of Mailing is equivalent to receipt for registered or certified mail .......................................................... 18

Actions. U.S. Postal Certificate of Mailing is example of sufficient proof of mailing of written notice to drawer that check has been refused when plaintiff uses regular mail; other items of proof will suffice, so long as such items provide sufficient proof of mailing ...... 18

Actions. Use of "may" in statutory requirement for mailing of written notice to drawer that check has been refused does not limit permissible methods of mailing to use of registered mail, certified mail, or regular mail with sender retaining U.S. Postal
Certificate of Mailing. Determination whether proof of mailing presented by plaintiff in action constitutes sufficient proof of mailing of such notice is factual matter to be made on case-by-case basis by trier of fact. Attorney's signature on certificate of mailing at bottom of written notice to drawer that above notice was mailed, postage prepaid, is representation by attorney, as officer of court subject to reprimand or removal from office for misconduct, that required mailing has been accomplished, and may be considered as sufficient proof by trier of fact that statutory notice has been mailed to drawer

Actions - Actions on Contracts Generally. Holder of bad check is entitled to claim from drawer of check, in addition to face amount of check, three statutorily prescribed amounts, one of which is processing charge limited to $20. Contract, whether express or implied, contravening statutory $20 limit would be void

Bad checks (see supra Actions - Actions on Contracts Generally)

Checks (see supra Actions - Actions on Contracts Generally)

Evidence - Medical Evidence. Medical facility may charge for expenses of retrieving, copying and mailing items provided in response to subpoena issued in criminal case at request of Commonwealth's attorney. Expenses associated with discreet individual criminal cases resulting from issuance of subpoena, and which are not incurred on continuing or predictable basis, properly may be considered expenses compensable by order of court, when authorized by statute and there is no designated source of payment other than state treasury from appropriations for criminal charges

Evidence - Medical Evidence. Patient has no property right in his own medical records, absent some state law that grants it

Evidence - Medical Evidence. Statutory provision for reimbursement of costs incurred in producing patient records does not expressly guarantee payment of such costs before delivery of documents

General Provisions as to Civil Cases. General Assembly has not authorized circuit court to require additional information for determining advisability of granting concealed handgun permit to applicant for reasons not enumerated in statute. Circuit court is prohibited from prescribing rule that is inconsistent with any statutory provision, or that has effect of abridging substantive right of persons appearing before such court. Court lacks authority to add exclusion to grant concealed handgun permit based on applicant's refusal to submit to psychosocial assessment or on results of such assessment. Court has no authority to require permit applicants to submit to psychosocial assessments

Injunctions. Clerk of Court of Appeals must charge $10 for filing of petition to review circuit court order denying concealed weapon permit
Personal Jurisdiction in Certain Actions. Nonresident defendant is within personal juris-
diction of Virginia courts when nonresident has performed act that purposefully avails it of
privilege of conducting activities within state, thus invoking benefits and protections of
state's laws. Nonresident defendants' conduct and connection with Virginia must be such
that defendants reasonably should anticipate being haled into Virginia court ............... 28

Personal Jurisdiction in Certain Actions. Nonresident defendants who enter into consumer
credit installment contracts in North Carolina with North Carolina company, and not with
Virginia company, have no contacts in Virginia. Valid service of process may not be
effected through use of Virginia's long-arm statute, because Virginia courts have no
personal jurisdiction over such defendants. Fact that nonresident defendants' only contact
with Virginia occurs from their mailing installment payments to Virginia plaintiff company
to whom North Carolina company subsequently transferred ownership of contracts is not
sufficient to consider defendants as having established minimum contacts in Virginia, thus
invoking benefits and protections of Virginia law. Defendants would not have expected
being haled into any Virginia court when they entered into contracts in North Carolina.
Venue for civil actions involving contract disputes with nonresident defendants who have
minimum contacts in Virginia would lie in county or city where plaintiff(s) reside ......... 28

Personal Jurisdiction in Certain Actions. Purpose of long-arm statute is to assert jurisdiction
over nonresidents engaged in purposeful activity in Virginia to extent permissible under due
process requirements .......................................................... 28

Personal Jurisdiction in Certain Actions. Scope of "transacting business" requirement of
long-arm statute is limited only by bounds of due process ........................................... 28

Uniform Enforcement of Foreign Judgments Act. Act authorizes circuit court clerks to
accept properly authenticated copies of nonmonetary foreign judgments, in addition to mone-
tary decrees or awards .......................................................... 26

Uniform Enforcement of Foreign Judgments Act. Foreign judgment, once docketed in Vir-
ginia circuit court pursuant to Act, becomes judgment of that court ............................... 26

Uniform Enforcement of Foreign Judgments Act. Purpose of Act is to give holders of
foreign judgment same rights and remedies as holders of domestic judgments and to expedite
relief .......................................................... 26

Venue. Clerk of court of original jurisdiction shall collect fees assessed at commencement
of civil action or chancery cause; clerk of circuit court to which venue of action or suit is
transferred may not charge additional filing fees. Circuit court receiving transferred case
retains right to assess costs, even though costs may have been assessed by transferor court.
Transferee clerk must assess costs against losing party upon final disposition of
case, as allowed by local ordinance .......................................................... 59
Venue. Nonresident defendants who enter into consumer credit installment contracts in North Carolina with North Carolina company, and not with Virginia company, have no contacts in Virginia. Valid service of process may not be effected through use of Virginia's long-arm statute, because Virginia courts have no personal jurisdiction over such defendants. Fact that nonresident defendants' only contact with Virginia occurs from their mailing installment payments to Virginia plaintiff company to whom North Carolina company subsequently transferred ownership of contracts is not sufficient to consider defendants as having established minimum contacts in Virginia, thus invoking benefits and protections of Virginia law. Defendants would not have expected being haled into any Virginia court when they entered into contracts in North Carolina. Venue for civil actions involving contract disputes with nonresident defendants who have minimum contacts in Virginia would lie in county or city where plaintiff(s) reside.

Clerks

Broad statutory language does not contemplate that locality may not use fees collected by circuit or district court clerk as part of costs assessed in civil, criminal, and traffic cases for jail maintenance expenses unless jail also contains additional court-related facilities.

Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected.

Clerk of Court of Appeals must charge $10 for filing of petition to review circuit court order denying concealed weapon permit.

Clerk of court of original jurisdiction shall collect fees assessed at commencement of civil action or chancery cause; clerk of circuit court to which venue of action or suit is transferred may not charge additional filing fees. Circuit court receiving transferred case retains right to assess costs, even though costs may have been assessed by transferor court. Transferee clerk must assess costs against losing party upon final disposition of case, as allowed by local ordinance.

Court may not waive jury costs required to be paid by defendant who pleads guilty after jury has been called, whether pursuant to plea agreement or otherwise. Defendant may be excused from paying costs required to be reimbursed to Commonwealth only when accused waives trial by jury, at least ten days before trial.

Fees and mileage allowances accruing to sheriff in connection with civil or criminal matter are collected by clerk of circuit or general district court in which case is heard.

Grand or great nieces and nephews are heirs at law who must receive written notification of qualification or probate by personal representative of decedent's estate.

Ten-dollar fee for processing application or issuing permit for concealed weapon is mandatory.
Clerks (contd.)

Uniform Enforcement of Foreign Judgments Act authorizes circuit court clerks to accept properly authenticated copies of nonmonetary foreign judgments, in addition to monetary decrees or awards ................................................................. 26

Commissioners of the Revenue

Apartment building/complex is not considered facility that provides nightly accommodations for transients. City of Fall Church is not authorized to impose transient room rentals tax on apartment facilities. City may not enact tax by charter that is prohibited by laws of Commonwealth ................................................................. 260

At 1995 reassessment of real property, commissioner must assess manufactured homes installed on land at same time real estate is assessed, using fair market value method. After completion of reassessment, commissioner must assess any manufactured home not previously assessed in locality and add value to previously charged land value ............... 273

Charter tour bus company holding certificate of public convenience and necessity for special or charter party carrier does not operate such carriers over regular routes, and is not “certificated motor vehicle carrier” exempt from personal property taxation. Charter party carrier is not public service corporation for purposes of local license tax exemption, and is not exempt from such tax ........................................ 278

Commissioner makes factual determination whether business is engaged in manufacturing and is exempt from local license tax ........................................ 47

Commissioner makes factual determination, on case-by-case basis, whether business is manufacturer for purposes of local license tax exemption .......... 47, 254, 257

Commissioner of revenue in each locality where portion of cemetery lies is responsible for regulating company that operates cemetery, regardless of location of company’s principal place of business ................................................................. 242

Exotic animals such as ostriches, giraffes, camels and monkeys do not fall within classification of “farm animals” exempt from taxation. Any doubt whether such animals fall within categories of exempt animals is to be resolved against allowing exemption. Determination is factual matter to be decided by local commissioner of revenue ............... 264

Limousine and executive sedan carries are subject to exclusive control, supervision and regulation by Department of Motor Vehicles, except that intracity or intratown operations are subject to licensing and regulatory authority of municipality that has adopted ordinance regulating such vehicles. Virginia Beach may, by ordinance, regulate limousine and executive sedans operated primarily, although not exclusively, within city’s corporate limits, by carrier located in city ................................................................. 199

Local governing bodies have no authority to create procedures for appeals from determinations of commissioner or revenue ........................................ 47
Local tax official determines domicile of student on case-by-case basis, considering all relevant facts. Student domiciled in Virginia but attending out-of-state institution remains subject to personal property tax on his vehicle in Virginia jurisdiction where he is domiciled. Situs for taxation of vehicle owned by student's parent is locality where vehicle is normally parked or garaged.

Locality may deny business license to individual operating sole proprietorship who fails to establish evidence of payment of delinquent taxes related to sole proprietorship; may not deny license to proprietor delinquent in payment of personal property taxes for property not used in business.

Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth's attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress.

Processes of electroplating and electropainting that do not involve transformation of raw material into product of substantially different character are not considered manufacturing for purposes of local license tax exemption. State agency has determined that process of electroplating is repair service.

Processes of pasteurization, homogenization, butterfat adjustment or vitamin fortification of, and addition of sugar and flavorings to, milk do not constitute manufacturing for purposes of local license tax exemption. Transformation of plain water into fruit-flavored liquid drink or sweetened tea through addition of flavored powders or powdered tea and sugar constitutes manufacturing for purposes of exemption from business license tax. Addition of water to orange juice concentrate is not manufacturing for purposes of assessing local business license taxes.

Public service corporations that conduct several separate business activities, which are ancillary to providing applicable utility service, are assessed public utility rate of one-half of one percent of total corporate gross receipts, consistent with statutory definition of "gross receipts.”

Taxing property classified as machinery and tools, which is encompassed within federal definition of "commercial and industrial property,” at rate of $20 per 100 of assessed value while taxing motor carrier tractors and trailers at rate of $4.25 per $100 of assessed value violates federal law. State tax rate on rolling stock of certificated motor vehicle carriers that does not exceed rate applied to "commercial and industrial property” does not violate federal law.
COMMISSIONERS OF THE REVENUE (contd.)

Upon request from Department of Social Services, commissioners of revenue must provide Department with names, social security account numbers, addresses and types of licenses of individuals who have business licenses on file in their offices. Commissioners are required to provide Department with information pertaining to holders of professional licenses identified by Department as noncustodial parents who are failing to support their children ................................................ 289

Voter registration is one factor to consider in determining domicile for purposes of subjecting person's property to taxation .......................................................... 270

COMMISSIONS, BOARDS AND INSTITUTIONS

Administrative Process Act. 1995 amendment removing authority of Board of Dentistry to recognize licenses issued by other jurisdictions as full or partial fulfillment of qualifications for licensure in Virginia does not apply to applications received before effective date of amendment—July 1, 1995; applications received by Board before July 1 should be processed according to law in effect before effective date of amendment. Board's written notification to applicants requiring all applications to be postmarked by midnight, June 30, 1995, before July 1 deadline, is reasonable and entitled to great weight. Board may not license dentists licensed in other jurisdictions whose applications for licensure by endorsement were postmarked and received after July 1, 1995 ................. 228

Administrative Process Act. Terms "cost" and "value" as used respectively in adopted statutory amendment and proposed bill do not have same meaning. Adopted amendment requires Department of Planning and Budget to consider projected "costs" to businesses or entities of implementing or complying with proposed regulations; proposed bill considered impact on "value" of private property in achieving compliance with proposed regulation. While Department is required to conduct analysis of time, effort and expense imposed on businesses or other entities to comply with proposed regulation, without conducting analysis of impact of compliance with proposed regulation on value of property, Department, in its discretion, may include such in its economic impact analysis ...................... 31

Department of Criminal Justice Services; Board. Auxiliary police officers possess powers and authority of full-time police officers only during time they are called into service to assist regular police officers of locality; such service is supplemental and exists under limited circumstances. When not in service, auxiliary police officers retain status as private citizens, and may not use police identification or weapons to exercise police powers and authority when observing crime in progress. Statutory restrictions applicable to auxiliary police officers who are not in service do not apply to auxiliary deputy sheriffs. Extent and scope of authority of such deputy sheriffs is within discretion of sheriff ................. 88

COMMONWEALTH'S ATTORNEYS

Activity constitutes illegal gambling when elements of prize, chance and consideration are present together. All three elements combine in "essay" contest to be conducted as raffle. Because prize in contest will not be awarded by random drawing, as is required of raffle, activity constitutes illegal gambling ........................................ 133
Agreement on Detainers requires sending state to credit prisoner’s sentence with all time prisoner is physically in Virginia jail awaiting trial pursuant to Agreement; prisoner remains in custody of sending state for purposes of computing time served on sentence imposed by that state. Prisoner returned to Virginia under Agreement may not receive duplication of credit for time spent in jail awaiting trial on criminal charges pending in Virginia; may be allowed concurrent credit on Virginia sentence for time spent in Virginia jail awaiting trial on criminal charges only when expressly ordered by Virginia court.

Bail provisions apply only to criminal proceedings involving adjudication of criminal charges pending in Virginia and not to civil extradition proceedings. Court has no authority to admit individual to bail once governor’s warrant of extradition issues. Fugitive from demanding state held in Virginia jail pursuant to such warrant is not entitled to release on bail pending resolution of his challenge to extradition.

Decision whether facts in particular instance support prosecution for violation of statute requiring identification of person(s) responsible for writings concerning elections is within discretion of Commonwealth’s attorney of county or city in which alleged violation occurred.

Decision whether to prosecute misdemeanors is left entirely to discretion of Commonwealth’s attorney. Decision may be based on staffing considerations or other factors not necessarily related to validity of misdemeanor complaints.

Defendant should be held responsible for cost of jury dismissed when Commonwealth’s attorney postpones case because of missing witness.

Disciplinary proceedings against Commonwealth’s attorneys are civil, and not criminal, in nature; proceedings are for purpose of protecting public and not for purpose of punishment.

Function of controlling prosecution of criminal cases must be exercised by attorney responsible to public.

General Assembly intended to provide constitutional officers with representation in actions not covered by Division of Risk Management’s tort liability insurance plan for constitutional officers; plan does not cover Commonwealth’s attorneys against whom disciplinary complaint has been filed with Virginia State Bar arising from discharge of official duties. Circuit court may, upon application made and good cause shown, order employment of attorney and payment of costs and legal fees, as appropriate for representation of Commonwealth’s attorney or assistant Commonwealth’s attorney against whom such disciplinary complaint has been filed.

General district court may determine and set new bail, including imposition of new conditions or denial of bail, after defendant has been convicted and sentenced to jail, before case is transferred to circuit court for de novo hearing. District court’s decision to deny, or increase conditions for, bail after conviction does not infringe on defendant’s constitutional rights or any statutory right of appeal or retrial.
COMMONWEALTH'S ATTORNEYS (contd.)

General district court may not appoint private attorneys who volunteer to serve as unpaid private prosecutors of misdemeanor cases when Commonwealth's attorney has decided not to prosecute such cases in that court ............................................. 139

Local department of social services may release personal information contained in CPS complaint and foster care records to data subject who has legitimate interest in such information or records, or to authorized agent of such person, upon presentation of proper identification. Requester, other than person who is data subject, must justify need for information, which must be directly connected to administration of public welfare program. Release of information is mandatory when personal information concerning data subject is contained in agency records. Department exercises discretion in deciding appropriateness of releasing child abuse and neglect information that does not pertain to requester. Department may refuse access to records by data subject against whom are pending criminal charges arising out of events that gave rise to CPS investigation involving same child .................. 281

May not charge for costs of services rendered in criminal cases deemed to be office operating expenses ................................................. 22

Medical facility may charge for expenses of retrieving, copying and mailing items provided in response to subpoena issued in criminal case at request of Commonwealth's attorney. Expenses associated with discreet individual criminal cases resulting from issuance of subpoena, and which are not incurred on continuing or predictable basis, properly may be considered expenses compensable by order of court, when authorized by statute and there is no designated source of payment other than state treasury from appropriations for criminal charges ................................................................. 22

Private attorneys may assist in prosecution of criminal case only with express consent of public prosecutor who must remain in continuous control of case ............................................. 139

Prosecutor's duty to administer criminal law impartially, in interest of justice, is essentially judicial one ................................................................. 139

Virginia Public Procurement Act specifically provides for use of design-build or construction management contracts only in construction of adult regional detention facilities, thereby excluding any other facilities. City of Winchester and Clarke and Frederick Counties may not use design-build procedures to contract for construction of secure juvenile detention facility .................................................. 51

When public prosecutor decides not to prosecute certain criminal charges, courts generally have no inherent authority to interfere with that decision by appointing private attorneys to prosecute such cases ............................................. 139
COMMUNICATIONS SYSTEMS

1995 statutory amendment will hold on-line communications entities or other cable networks culpable only when there is prior knowledge of transmission of computer-generated reproduction of sexually explicit digital image involving person under 18. Such entities have no affirmative legal duty to review such material in advance; are responsible only for actual knowledge of contents of materials they transmit ..................................................... 136

Statutory authority for localities to own and operate public utilities other than those specified is not broad enough to encompass communications system, which, in addition to providing cable television service, may provide other services that are not normally provided by local governments or are not clearly within meaning of term “public utility.” Localities may not own and operate such system ..................................................... 93

CONSERVATION

Department of Environmental Quality. County has authority to adopt ordinance requiring groundwater monitoring of facility that may cause pollution of county’s waters. Ordinance must not be inconsistent with general laws of Commonwealth embodied in State Water Control Law. Locality may not, by ordinance, require facility to install groundwater monitoring wells when State Water Control Board’s VPA permit does not require groundwater monitoring, but may require facility to report measurements from well to county when permit requires groundwater monitoring ..................................................... 66

Flood Protection and Dam Safety - Stormwater Management. Determinants in calculating stormwater runoff from property in particular rainstorm during given period of time ...... 91

Flood Protection and Dam Safety - Stormwater Management. Hampton ordinance does not comply with statutory requirement that stormwater service charge rates bear some relationship to factors that affect amount of stormwater runoff produced by various properties; should be amended to require rational connection between amounts charged to various categories of property and their respective runoff contributions. City council must determine whether citizens who have previously paid fees without making request for adjustment are now entitled to one, or have waived any right to refund ..................................................... 91

Flood Protection and Dam Safety - Watershed Improvements Districts. Directors of soil and water conservation district decide, in exercise of their statutory discretion, whether referendum to establish watershed improvement district may be conducted by mailing ballots to property owners within proposed district; may permit each owner of land within proposed district one vote per person or one vote for each lot or parcel of land they own within district. Tax or service charge to be used for purposes for which watershed improvement district was created may be imposed only when two-thirds of owners of at least two-thirds of land in district cast affirmative vote for such tax or service charge in referendum ...... 33

Flood Protection and Dam Safety - Watershed Improvement Districts. Watershed improvement district is public body whose contracts with nongovernmental contractors for purchase or lease of goods, or for purchase of services, insurance or construction are governed by
CONSERVATION (contd.)

Virginia Public Procurement Act. Whether alternative sources for goods, services or construction are practicably available only from one source is factual determination to be made by public body and court reviewing appeal protesting sole source award .................. 37

Open-Space Land Act. Virginia Outdoors Foundation is public body for purposes of exercising powers granted by Open-Space Land Act and is authorized to borrow money to finance its land acquisition activities, to accomplish intent of General Assembly of preserving Commonwealth’s open-space and recreational areas ...................... 39

Soil and Water Conservation. Watershed improvement district is public body whose contracts with nongovernmental contractors for purchase or lease of goods, or for purchase of services, insurance or construction are governed by Virginia Public Procurement Act. Whether alternative sources for goods, services or construction are practicably available only from one source is factual determination to be made by public body and court reviewing appeal protesting sole source award .......................... 37

Virginia Outdoors Foundation. Virginia Outdoors Foundation is public body for purposes of exercising powers granted by Open-Space Land Act and is authorized to borrow money to finance its land acquisition activities, to accomplish intent of General Assembly of preserving Commonwealth’s open-space and recreational areas ...................... 39

CONSTITUTION OF THE UNITED STATES

Commerce Clause does not prohibit gross receipts tax on foreign corporation if corporation has sufficient nexus in taxing jurisdiction and if tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by state .... 245

Due process (see infra Fourteenth Amendment (1) (due process) or (2) (Due Process Clause))

Due process. Bail provisions apply only to criminal proceedings involving adjudication of criminal charges pending in Virginia and not to civil extradition proceedings. Court has no authority to admit individual to bail once governor’s warrant of extradition issues. Fugitive from demanding state held in Virginia jail pursuant to such warrant is not entitled to release on bail pending resolution of his challenge to extradition ............. 141

Due process. Denial of bail to fugitive after governor’s rendition warrant issues furthers extradition process between states; is not violative of due process rights .......... 141

Equal Protection Clause. Pittsylvania County board of supervisors may enact ordinance providing for seven-member school board, representing each county election district, before November 1995 initial election of school board; may abolish two at-large seats and eliminate three town seats on its appointed school board to conform composition of school board to seven-member board of supervisors before election. Resident voters of incorporated towns within county may participate in election of school board members of county election districts in which towns are situated, assuring representation on school board that is apportioned on population basis .......................... 158
CONSTITUTION OF THE UNITED STATES (contd.)

Equal Protection Clause. Representation on elected governmental bodies must be apportioned on population basis, to accomplish one-person, one-vote mandate .................. 158

Establishment Clause (see infra First Amendment (Establishment Clause))

Establishment of religion. Public schools must be sensitive to religious pluralism of student body and avoid impermissible state sponsorship of religion .......................... 1

Establishment of religion. Recognizing Christmas Day and period surrounding it as official holidays in school calendar qualifies as permissible accommodation of religious practices ........ 1

Establishment of religion. Reference to "Christmas break" as period of student vacation when public schools customarily are closed in late December of each year does not constitute impermissible establishment of religion .......................................................... 1

Establishment of religion. School policies supported by secular purposes, which neither advance religion nor foster excessive entanglement with religion, are constitutionally permitted ................................. 1

Establishment of religion. Use of term "Christmas break" by county public schools to denote period of vacation taken by students in late December of each year, when schools customarily are closed is not prohibited .................. 1

First Amendment. Candidates seeking public office cannot claim anonymity in presenting views to those they seek to govern ................................. 170

First Amendment. Disclosure of identity of person who advocates in writing election or defeat of candidate may be unconstitutional if person can show that disclosure will subject him to harassment or retaliation ................................. 170

First Amendment. General Assembly's designation that courts and incumbent officeholders may receive lists of voters registered in Commonwealth or persons who voted for purpose of either jury selection or reporting to constituents does not extend to entities or persons not so classified. Persons/groups seeking to further candidacy of others may obtain lists to be used for legislatively ordained political and official purposes, but not for commercial purposes or to harass voters. Confining organizations that may obtain lists to nonprofit organizations would be subject to constitutional attack; organization must have political purpose and use list for political, rather than commercial, purpose. State Board of Elections may provide lists of persons who voted in two preceding primary or general elections to persons or entities involved in election process only for specific statutory purposes. If such lists are provided to other persons or entities for their districts, State Board should interpret term "district" in manner that fulfills statutory intent and purpose. Lists may not be provided to commercial vendor for commercial purpose. State Board should forward to appropriate Commonwealth's attorney any information concerning alleged violation of statutory oath .................................................. 181
CONSTITUTION OF THE UNITED STATES (contd.)

First Amendment. Imposition of identity requirement on candidates and on political committees whose primary purpose is to influence outcome of elections, by distributing writings to electorate, is not overbroad in accomplishing government interests .......................... 170

First Amendment. Limiting expenditure of corporate treasury funds in connection with election is substantial restriction on speech; disclosing expenditures is reasonable and minimally restrictive ................................................................. 170

First Amendment. Obscenity statute without scienter requirement would be unconstitutional restriction on free speech ..................................................... 136

First Amendment. Purpose of identifying person(s) responsible for writing supporting election or defeat of candidate(s) is not to control content of speech but to provide information to assist voters in deciding which candidate to support ........................................ 170

First Amendment. Reporting obligations on campaign expenditures are not constitutionally infirm if they further governmental interests rather than infringe exercise of First Amendment rights; governmental interests are accorded particular weight when free functioning of our national institutions is involved ................................................................. 170

First Amendment. State has compelling governmental interest to fully inform electorate, to preserve integrity of candidate elections, and to promote fair and honest campaigns, by requiring identification disclosure of writing regarding referendum issues, which outweighs First Amendment right to anonymity ................................................................. 170

First Amendment. State law that burdens free speech will be upheld only if it is narrowly tailored to serve overriding state interest ........................................ 170

First Amendment. Statute that infringes First Amendment rights must be narrowly drawn to accomplish government interest ........................................ 170

First Amendment. Statute that involves regulation of pure speech in political arena rather than mechanics of electoral process violates will be upheld only if narrowly tailored to serve overriding state interest ........................................ 170

First Amendment. Statutory provision requiring disclosure of identity of person(s) responsible for writings concerning referendum issue(s) to be submitted to voters would likely not survive constitutional challenge, based on U.S. Supreme Court’s decision in McIntyre v. Ohio Elections Commission; such disclosure of identity of person(s) responsible for writings concerning candidate elections would survive constitutional challenge, given narrow construction accorded statutes imposing criminal sanctions. Requiring identification of source of person(s) supporting election or defeat of candidates and of campaign advertising is governmental interest that clearly outweighs First Amendment right to anonymity. Requiring identification of individuals and groups of individuals who advocate in writing election or defeat of candidate(s) promotes interests of Commonwealth in fully informing electorate and in avoiding circumvention of other statutory provisions, and is thus not
overbroad in regard to persons and entities encompassed within statute. Statute encompassing writings related to clearly identified candidate(s) in particular election is not unconstitutionally overbroad. Criterion for determining whether identity is required is whether writing advocates election or defeat of candidate(s) or whether writing advocates political issues. Decision whether facts in particular instance support prosecution for violation of statutory identification requirements concerning elections is within discretion of local Commonwealth's attorney ........................................... 170

First Amendment. Strict scrutiny applies to content-based restriction on political speech in public forum ........................................................ 170

First Amendment. Test to apply in determining whether restrictions on political advertising in candidate elections are valid ........................................... 170

First Amendment (Establishment Clause). Amendment does not preclude state from granting aid that may flow to religious institution only as result of genuinely independent and private choices of aid recipients ........................................... 149

First Amendment (Establishment Clause). Application of three-part Establishment Clause test to financing by industrial development authority of facility for use by § 501(c)(3) organization associated with religious denomination ........................................... 77

First Amendment (Establishment Clause). Government programs that provide neutral benefits to broad class of citizens defined without reference to religion are not subject to constitutional challenge ........................................... 149

First Amendment (Establishment Clause). Industrial development authority is not prohibited from issuing bonds to finance residential housing for § 501(c)(3) organization exempt from federal income taxation, so long as such organization is not organized and operated exclusively for religious purposes. Authority makes factual determination whether § 501(c)(3) organization is organized exclusively for religious purposes, and whether financing of such organization violates establishment of religion clause of U.S. Constitution and similar limitations within Virginia Constitution. Section 501(c)(3) organization affiliated with religious denomination that is not organized and operated exclusively for religious purposes, whose facility will be used to advance secular purpose, would not be disqualified from obtaining financing for facility through authority. Voter referendum is not required to authorize IDA to issue bonds to finance acquisition and improvement of low-income rental housing by such organization ........................................... 77

First Amendment (Establishment Clause). Neither federal nor state constitution prohibits local governing body or local school board from transporting students on public school buses to and from sectarian and nonsectarian private schools as part of general public transportation program for all students. Fact that tax dollars are expended or that religious group receives public benefit is not sufficient to render program invalid, when such program is of neutral, general benefit; i.e., providing safe and reliable bus transportation for all school-age children. Constitutionality of particular transportation program requires examination
of purpose of program, its primary effect, and whether administration of program fosters excessive religious entanglement. Local governing bodies and local school boards must have express statutory authority permitting use of public school transportation facilities and equipment to transport private school students pursuant to constitutional authority

First Amendment (freedom of speech). Courts, in determining reasonable doubt as to constitutionality of statute limiting right of association, must balance burden of statutory limit against state interest justifying statute

First Amendment (freedom of speech). Freedom to engage in association for advancement of beliefs and ideas is inseparable aspect of liberty assured by due process, which embraces First Amendment freedom of speech; states may not interfere with right to freedom of association guaranteed by Constitution

First Amendment (freedom of speech). In determining constitutionality of law limiting freedom of association rights, courts must balance burden on constitutional right against state interest justifying statute

First Amendment (freedom of speech). Political parties, their internal workings, and individual party adherents are protected by First Amendment

First Amendment (freedom of speech). Statute limiting when political party, once having chosen to nominate federal officeholder by primary, may revert to convention or other method of nomination, burdens party’s associational rights and raises serious constitutional questions; however, requiring or favoring primaries as means of conducting nomination contests while providing mechanism for returning to nomination by convention provides protection for voters deprived of opportunity to vote in future primaries, thereby serving compelling governmental interest in enhancing democratic character of election process. Court, in reviewing matter, may not find burden on party so great or governmental interest so slight as to justify invalidating statute. Because Virginia Attorneys General historically have refrained from issuing opinions declaring statute unconstitutional, and they have not been vested with power to invalidate state statute, and because every reasonable doubt is to be resolved in favor of statute’s constitutionality, Attorney General cannot conclude beyond reasonable doubt that statute limiting associational rights guaranteed by First and Fourteenth Amendments is violative of U.S. Constitution

Fourteenth Amendment. Amendment does not preclude state from granting aid that may flow to religious institution only as result of genuinely independent and private choices of aid recipients

Fourteenth Amendment (due process). Essential elements of adversary process which must be afforded individual deprived of life, liberty or property as part of due process

Fourteenth Amendment (due process). Hearing and appeal procedures comply with fundamental requisite of due process of law by providing unsuccessful concealed weapon permit applicant opportunity to be heard
CONSTITUTION OF THE UNITED STATES (contd.)

Fourteenth Amendment (Due Process Clause). Courts, in determining reasonable doubt as to constitutionality of statute limiting right of association, must balance burden of statutory limit against state interest justifying statute .......................................................... 164

Fourteenth Amendment (Due Process Clause). Due process requires showing of some deliberate effort by defendant to do business in forum state, to establish minimum contacts ......................................................... 28

Fourteenth Amendment (Due Process Clause). Freedom to engage in association for advancement of beliefs and ideas is inseparable aspect of liberty assured by due process, which embraces First Amendment freedom of speech; states may not interfere with right to freedom of association guaranteed by Constitution .......................................................... 164

Fourteenth Amendment (Due Process Clause). In determining constitutionality of law limiting freedom of association rights, courts must balance burden on constitutional right against state interest justifying statute .......................................................... 164

Fourteenth Amendment (Due Process Clause). Nonresident defendants who enter into consumer credit installment contracts in North Carolina with North Carolina company, and not with Virginia company, have no contacts in Virginia. Valid service of process may not be effected through use of Virginia's long-arm statute, because Virginia courts have no personal jurisdiction over such defendants. Fact that nonresident defendants' only contact with Virginia occurs from their mailing installment payments to Virginia plaintiff company to whom North Carolina company subsequently transferred ownership of contracts is not sufficient to consider defendants as having established minimum contacts in Virginia, thus invoking benefits and protections of Virginia law. Defendants would not have expected being haled into any Virginia court when they entered into contracts in North Carolina. Venue for civil actions involving contract disputes with nonresident defendants who have minimum contacts in Virginia would lie in county or city where plaintiff(s) reside ........... 28

Fourteenth Amendment (Due Process Clause). Nonresidents must have contacts in state for state court to exercise personal jurisdiction over nonresident defendant, and to not offend traditional notions of fair play and substantial justice .......................................................... 28

Fourteenth Amendment (Due Process Clause). Statute limiting when political party, once having chosen to nominate federal officeholder by primary, may revert to convention or other method of nomination, burdens party's associational rights and raises serious constitutional questions; however, requiring or favoring primaries as means of conducting nomination contests while providing mechanism for returning to nomination by convention provides protection for voters deprived of opportunity to vote in future primaries, thereby serving compelling governmental interest in enhancing democratic character of election process. Court, in reviewing matter, may not find burden on party so great or governmental interest so slight as to justify invalidating statute. Because Virginia Attorneys General historically have refrained from issuing opinions declaring statute unconstitutional, and they have not been vested with power to invalidate state statute, and because every reasonable doubt is to be resolved in favor of statute's constitutionality, Attorney General cannot conclude beyond reasonable doubt that statute limiting associational rights guaranteed by First and Fourteenth Amendments is violative of U.S. Constitution .......................................................... 164
CONSTITUTION OF THE UNITED STATES (contd.)

Fourteenth Amendment (Due Process Clause). To establish minimum contacts, nonresident defendants' activities in forum state should be viewed in their entirety and not be structured to manufacture such contacts from every amenable act ....................... 28

Freedom of speech (see supra First Amendment (freedom of speech))

Full Faith and Credit Clause. Uniform Enforcement of Foreign Judgments Act authorizes circuit court clerks to accept properly authenticated copies of nonmonetary foreign judgments, in addition to monetary decrees or awards ....................... 26

Use of term "Christmas break" by county public schools to denote period of vacation taken by students in late December of each year, when schools customarily are closed is not prohibited ............................................. 1

CONSTITUTION OF VIRGINIA

Bill of Rights. Application of three-part Establishment Clause test to financing by industrial development authority of facility for use by § 501(c)(3) organization associated with religious denomination ............................................. 77

Bill of Rights. Industrial development authority is not prohibited from issuing bonds to finance residential housing for § 501(c)(3) organization exempt from federal income taxation, so long as such organization is not organized and operated exclusively for religious purposes. Authority makes factual determination whether § 501(c)(3) organization is organized exclusively for religious purposes, and whether financing of such organization violates establishment of religion clause of U.S. Constitution and similar limitations within Virginia Constitution. Section 501(c)(3) organization affiliated with religious denomination that is not organized and operated exclusively for religious purposes, whose facility will be used to advance secular purpose, would not be disqualified from obtaining financing for facility through authority. Voter referendum is not required to authorize IDA to issue bonds to finance acquisition and improvement of low-income rental housing by such organization ............................................. 77

Bill of Rights. No constitutional right to hearing on issue of necessity of state's condemnation efforts. Necessity or expediency of condemnor's project is legislative question not reviewable by courts ............................................. 15

Bill of Rights. Only constitutional limitations imposed on power of eminent domain are contained in just compensation clause ............................................. 15

Bill of Rights (establishment of religion clause). Neither federal nor state constitution prohibits local governing body or local school board from transporting students on public school buses to and from sectarian and nonsectarian private schools as part of general public transportation program for all students. Fact that tax dollars are expended or that religious group receives public benefit is not sufficient to render program invalid, when such program is of neutral, general benefit; i.e., providing safe and reliable bus transportation for all
CONSTITUTION OF VIRGINIA (contd.)

school-age children. Constitutionality of particular transportation program requires examination of purpose of program, its primary effect, and whether administration of program fosters excessive religious entanglement. Local governing bodies and local school boards must have express statutory authority permitting use of public school transportation facilities and equipment to transport private school students pursuant to constitutional authority.

Bill of Rights (establishment of religion clause). Under child benefit theory, provision by school district or local governing body for transporting students on public school buses to both public and private schools, some of which may be sectarian, is not violative of Constitution.

Constitution does not vest in Attorney General power to invalidate state statute.

Constitution impliedly denies legislature power to relinquish, surrender or destroy, or substantially impair state’s sovereignty over its lands.

Constitutionality of statute. Attorneys General historically have refrained from declaring statute unconstitutional unless its unconstitutionality is clear beyond reasonable doubt.

Constitutionality of statute. Every presumption is to be made in favor of constitutionality of statute.

Constitutionality of statute. Every reasonable doubt should be resolved in favor of constitutionality of act of legislature.

Constitutionality of statute. Statute is not to be declared unconstitutional unless court is driven to that conclusion.

Education. Neither federal nor state constitution prohibits local governing body or local school board from transporting students on public school buses to and from sectarian and nonsectarian private schools as part of general public transportation program for all students. Fact that tax dollars are expended or that religious group receives public benefit is not sufficient to render program invalid, when such program is of neutral, general benefit; i.e., providing safe and reliable bus transportation for all school-age children. Constitutionality of particular transportation program requires examination of purpose of program, its primary effect, and whether administration of program fosters excessive religious entanglement. Local governing bodies and local school boards must have express statutory authority permitting use of public school transportation facilities and equipment to transport private school students pursuant to constitutional authority.

Education (school boards). Advisory committee members are not considered members of school board.

Education (school boards). School board should not delegate its power of appointment.
Education (school boards). School board, in exercising its powers of appointment, may appoint teacher(s) recommended by board's licensed instructional personnel to serve on advisory committee to board, but is not authorized to appoint to its membership *ex officio*, nonvoting teacher representative .............................................. 160

Education (school boards). School board's provision of health care coverage for its members does not contravene intent of General Assembly that local governing bodies may provide same benefits to members as are provided to their employees, so long as funds have been appropriated by local governing body to pay health insurance premiums. School board's payment of premiums is fringe benefit that need not be deducted from board members' salaries .................................................. 162

Establishment Clause (see also Bill of Rights (establishment of religion clause))

Establishment Clause. Use of term "Christmas break" by county public schools to denote period of vacation taken by students in late December of each year, when schools customarily are closed is not prohibited ........................................... 1

Every presumption is to be made in favor of constitutionality of statute .................................. 170

Franchise and Officers (qualifications of voters). Local tax official must consider and weigh all relevant facts in determining whether locality in which college or university student is registered to vote constitutes student's domicile for purposes of imposing motor vehicle license fees and personal property taxes. Person's domicile is matter of subjective intent known only to that person .................................................. 270

Freedom of religion. Use of term "Christmas break" by county public schools to denote period of vacation taken by students in late December of each year, when schools customarily are closed is not prohibited ........................................... 1

Judiciary. Neither Constitution nor Virginia statute prohibits wife from holding office of circuit court clerk in same jurisdiction and at same time her husband serves as circuit court judge .................................................. 41

Judiciary. No constitutional provision or Virginia statute prohibits spouses from simultaneously serving as judge and clerk of circuit court in same jurisdiction ........................................... 41

Legislature. Application of three-part Establishment Clause test to financing by industrial development authority of facility for use by § 501(c)(3) organization associated with religious denomination ........................................... 77

Legislature. Industrial development authority is not prohibited from issuing bonds to finance residential housing for § 501(c)(3) organization exempt from federal income taxation, so long as such organization is not organized and operated exclusively for religious purposes. Authority makes factual determination whether § 501(c)(3) organization is organized exclusively for religious purposes, and whether financing of such organization violates
CONSTITUTION OF VIRGINIA (contd.)

establishment of religion clause of U.S. Constitution and similar limitations within Virginia Constitution. Section 501(c)(3) organization affiliated with religious denomination that is not organized and operated exclusively for religious purposes, whose facility will be used to advance secular purpose, would not be disqualified from obtaining financing for facility through authority. Voter referendum is not required to authorize IDA to issue bonds to finance acquisition and improvement of low-income rental housing by such organization ................................................................. 77

Legislature. Neither federal nor state constitution prohibits local governing body or local school board from transporting students on public school buses and from sectarian and nonsectarian private schools as part of general public transportation program for all students. Fact that tax dollars are expended or that religious group receives public benefit is not sufficient to render program invalid, when such program is of neutral, general benefit; i.e., providing safe and reliable bus transportation for all school-age children. Constitutionality of particular transportation program requires examination of purpose of program, its primary effect, and whether administration of program fosters excessive religious entanglement. Local governing bodies and local school boards must have express statutory authority permitting use of public school transportation facilities and equipment to transport private school students pursuant to constitutional authority .................................................. 149

Legislature (effective date of laws). 1995 amendment removing authority of Board of Dentistry to recognize licenses issued by other jurisdictions as full or partial fulfillment of qualifications for licensure in Virginia does not apply to applications received before effective date of amendment—July 1, 1995; applications received by Board before July 1 should be processed according to law in effect before effective date of amendment. Board’s written notification to applicants requiring all applications to be postmarked by midnight, June 30, 1995, before July 1 deadline, is reasonable and entitled to great weight. Board may not license dentists licensed in other jurisdictions whose applications for licensure by endorsement were postmarked and received after July 1, 1995 ......................... 228

Local Government. Absent specific statutory or constitutional prohibition, common law doctrine of compatibility of dual officeholding may preclude such officeholding if two offices are inherently incompatible ................................................................. 42

Local Government. Auxiliary police officers possess powers and authority of full-time police officers only during time they are called into service to assist regular police officers of locality; such service is supplemental and exists under limited circumstances. When not in service, auxiliary police officers retain status as private citizens, and may not use police identification or weapons to exercise police powers and authority when observing crime in progress. Statutory restrictions applicable to auxiliary police officers who are not in service do not apply to auxiliary deputy sheriffs. Extent and scope of authority of such deputy sheriffs is within discretion of sheriff ................................................................. 88

Local Government. Bar to dual officeholding does not apply to sheriff serving simultaneously as high constable ................................................................. 42
CONSTITUTION OF VIRGINIA (contd.)

Local Government. Constitutional debt restrictions imposed on county have no application to bonds issued by industrial development authority ............................................. 44

Local Government. Neither Constitution nor Virginia statute prohibits wife from holding office of circuit court clerk in same jurisdiction and at same time her husband serves as circuit court judge ................................................. 41

Local Government. No constitutional provision or Virginia statute prohibits spouses from simultaneously serving as judge and clerk of circuit court in same jurisdiction ............... 41

Local Government. Offices of sheriff and high constable are not incompatible. Norfolk city sheriff may serve simultaneously as Norfolk high constable. Fees collected by sheriff as high constable must be deposited in city treasury for use in operation of city government .......................................................... 42

Local Government. Voter approval is not required before school board obtains loan from Literary Fund and issues its bonds or notes to secure loan ................................................. 44

Local Government. Voter referendum is not required for county to issue bonds for school construction if bonds are sold to Virginia Public School Authority ......................... 44

Local Government. Voter referendum is not required to fund school construction through county bonds sold to Virginia Public School Authority or to Literary Fund or through bonds issued by industrial development authority that leases school facilities to Warren County . 44

Local Government (county and city officers). Absent specific legislation, local governing bodies have no authority to specify duties of constitutional officers ......................... 47

Local Government (county and city officers). Constitutional offices in City of South Boston will cease to exist, and city's incumbent constitutional officers will not continue to hold office, when city reverts to town status on July 1, 1995 .................................................. 46

Local Government (county and city officers). General Assembly intended to provide constitutional officers with representation in actions not covered by Division of Risk Management's tort liability insurance plan for constitutional officers; plan does not cover Commonwealth's attorneys against whom disciplinary complaint has been filed with Virginia State Bar arising from discharge of official duties. Circuit court may, upon application made and good cause shown, order employment of attorney and payment of costs and legal fees, as appropriate for representation of Commonwealth's attorney or assistant Commonwealth's attorney against whom such disciplinary complaint has been filed ................................. 69

Local Government (county and city officers). Local governing bodies have no authority to supervise or intervene in management and control of constitutional officer's duties; may add additional duties for such officer to perform that are not inconsistent with office and statutorily prescribed duties ...................................................... 47
Local Government (county and city officers). Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth’s attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress .................................................. 47

Religious freedom. Use of term “Christmas break” by county public schools to denote period of vacation taken by students in late December of each year, when schools customarily are closed is not prohibited .................................................. 1

Tax exemptions. Amendment that does not expand permitted scope of cogeneration property tax exemption is not unconstitutional ........................................ 265

Tax exemptions. General Assembly may not expand constitutionally authorized exemptions except when Constitution specifically provides for such expansion ........................................ 265

Taxation and Finance. Amendment that does not expand permitted scope of cogeneration property tax exemption is not unconstitutional ........................................ 265

Taxation and Finance. Charter tour bus company holding certificate of public convenience and necessity for special or charter party carrier does not operate such carriers over regular routes, and is not "certificated motor vehicle carrier" exempt from personal property taxation. Charter party carrier is not public service corporation for purposes of local license tax exemption, and is not exempt from such tax ........................................ 278

Taxation and Finance. Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement Act; all public funds must clear through Comptroller’s Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director’s salary without Governor’s approval. VRS must comply with Comptroller’s regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General ........................................ 213
CONSTITUTION OF VIRGINIA (contd.)

Taxation and Finance. 1992 amendment expanding separate classification of certain equipment purchased by firms engaged in cogeneration of steam or electricity, which is taxed at rate that does not exceed locality's tax rate applicable to machinery and tools, does not violate constitutional requirement for uniformity in property taxation, and is within General Assembly's power to classify property for local taxation purposes ........................................ 265

Taxation and Finance. Property placed in same classification and assessed by same methodology does not violate constitutional uniformity requirement ........................................ 265

Taxation and Finance (exempt property). Exotic animals such as ostriches, giraffes, camels and monkeys do not fall within classification of "farm animals" exempt from taxation. Any doubt whether such animals fall within categories of exempt animals is to be resolved against allowing exemption. Determination is factual matter to be decided by local commissioner of revenue ........................................ 264

CONTRACTS

Virginia Public Procurement Act. Act specifically provides for use of design-build or construction management contracts only in construction of adult regional detention facilities, thereby excluding any other facilities. City of Winchester and Clarke and Frederick Counties may not use design-build procedures to contract for construction of secure juvenile detention facility ........................................ 51

Virginia Public Procurement Act. Corporation whose corporate officer is mayor or member of city council is prohibited from contracting with city's public works department, unless exception to contract prohibitions in State and Local Government Conflict of Interests Act applies ........................................ 2

Virginia Public Procurement Act. Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement Act; all public funds must clear through Comptroller's Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director's salary without Governor's approval. VRS must comply with Comptroller's regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General ........................................ 213

Virginia Public Procurement Act. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in
lieu of issuing traffic summonses. Technician, who executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor’s receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute “other recorded images” inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective.

Virginia Public Procurement Act. Locality may contract with private entity to operate traffic light signal monitoring system.

Virginia Public Procurement Act. Section 11-45(G) association may communicate quote on insurance products available through association to public body that has solicited and received bids for insurance; public body may not enter into contract based on quote. Public announcement of bids received by public body in response to invitation to bid may be repeated at later date to members of public who could have attended, but were not present to receive information at, bid opening. Association that fails to bid in response to public body’s invitation to bid may not inspect bid records before award of contract.

Virginia Public Procurement Act. Watershed improvement district is public body whose contracts with nongovernmental contractors for purchase or lease of goods, or for purchase of services, insurance or construction are governed by Act. Whether alternative sources for goods, services or construction are practicably available only from one source is factual determination to be made by public body and court reviewing appeal protesting sole source award.

CORPORATIONS

Virginia Stock Corporation Act. Charter tour bus company holding certificate of public convenience and necessity for special or charter party carrier does not operate such carriers over regular routes, and is not “certificated motor vehicle carrier” exempt from personal property taxation. Charter party carrier is not public service corporation for purposes of local license tax exemption, and is not exempt from such tax.
<table>
<thead>
<tr>
<th>COSTS, FEES, SALARIES AND ALLOWANCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Costs Generally. Allowance of costs in civil actions depends entirely upon statute; costs are not allowable in cases at common law</td>
</tr>
<tr>
<td>Costs Generally. Allowance of costs other than those specified by statute is within discretion of trial court</td>
</tr>
<tr>
<td>Costs Generally. Convicted defendant who necessitated calling of jurors by having requested jury trial is liable for expenses of jurors, including those discharged or excused during <em>voir dire</em></td>
</tr>
<tr>
<td>Costs Generally. Court may not waive jury costs required to be paid by defendant who pleads guilty after jury has been called, whether pursuant to plea agreement or otherwise. Defendant may be excused from paying costs required to be reimbursed to Commonwealth only when accused waives trial by jury, at least ten days before trial</td>
</tr>
<tr>
<td>Costs Generally. Court may not waive jury costs, as part of defendant's guilty plea agreement, when jurors already have been summoned</td>
</tr>
<tr>
<td>Costs Generally. Defendant should be held responsible for cost of two juries when first jury results in hung jury, and for cost of jury dismissed when Commonwealth's attorney postpones case because of missing witness</td>
</tr>
<tr>
<td>Costs Generally. Fee paid sheriff for service of process is recoverable by prevailing party as part of court costs; no statutory requirement to include amount paid to private process server. General district court may determine, within its discretion, whether to include amount paid to private process server in court costs recoverable by prevailing party</td>
</tr>
<tr>
<td>Costs Generally. Jurors are entitled to compensation for each day's attendance at term of court, even those not selected as part of jury panel</td>
</tr>
<tr>
<td>Costs Generally. Payment of costs in criminal case is not part of court sentence, nor part of penalty or punishment prescribed for offense</td>
</tr>
<tr>
<td>Costs Generally. Right to enforce payment of costs is mere incident to conviction; purpose of enforcing payment is to replace amount in treasury defendant caused to be withdrawn from it</td>
</tr>
<tr>
<td>Fees. Broad range of obligations imposed on locality in connection with operation of judicial system indicates legislative intent to grant localities broad funding mechanism to assist in operation of its system</td>
</tr>
<tr>
<td>Fees. Broad statutory language does not contemplate that locality may not use fees collected by circuit or district court clerk as part of costs assessed in civil, criminal and traffic cases for jail maintenance expenses unless jail also contains additional court-related facilities</td>
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COSTS, FEES, SALARIES AND ALLOWANCES (contd.)

Fees. Clerk of court of original jurisdiction shall collect fees assessed at commencement of civil action or chancery cause; clerk of circuit court to which venue of action or suit is transferred may not charge additional filing fees. Circuit court receiving transferred case retains right to assess costs, even though costs may have been assessed by transferor court. Transferee clerk must assess costs against losing party upon final disposition of case, as allowed by local ordinance ........................................ 59

Fees. Fee paid sheriff for service of process is recoverable by prevailing party as part of court costs; no statutory requirement to include amount paid to private process server. General district court may determine, within its discretion, whether to include amount paid to private process server in court costs recoverable by prevailing party ....................... 54

Fees. Offices of sheriff and high constable are not incompatible. Norfolk city sheriff may serve simultaneously as Norfolk high constable. Fees collected by sheriff as high constable must be deposited in city treasury for use in operation of city government ......................... 42

Fees - Amount of Fees. Clerk of Court of Appeals must charge $10 for filing of petition to review circuit court order denying concealed weapon permit ............................. 121

Fees - Amounts of Fees. Commonwealth or locality that pays sheriff’s salary is exempt from paying sheriff’s fees for services rendered. Conclusion does not affect sheriff’s fees and mileage allowances clerk of circuit or general district court is required to collect in civil and criminal matters ................................................................. 61

Fees - Amounts of Fees. Fees and mileage allowances accruing to sheriff in connection with civil or criminal matter are collected by clerk of circuit or general district court in which case is heard ................................................................. 63

Salaries and Expenses of Office. Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement Act; all public funds must clear through Comptroller’s Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director’s salary without Governor’s approval. VRS must comply with Comptroller’s regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General ................................. 213

Salaries and Expenses of Office. Medical facility may charge for expenses of retrieving, copying and mailing items provided in response to subpoena issued in criminal case at request of Commonwealth’s attorney. Expenses associated with discreet individual criminal
cases resulting from issuance of subpoena, and which are not incurred on continuing or predictable basis, properly may be considered expenses compensable by order of court, when authorized by statute and there is no designated source of payment other than state treasury from appropriations for criminal charges .............................................. 22

Salaries and Expenses of Office - Attorneys for the Commonwealth, Treasurers and Commissioners of Revenue. General Assembly intended to provide constitutional officers with representation in actions not covered by Division of Risk Management's tort liability insurance plan for constitutional officers; plan does not cover Commonwealth’s attorneys against whom disciplinary complaint has been filed with Virginia State Bar arising from discharge of official duties. Circuit court may, upon application made and good cause shown, order employment of attorney and payment of costs and legal fees, as appropriate for representation of Commonwealth’s attorney or assistant Commonwealth’s attorney against whom such disciplinary complaint has been filed .................................................. 69

Salaries and Expenses of Office - Sheriffs and Sergeants. Commonwealth or locality that pays sheriff’s salary is exempt from paying sheriff’s fees for services rendered. Conclusion does not affect sheriff’s fees and mileage allowances clerk of circuit or general district court is required to collect in civil and criminal matters ................................................................. 61

Salaries and Expenses of Office - Sheriffs and Sergeants. Fee paid sheriff for service of process is recoverable by prevailing party as part of court costs; no statutory requirement to include amount paid to private process server. General district court may determine, within its discretion, whether to include amount paid to private process server in court costs recoverable by prevailing party ...................................................... 54

Salaries and Expenses of Office - Sheriffs and Sergeants. Fees and mileage allowances accruing to sheriff in connection with civil or criminal matter are collected by clerk of circuit or general district court in which case is heard ......................................................... 63

Salaries and Expenses of Office - Sheriffs and Sergeants. History of sheriffs’ fees exemption .................................................................................................................. 61

Salaries and Expenses of Office - Sheriffs and Sergeants. Intent of General Assembly in excepting fees for services sheriff would be entitled to receive from Commonwealth or county or city he represents was to relieve any local government that pays sheriff’s salary from also paying fees for services sheriff provides to local government ................................................. 61

COUNTIES, CITIES AND TOWNS

Counties Generally. By establishing water and sanitation authority to maintain and operate water system, county does not relinquish power granted by statute to enact ordinances regulating pollution of water in county; ordinances must be consistent with authority’s regulations .................................................................................. 100
COUNTIES, CITIES AND TOWNS (contd.)

Counties Generally. County has authority to adopt ordinance requiring groundwater monitoring of facility that may cause pollution of county’s waters. Ordinance must not be inconsistent with general laws of Commonwealth embodied in State Water Control Law. Locality may not, by ordinance, require facility to install groundwater monitoring wells when State Water Control Board’s VPA permit does not require groundwater monitoring, but may require facility to report measurements from well to county when permit requires groundwater monitoring .............................................. 66

Counties Generally. County may adopt ordinance requiring groundwater monitoring by facility whose activities present reasonable risk of polluting county’s waters, which must not be inconsistent with state law pertaining to pollution of state waters ......................... 66

Counties Generally. Fauquier County board of supervisors may enact ordinance, consistent with regulations of Fauquier Water and Sanitation Authority, State Water Control Board and Environmental Protection Agency, requiring pretreatment of wastewater by industrial users of Authority’s facilities. Ordinance may impose penalties required by federal and state law for violation of its provisions ......................................................... 100

Counties Generally. General statutory authority granted counties to regulate traditional aspects of public health and safety is broadly construed. Broad construction is appropriate when county ordinance relates to power expressly recognized in statute .................. 100

Counties Generally. Highland County may adopt ordinance requiring vendors to obtain permits to sell food, beverages or merchandise from streets or sidewalks during Highland County Maple Festival and establishing penalties for violating permit requirement. County may delegate authority to Chamber of Commerce to establish reasonable guidelines assuring that vendors’ merchandise is of quality and nature that will not adversely affect reputation of Festival. County also may authorize Chamber to limit number of vendors who may participate in Festival; basis for determining which vendors may participate must be reasonably related to county’s purpose of holding Festival to promote and celebrate its historical or cultural significance. Highland County may not exclude all except local vendors from participating in Festival and may not authorize Chamber to do so, because their inclusion may have detrimental financial effect on local merchants and organizations. Authority for county to restrict traffic on designated streets does not extend to regulating sale of food and merchandise on adjacent privately owned lands during Festival .................... 74

Counties Generally. In enacting statutes defining powers of county, water and sewer authority, and State Water Control Board, legislature did not intend to establish system that would create conflict between local, state and federal law regarding water pollution controls ... 100

Counties Generally. Legislative intent that governing body retain power to regulate water and sewer services, despite existence of water and sewer authority with same powers ... 100

Counties Generally. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issu-
COUNTIES, CITIES AND TOWNS (contd.)

ing traffic summonses. Technician, who executes certificate proving statutory violation, may
be employee of local governing body or employee of contractor. Locality must initially
determine whether technician has required qualifications to inspect and interpret recorded
images produced by traffic light signal violation monitoring system. Employees of private
entity sworn as conservators of peace may access Department of Motor Vehicle records to
determine registered owner of vehicle operated in violation of statute, prepare summonses,
cause summonses to be issued, or mail summonses to suspected violators. Locality may not
share or split monetary penalties received from traffic infractions with private entities that
provide photo-monitoring equipment; may not include payment provisions in contract of
purchase based on amount received from monetary penalties enforced for violations of traf-
fic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on
donor’s receiving statistical information regarding demonstration program. Police depart-
ment employees and persons with whom locality contracts to operate demonstration program
must be sworn as conservators of peace before issuing traffic summonses for traffic infrac-
tions. Digitally recorded images may constitute “other recorded images” inspected
by tech-
nician as proof of statutory violation sworn to or affirmed in certificate. Violations of
demonstration programs imposing monetary liability for failure to comply with traffic light
signals constitute traffic infractions. Statute that does not refer to statute specifying colors
of traffic light and their meaning as failing to obey traffic lights is not defective

Counties Generally. Ordinance consistent with regulations of county water and sanitation
authority and enacted for express purpose of complying with federal and state law pollution
standards is factually distinct from ordinance attempting to control general regulations or
general operations of authority

County, City and Town Officers Generally. Absent specific statutory or constitutional
prohibition, common law doctrine of compatibility of dual officeholding may preclude such
officeholding if two offices are inherently incompatible

County, City and Town Officers Generally. Bar to dual officeholding does not apply
to sheriff serving simultaneously as high constable

County, City and Town Officers Generally. Neither Constitution nor Virginia statute pro-
hibits wife from holding office of circuit court clerk in same jurisdiction and at same time
her husband serves as circuit court judge

County, City and Town Officers Generally. No constitutional provision or Virginia statute
prohibits spouses from simultaneously serving as judge and clerk of circuit court in same
jurisdiction

County, City and Town Officers Generally. Offices of sheriff and high constable are not
incompatible. Norfolk city sheriff may serve simultaneously as Norfolk high constable. Fees
collected by sheriff as high constable must be deposited in city treasury for use in operation
of city government
### COUNTY, CITY, AND TOWN OFFICERS

**Actions Against Officers**

General Assembly intended to provide constitutional officers with representation in actions not covered by Division of Risk Management's tort liability insurance plan for constitutional officers; plan does not cover Commonwealth's attorneys against whom disciplinary complaint has been filed with Virginia State Bar arising from discharge of official duties. Circuit court may, upon application made and good cause shown, order employment of attorney and payment of costs and legal fees, as appropriate for representation of Commonwealth's attorney or assistant Commonwealth's attorney against whom such disciplinary complaint has been filed.

<table>
<thead>
<tr>
<th>Clause</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>County, City and Town Officers Generally - Actions Against Officers</td>
<td>69</td>
</tr>
<tr>
<td>Dillon rule. Local public bodies may exercise only those powers conferred expressly or by necessary implication</td>
<td>47</td>
</tr>
<tr>
<td>Dillon rule. Locality has only those powers expressly granted by statute and those necessarily implied from expressly granted powers; in construing extent of powers granted, purpose for which statute was enacted is of primary importance</td>
<td>74</td>
</tr>
<tr>
<td>Dillon rule. Locality may not engage in particular activity unless authority for it to do so is expressly granted in state statute or necessarily implied from power expressly granted</td>
<td>93</td>
</tr>
<tr>
<td>Dillon rule. Locality may not engage in particular activity unless authority to do so is expressly granted in statute or necessarily implied from power expressly granted</td>
<td>205</td>
</tr>
<tr>
<td>Dillon rule. Strict construction of local governmental powers</td>
<td>93</td>
</tr>
<tr>
<td>Dillon's rule. Limits powers of local governing bodies to those conferred expressly by law or by necessary implication from conferred powers</td>
<td>253</td>
</tr>
<tr>
<td>Dillon's rule. Local governing bodies and local school boards possess only those powers granted to them expressly or by necessary implication</td>
<td>149</td>
</tr>
</tbody>
</table>

**Fauquier County**

Fauquier County board of supervisors and school board may create legal entity by agreement for joint exercise of powers enjoyed by each political subdivision, i.e., for provision of administrative services to county and school board. Entity has only those powers delegated to it by participating political subdivisions. As instrumentality of Fauquier County and county school board, entity and its employees would be immune from liability for negligent acts or omissions to same degree that political subdivisions are immune.

<table>
<thead>
<tr>
<th>Clause</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>General. Fauquier County board of supervisors and school board may create legal entity by agreement for joint exercise of powers enjoyed by each political subdivision, i.e., for provision of administrative services to county and school board. Entity has only those powers delegated to it by participating political subdivisions. As instrumentality of Fauquier County and county school board, entity and its employees would be immune from liability for negligent acts or omissions to same degree that political subdivisions are immune</td>
<td>72</td>
</tr>
</tbody>
</table>
COUNTIES, CITIES AND TOWNS (contd.)

General. General district court may not appoint private attorneys who volunteer to serve as unpaid private prosecutors of misdemeanor cases when Commonwealth’s attorney has decided not to prosecute such cases in that court ........................................ 139

General. Highland County may adopt ordinance requiring vendors to obtain permits to sell food, beverages or merchandise from streets or sidewalks during Highland County Maple Festival and establishing penalties for violating permit requirement. County may delegate authority to Chamber of Commerce to establish reasonable guidelines assuring that vendors’ merchandise is of quality and nature that will not adversely affect reputation of Festival. County also may authorize Chamber to limit number of vendors who may participate in Festival; basis for determining which vendors may participate must be reasonably related to county’s purpose of holding Festival to promote and celebrate its historical or cultural significance. Highland County may not exclude all except local vendors from participating in Festival and may not authorize Chamber to do so, because their inclusion may have detrimental financial effect on local merchants and organizations. Authority for county to restrict traffic on designated streets does not extend to regulating sale of food and merchandise on adjacent privately owned lands during Festival ........................................ 74

General. Town of Floyd deposits solid waste collected from its residents at county’s transfer station and accesses county’s solid waste management system at no charge. Floyd County ordinance imposing reduced monthly solid waste management and environmental services fee, to reflect collection services town provides to its residents, is enforceable within Town of Floyd ........................................ 95

Government of Cities and Towns. General district court may not appoint private attorneys who volunteer to serve as unpaid private prosecutors of misdemeanor cases when Commonwealth’s attorney has decided not to prosecute such cases in that court ........................................ 139

Industrial Development and Bonds. Constitutional debt restrictions imposed on county have no application to bonds issued by industrial development authority ........................................ 44

Industrial Development and Bonds. Industrial development authority is not prohibited from issuing bonds to finance residential housing for § 501(c)(3) organization exempt from federal income taxation, so long as such organization is not organized and operated exclusively for religious purposes. Authority makes factual determination whether § 501(c)(3) organization is organized exclusively for religious purposes, and whether financing of such organization violates establishment of religion clause of U.S. Constitution and similar limitations within Virginia Constitution. Section 501(c)(3) organization affiliated with religious denomination that is not organized and operated exclusively for religious purposes, whose facility will be used to advance secular purpose, would not be disqualified from obtaining financing for facility through authority. Voter referendum is not required to authorize IDA to issue bonds to finance acquisition and improvement of low-income rental housing by such organization ........................................ 77

Industrial Development and Bonds. Voter approval is not required as condition for industrial development authority to issue bonds or for county or county school board to enter into lease with such authority ........................................ 44
<table>
<thead>
<tr>
<th><strong>COUNTIES, CITIES AND TOWNS (contd.)</strong></th>
<th><strong>Page</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial Development and Bonds. Voter referendum is not required to authorize industrial development authority to exercise power statutorily granted</td>
<td>77</td>
</tr>
<tr>
<td>Industrial Development and Bonds. Voter referendum is not required to fund school construction through county bonds sold to Virginia Public School Authority or to Literary Fund or through bonds issued by industrial development authority that leases school facilities to Warren County</td>
<td>44</td>
</tr>
<tr>
<td>Local governing bodies and local school boards possess only those powers granted to them expressly or by necessary implication</td>
<td>149</td>
</tr>
<tr>
<td>Local governing bodies have no authority to create procedures for appeals from determinations of commissioner or revenue</td>
<td>47</td>
</tr>
<tr>
<td>Local governing bodies have no authority to specify duties of constitutional officers, absent specific legislation</td>
<td>47</td>
</tr>
<tr>
<td>Local governing bodies have no authority to supervise or intervene in management and control of constitutional officer's duties; may add additional duties for such officer to perform that are not inconsistent with office and statutorily prescribed duties</td>
<td>47</td>
</tr>
<tr>
<td>Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth's attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress</td>
<td>47</td>
</tr>
<tr>
<td>Neither federal nor state constitution prohibits local governing body or local school board from transporting students on public school buses to and from sectarian and nonsectarian private schools as part of general public transportation program for all students. Fact that tax dollars are expended or that religious group receives public benefit is not sufficient to render program invalid, when such program is of neutral, general benefit; i.e., providing safe and reliable bus transportation for all school-age children. Constitutionality of particular transportation program requires examination of purpose of program, its primary effect, and whether administration of program fosters excessive religious entanglement. Local governing bodies and local school boards must have express statutory authority permitting use of public school transportation facilities and equipment to transport private school students pursuant to constitutional authority</td>
<td>149</td>
</tr>
<tr>
<td>Ordinances may not operate to forbid what legislature expressly has licensed, authorized or required</td>
<td>66</td>
</tr>
<tr>
<td>Ordinances must not be inconsistent with laws of Commonwealth</td>
<td>66</td>
</tr>
</tbody>
</table>
COUNTIES, CITIES AND TOWNS (contd.)

Pittsylvania County board of supervisors may enact ordinance providing for seven-member school board, representing each county election district, before November 1995 initial election of school board; may abolish two at-large seats and eliminate three town seats on its appointed school board to conform composition of school board to seven-member board of supervisors before election. Resident voters of incorporated towns within county may participate in election of school board members of county election districts in which towns are situated, assuring representation on school board that is apportioned on population basis ........................................... 158

Planning, Subdivision of Land and Zoning. Downzoning of property requires that locality show fraud, mistake or changed circumstances substantially affecting public health, safety or welfare to satisfy requirement that change in zoning not be arbitrary, capricious or unreasonable; changed circumstances should be objectively verifiable from evidence .............. 83

Planning, Subdivision of Land and Zoning. Exercise of local special use power constitutes legislative act entitled to presumption of validity .......................... 85

Planning, Subdivision of Land and Zoning. Local ordinance or other official action providing generally for downzoning, or automatic reversion to prior zoning status, of property granted conditional zoning permit is invalid if authorized use does not begin within stated period of time ............................................. 83

Planning, Subdivision of Land and Zoning. Locality may not prohibit business licensed by ABC Board from selling alcoholic beverages on premises, because domain of control over alcoholic beverages is preempted by Commonwealth ........................................... 85

Planning, Subdivision of Land and Zoning. Ordinance that permits special exception commercial use in residential section but imposes restrictions on extent of commercial use is reasonable means of preserving noncommercial character of residential section; ordinance that restricts commercial use because of impact on traffic at particular spot or time is reasonable and legitimate land use restriction ............................................. 85

Planning, Subdivision of Land and Zoning. Political subdivision that employs certified professional engineer, or person other than licensed land surveyor engaged in practice of engineering or surveying whose employment position is exempted from statutory licensure requirements, is authorized to accept for recordation plats of property owned by local government when preparation of such plats is incidental to governmental engineering project and is not for general public or as independent contractor ......................... 225

Planning, Subdivision of Land and Zoning. Richmond is not required, but may adopt zoning ordinance, to provide single-family zoning treatment to adult group homes for 8 or fewer unrelated, aged, infirm or disabled persons same as is provided in homes in county operating under county manager plan that house mentally ill, mentally retarded, or developmentally disabled persons. Richmond Aids Ministry may not operate unlicensed adult care residence for 8 unrelated adults. Ministry must satisfy all statutory and regulatory requirements to obtain licensure as ACR; may receive such license without obtaining hospice
COUNTIES, CITIES AND TOWNS (contd.)

license if it does not provide intravenous therapy to its residents, but must obtain hospice licensure prior to ACR licensure if it intends to care for residents requiring intravenous drug therapy ................................................................. 286

Planning, Subdivision of Land and Zoning. Special use ordinances must be reasonable, representing local legislative determination that use is sufficiently different from surrounding uses, requiring imposition of conditions to reduce potential adverse impact on neighboring parcels or public ..................................... . . . . . . . . . 85

Planning, Subdivision of Land and Zoning. State Lottery Law relates to licensing of agents and not to uses of land. Local governments are authorized to impose reasonable restrictions on sale of lottery tickets at specific sites to further legitimate land use goal. Ordinance prohibiting sale of lottery tickets on premises of retail store as condition for obtaining special use permit is neither in conflict with, nor preempted by, State Lottery Law ............................... 85

Planning, Subdivision of Land and Zoning. Zoning ordinance restrictions must bear reasonable relationship to legitimate land use concerns and to problems generated by use of property ........................................................................ 85

Planning, Subdivision of Land and Zoning. Zoning ordinances adopted under broad power granted in enabling statutes must not be inconsistent with state law; ordinance is inconsistent with state law if state law preempts any local regulation in area ................................. 85

Police and Public Order - Auxiliary Police Forces in Counties, Cities and Towns. Auxiliary police force only complements existing police force with general law-enforcement duties .. 88

Police and Public Order - Auxiliary Police Forces in Counties, Cities and Towns. Auxiliary police officers possess powers and authority of full-time police officers only during time they are called into service to assist regular police officers of locality; such service is supplemental and exists under limited circumstances. When not in service, auxiliary police officers retain status as private citizens, and may not use police identification or weapons to exercise police powers and authority when observing crime in progress. Statutory restrictions applicable to auxiliary police officers who are not in service do not apply to auxiliary deputy sheriffs. Extent and scope of authority of such deputy sheriffs is within discretion of sheriff ........................................................................ 88

Police and Public Order - Auxiliary Police Forces in Counties, Cities and Towns. May be called into service only in limited circumstances ................................................................. 88

Political subdivisions. May not impose civil or criminal penalties, without statutory authority to do so ................................................................. 100

Political subdivisions. School boards are considered to be political subdivisions ..................... 72

Power of political subdivision to create separate administration or joint board for exercise of powers it enjoys is derived from other powers expressly granted by statute ............ 72
COUNTIES, CITIES AND TOWNS (contd.)

Powers of Cities and Towns. Apartment building/complex is not considered facility that provides nightly accommodations for transients. City of Fall Church is not authorized to impose transient room rentals tax on apartment facilities. City may not enact tax by charter that is prohibited by laws of Commonwealth .......................................................... 260

Powers of Cities and Towns. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor's receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute “other recorded images” inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective ............... 205

Public Finance Act - Bonds Issued by Counties. Voter approval is not required before school board obtains loan from Literary Fund and issues its bonds or notes to secure loan ................................................................. 44

Public Finance Act - Bonds Issued by Counties. Voter referendum is not required for county to issue bonds for school construction if bonds are sold to Virginia Public School Authority ......................................................... 44

Public Finance Act - Bonds Issued by Counties. Voter referendum is not required to fund school construction through county bonds sold to Virginia Public School Authority or to Literary Fund or through bonds issued by industrial development authority that leases school facilities to Warren County ......................................................... 44

Public Utilities; Franchises; etc. County governing body may enact ordinance prohibiting owner of manufactured home park to resell to his tenants water supplied and sold to park by county, thereby protecting county water system’s exclusive service area. Attorney General does not interpret language of county ordinance as to whether park owner is actually selling water purchased from county water system ........................................................................... 240
Public Utilities; Franchises, etc. Fauquier County board of supervisors may enact ordinance, consistent with regulations of Fauquier Water and Sanitation Authority, State Water Control Board and Environmental Protection Agency, requiring pretreatment of wastewater by industrial users of Authority's facilities. Ordinance may impose penalties required by federal and state law for violation of its provisions ........................................ 100

Public Utilities; Franchises, etc. Hampton ordinance does not comply with statutory requirement that stormwater service charge rates bear some relationship to factors that affect amount of stormwater runoff produced by various properties; should be amended to require rational connection between amounts charged to various categories of property and their respective runoff contributions. City council must determine whether citizens who have previously paid fees without making request for adjustment are now entitled to one, or have waived any right to refund ........................................ 91

Public Utilities; Franchises, etc. In order for county to exercise duty and authority to provide solid waste management system, corresponding ability to pay for system must exist .... 95

Public Utilities; Franchises, etc. Regulations governing public utilities must have utility-related purpose ........................................ 240

Public Utilities; Franchises, etc. Statutory authority for localities to own and operate public utilities other than those specified is not broad enough to encompass communications system, which, in addition to providing cable television service, may provide other services that are not normally provided by local governments or are not clearly within meaning of term "public utility." Localities may not own and operate such system ............. 93

Public Utilities; Franchises, etc. Town of Floyd deposits solid waste collected from its residents at county's transfer station and accesses county's solid waste management system at no charge. Floyd County ordinance imposing reduced monthly solid waste management and environmental services fee, to reflect collection services town provides to its residents, is enforceable within Town of Floyd ........................................ 95

Regulatory powers. Exercise of local regulatory power must be reasonable and nondiscriminatory ........................................ 240

School boards are considered to be political subdivisions ........................................ 72

Sovereign immunity. Applicable to governmental entities and instrumentalities, Commonwealth and local governments ........................................ 72

Sovereign immunity. Counties and school boards may not be sued unless such a right and liability are conferred by law, nor may they waive their own immunity ........................................ 72

Sovereign immunity. Fauquier County board of supervisors and school board may create legal entity by agreement for joint exercise of powers enjoyed by each political subdivision, i.e., for provision of administrative services to county and school board. Entity has only
those powers delegated to it by participating political subdivisions. As instrumentality of Fauquier County and county school board, entity and its employees would be immune from liability for negligent acts or omissions to same degree that political subdivisions are immune ........................................ 72

Sovereign immunity. Individual who works for immune governmental entity, in proper case, is eligible for protection afforded by doctrine ........................................ 72

Sovereign immunity. Limits liability of employees of local school boards in exercise of discretionary and supervisory functions ........................................ 72

Sovereign immunity. School boards may not be sued unless such a right and liability are conferred by law, nor may they waive their own immunity ..................... 72

Town of Floyd deposits solid waste collected from its residents at county’s transfer station and accesses county’s solid waste management system at no charge. Floyd County ordinance imposing reduced monthly solid waste management and environmental services fee, to reflect collection services town provides to its residents, is enforceable within Town of Floyd ................................................. 95

Virginia Area Development Act. Board of Virginia Coalfield Economic Development Authority decides whether Authority may provide grant from its Fund to be used as Tazewell County’s matching share of loan that Cumberland Plateau Planning District Commission plans to provide to private industry in county. Grant funds to be used by Authority are limited to those contributed by Tazewell County, unless required approval for use of funds contributed by any other county or city has been obtained. Monies repaid to Commission by recipient of Authority’s original grant of Tazewell County’s matching share may be used in county, or, in Authority’s determination whether particular grant is in best interest of county, to provide loan which may not again be available for county’s use .............. 97

Virginia Coalfield Authority. Board of Virginia Coalfield Economic Development Authority decides whether Authority may provide grant from its Fund to be used as Tazewell County’s matching share of loan that Cumberland Plateau Planning District Commission plans to provide to private industry in county. Grant funds to be used by Authority are limited to those contributed by Tazewell County, unless required approval for use of funds contributed by any other county or city has been obtained. Monies repaid to Commission by recipient of Authority’s original grant of Tazewell County’s matching share may be used in county, or, in Authority’s determination whether particular grant is in best interest of county, to provide loan which may not again be available for county’s use .............. 97

Virginia Coalfield Authority. Chapter creating Authority is to be liberally construed to effect its purposes ........................................ 97

Virginia Water and Sewer Authorities Act. By establishing water and sanitation authority to maintain and operate water system, county does not relinquish power granted by statute to enact ordinances regulating pollution of water in county; ordinances must be consistent with authority’s regulations ........................................ 100
COUNTIES, CITIES AND TOWNS (contd.)

Virginia Water and Sewer Authorities Act. County ordinance consistent with regulations of county water and sanitation authority and enacted for express purpose of complying with federal and state law pollution standards is factually distinct from county ordinance attempting to control general regulations or general operations of authority. 100

Virginia Water and Sewer Authorities Act. Fauquier County board of supervisors may enact ordinance, consistent with regulations of Fauquier Water and Sanitation Authority, State Water Control Board and Environmental Protection Agency, requiring pretreatment of wastewater by industrial users of Authority's facilities. Ordinance may impose penalties required by federal and state law for violation of its provisions. 100

Virginia Water and Sewer Authorities Act. In enacting statutes defining powers of county, water and sewer authority, and State Water Control Board, legislature did not intend to establish system that would create conflict between local, state and federal law regarding water pollution controls. 100

Virginia Water and Sewer Authorities Act. Legislative intent that governing body retain power to regulate water and sewer services, despite existence of water and sewer authority with same powers. 100

COURTS NOT OF RECORD

Appeals. When legislature prescribes method for exercise of right of appeal or supervision, such method is exclusive; neither court nor judge may modify these rules without express statutory authority, and then only to extent specified. 103

District Courts - Financing of the District System. Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected. 103

General district court may determine and set new bail, including imposition of new conditions or denial of bail, after defendant has been convicted and sentenced to jail, before case is transferred to circuit court for de novo hearing. District court's decision to deny, or increase conditions for, bail after conviction does not infringe on defendant's constitutional rights or any statutory right of appeal or retrial. 106

General district courts. Entry of judgment pursuant to conviction for drug offense(s) automatically results in six-month license forfeiture from date of judgment; general district court imposes such license forfeiture at time of entry of disposition order. 114

General district courts. Fee paid sheriff for service of process is recoverable by prevailing party as part of court costs; no statutory requirement to include amount paid to private process server. General district court may determine, within its discretion, whether to include amount paid to private process server in court costs recoverable by prevailing party. 54
COURTS NOT OF RECORD (contd.)

Jurisdiction and Procedure, Civil Matters. Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected ................................. 103

Jurisdiction and Procedure, Criminal Matters. Authority of general district court after conviction is limited to granting bail and carrying into execution its judgment. Court may set post-conviction bail only when application is made before transfer of case to circuit court .................................................. 106

Jurisdiction and Procedure, Criminal Matters. Defendant’s motion before general district court to suspend jail sentence does not act as waiver of, or bar to, his right to retrial in circuit court ................................................................. 106

Jurisdiction and Procedure, Criminal Matters. General district court may determine and set new bail, including imposition of new conditions or denial of bail, after defendant has been convicted and sentenced to jail, before case is transferred to circuit court for de novo hearing. District court’s decision to deny, or increase conditions for, bail after conviction does not infringe on defendant’s constitutional rights or any statutory right of appeal or retrial ................................................................. 106

Jurisdiction and Procedure, Criminal Matters. Right of retrial is absolute right that may not be conditioned on any factor except filing of timely notice of appeal ................................................................. 106

Jurisdiction and Procedure, Criminal Matters. Right to de novo trial may not be conditioned on filing of bond ................................................................. 106

Juvenile and Domestic Relations Courts. Juvenile previously tried and convicted in circuit court as adult, who again is charged with commission of offense classified as felony, does not have to be housed entirely separate and apart from adult inmates. Juvenile who remains within jurisdiction of juvenile court and whose disruptive behavior necessitates removal from juvenile detention facility to adult facility must be physically separated from adults in jails and other detention facilities ................................................................. 109

Juvenile and Domestic Relations Courts. Juvenile tried and sentenced by circuit court as adult should be treated as adult offender for all purposes ................................................................. 109

Juvenile and Domestic Relations Courts. Welfare of child is paramount concern in all juvenile court proceedings ................................................................. 111

Juvenile and Domestic Relations Courts - Disposition. Juvenile court has no authority to manage operation, or to delegate management to court services units or juvenile probation officers, of shelter care home. Subsequent to court’s placement of juvenile in shelter care facility, services and programs facility provides to juvenile are determined by entity operating facility, subject only to constraints placed on facility by State Board of Youth and Family Services regulations and by applicable statutory law ................................................................. 111
Juvenile and Domestic Relations Courts - Facilities for Detention and Other Residential Care. Juvenile court has no authority to manage operation, or to delegate management to court services units or juvenile probation officers, of shelter care home. Subsequent to court’s placement of juvenile in shelter care facility, services and programs facility provides to juvenile are determined by entity operating facility, subject only to constraints placed on facility by State Board of Youth and Family Services regulations and by applicable statutory law.

Juvenile and Domestic Relations Courts - Jurisdiction and Venue. Courts have exclusive jurisdiction over juveniles charged with criminal offenses.

Juvenile and Domestic Relations Courts - Jurisdiction and Venue. Jurisdiction, practice and procedure of juvenile courts are entirely statutory.

Juvenile and Domestic Relations Courts - Jurisdiction and Venue. Juvenile court has no authority to manage operation, or to delegate management to court services units or juvenile probation officers, of shelter care home. Subsequent to court’s placement of juvenile in shelter care facility, services and programs facility provides to juvenile are determined by entity operating facility, subject only to constraints placed on facility by State Board of Youth and Family Services regulations and by applicable statutory law.

Trial. Conduct of trial or hearing is left to sound discretion of trial court.

COURTS OF RECORD

Appeals. When legislature prescribes method for exercise of right of appeal or supervision, such method is exclusive; neither court nor judge may modify these rules without express statutory authority, and then only to extent specified.

Circuit courts. Authority to appoint prosecutor when Commonwealth’s attorney is unable to act is limited to temporary situations analogous to that attorney’s sickness or disability.

Circuit courts. Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected.

Circuit courts. General Assembly has not authorized circuit court to require additional information for determining advisability of granting concealed handgun permit to applicant for reasons not enumerated in statute. Circuit court is prohibited from prescribing rule that is inconsistent with any statutory provision, or that has effect of abridging substantive right of persons appearing before such court. Court lacks authority to add exclusion to grant concealed handgun permit based on applicant’s refusal to submit to psychosocial assessment or on results of such assessment. Court has no authority to require permit applicants to submit to psychosocial assessments.
COURTS OF RECORD (contd.)

Circuit courts. Juvenile previously tried and convicted in circuit court as adult, who again is charged with commission of offense classified as felony, does not have to be housed entirely separate and apart from adult inmates. Juvenile who remains within jurisdiction of juvenile court and whose disruptive behavior necessitates removal from juvenile detention facility to adult facility must be physically separated from adults in jails and other detention facilities ........................................ 109

Circuit courts. Uniform Enforcement of Foreign Judgments Act authorizes circuit court clerks to accept properly authentica. 4 copies of nonmonetary foreign judgments, in addition to monetary decrees or awards ........................................ 26

Court of Appeals (see infra The Court of Appeals)

The Court of Appeals. Circuit court may exercise discretion in determining whether to require proof from applicant of demonstrated competence with handgun before issuing permit; court shall not disregard documented evidence that permit applicant has satisfactorily completed approved method for demonstrating competence with handgun. Court may not limit or restrict concealed weapon permit to specific handgun with particular serial number. Decision whether to permit the Commonwealth’s attorney to appear and be heard at ore tenus hearing rests within sound discretion of circuit court. Commonwealth’s attorney is not authorized to petition Court of Appeals for review of final decision of circuit court either granting or opposing application for permit. Sworn written statement submitted to court by sheriff, chief of police or Commonwealth’s attorney must contain specific facts upon which opinion regarding applicant’s unlawful or negligent use of weapon is based. Individual who carries handgun into areas expressly prohibited may be charged with statutorily prescribed misdemeanor or felony violation ........................................ 123

The Court of Appeals. Clerk must charge $10 for filing of petition to review circuit court order denying concealed weapon permit ........................................ 121

Trial. Conduct of trial or hearing is left to sound discretion of trial court ............. 123

CRIMES AND OFFENSES GENERALLY

Bingo (see infra Crimes Involving Morals and Decency - Bingo and Raffles)

Crimes Involving Health and Safety - Driving Motor Vehicle, etc., While Intoxicated. Individual issued commercial driver’s license and/or regular driver’s license may be convicted of driving under influence of alcohol intoxicants while operating personal vehicle with BAC between 0.04 and 0.08%. Commonwealth must obtain credible proof of intoxication other than test result when BAC is less than 0.08% and must overcome presumption that individual was not under influence when BAC measures less than 0.05% to obtain conviction. Individual operating private vehicle with BAC of 0.04% or more may be prosecuted under Virginia Commercial Driver’s License Act only when vehicle is used as “commercial motor vehicle” to transport “hazardous materials,” as both terms are defined in Act ............ 195
CRIMES AND OFFENSES GENERALLY (contd.)

Crimes Involving Health and Safety - Driving Motor Vehicle, etc., While Intoxicated. Inmate ineligible for parole may not earn good conduct credit when mandatory minimum sentence is imposed. Intent of General Assembly is to ensure that inmate convicted of crime carrying mandated minimum sentence must serve entire time. Inmate is ineligible to receive good conduct credit for 30 days of 90-day sentence served as mandatory minimum sentence for third conviction of driving motor vehicle while intoxicated within five-year period, but is eligible to earn good conduct credit on last 60 days of three-month sentence ............ 224

Crimes Involving Health and Safety - Drugs. DMV Commissioner is required to revoke driver's license of individual convicted in federal court criminal case under federal law substantially similar to one of requisite Virginia provisions .................. 192

Crimes Involving Health and Safety - Drugs. Entry of judgment pursuant to conviction for drug offense(s) automatically results in six-month license forfeiture from date of judgment; general district court imposes such license forfeiture at time of entry of disposition order. DMV Commissioner's revocation of defendant's driver's license for six months, after receiving notice of conviction of drug offense or deferral of proceedings, is not formal prerequisite for such revocation ...................... 114

Crimes Involving Health and Safety - Drugs. Federal regulations properly promulgated have full force and effect of federal law. Statutory mandate that DMV Commissioner revoke driver's license of Virginia citizen convicted of possession of cocaine in federal district court, under federal regulation substantially similar to Virginia law, is administratively imposed requirement, denying citizen's privilege to drive on Virginia's highways, and is not penal in nature ............................. 192

Crimes Involving Health and Safety - Other Illegal Weapons. Circuit court may exercise discretion in determining whether to require proof from applicant of demonstrated competence with handgun before issuing permit; court shall not disregard documented evidence that permit applicant has satisfactorily completed approved method for demonstrating competence with handgun. Court may not limit or restrict concealed weapon permit to specific handgun with particular serial number. Decision whether to permit the Commonwealth's attorney to appear and be heard at ore tenus hearing rests within sound discretion of circuit court. Commonwealth's attorney is not authorized to petition Court of Appeals for review of final decision of circuit court either granting or opposing application for permit. Sworn written statement submitted to court by sheriff, chief of police or Commonwealth's attorney must contain specific facts upon which opinion regarding applicant's unlawful or negligent use of weapon is based. Individual who carries handgun into areas expressly prohibited may be charged with statutorily prescribed misdemeanor or felony violation .................. 123

Crimes Involving Health and Safety - Other Illegal Weapons. Clerk of Court of Appeals must charge $10 for filing of petition to review circuit court order denying concealed weapon permit ........................................ 121

Crimes Involving Health and Safety - Other Illegal Weapons. Concealed handgun permit allows holder to carry handgun in area not otherwise prohibited .................. 123
CRIMES AND OFFENSES GENERALLY (contd.)

Crimes Involving Health and Safety - Other Illegal Weapons. General Assembly has not authorized circuit court to require additional information for determining advisability of granting concealed handgun permit to applicant for reasons not enumerated in statute. Circuit court is prohibited from prescribing rule that is inconsistent with any statutory provision, or that has effect of abridging substantive right of persons appearing before such court. Court lacks authority to add exclusion to grant concealed handgun permit based on applicant's refusal to submit to psychosocial assessment or on results of such assessment. Court has no authority to require permit applicants to submit to psychosocial assessments.

Crimes Involving Health and Safety - Other Illegal Weapons. General Assembly intended concealed handgun permit holder to carry handgun only in area where possession is not specifically prohibited. Prohibition against carrying concealed handgun applies to any individual other than owner/sponsor or employees of business/event issued either on-, or on- and off-, premises license by ABC Board to sell or serve alcoholic beverages. Concealed handgun permit holder may carry concealed handgun into business licensed only to sell or serve alcoholic beverages in closed containers for off-premises consumption, unless specifically prohibited.

Crimes Involving Health and Safety - Other Illegal Weapons. Total maximum fee for obtaining concealed weapon permit is not to exceed $50. Ten-dollar fee charged by circuit court clerk for processing application or issuing permit is mandatory; assessment of State Police fee for cost of processing application and local law-enforcement agency(-ies) fee for cost of investigating applicant is optional, but may not exceed $5 and $35, respectively.

Crimes Involving Morals and Decency - Bingo and Raffles. Activity constitutes illegal gambling when elements of prize, chance and consideration are present together. All three elements combine in "essay" contest to be conducted as raffle. Because prize in contest will not be awarded by random drawing, as is required of raffle, activity constitutes illegal gambling.

Crimes Involving Morals and Decency - Bingo and Raffles. Activity that is not conducted by qualified organization constitutes illegal gambling.

Crimes Involving Morals and Decency - Bingo and Raffles. Statutory definition of "raffle" must be strictly construed.

Crimes Involving Morals and Decency - Obscenity and Related Offenses. 1995 statutory amendment will hold on-line communications entities or other cable networks culpable only when there is prior knowledge of transmission of computer-generated reproduction of sexually explicit digital image involving person under 18. Such entities have no affirmative legal duty to review such material in advance; are responsible only for actual knowledge of contents of materials they transmit.

Crimes Involving Morals and Decency - Obscenity and Related Offenses. Scienter requirement may apply even when not expressly stated in statute.

Drugs (see supra Crimes Involving Health and Safety - Drugs)
CRIMES AND OFFENSES GENERALLY (contd.)

Pornography (see generally supra Crimes Involving Morals and Decency - Obscenity and Related Offenses)

Raffles (see supra Crimes Involving Morals and Decency - Bingo and Raffles)

CRIMINAL PROCEDURE

Arrest. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor’s receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute “other recorded images” inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective.

Arrest. Offices of sheriff and high constable are not incompatible. Norfolk city sheriff may serve simultaneously as Norfolk high constable. Fees collected by sheriff as high constable must be deposited in city treasury for use in operation of city government.

Arrest. Private citizen may only effect arrest for felonies, or for affrays or breaches of peace, committed in his presence; may use deadly force to prevent commission of felony only in certain limited circumstances, and use of such force must be reasonable and may be resorted to only when apprehending most serious felons.

Bail and Recognizances. General district court may determine and set new bail, including imposition of new conditions or denial of bail, after defendant has been convicted and sentenced to jail, before case is transferred to circuit court for de novo hearing. District court’s decision to deny, or increase conditions for, bail after conviction does not infringe on defendant’s constitutional rights or any statutory right of appeal or retrial.
### 1995 REPORT OF THE ATTORNEY GENERAL

#### CRIMINAL PROCEDURE (contd.)

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disability of Judge; Appointed Counsel, etc. - Disability of Attorney for Commonwealth.</td>
<td>139</td>
</tr>
<tr>
<td>General district court may not appoint private attorneys who volunteer to serve as unpaid</td>
<td></td>
</tr>
<tr>
<td>private prosecutors of misdemeanor cases when Commonwealth's attorney has decided not to</td>
<td></td>
</tr>
<tr>
<td>prosecute such cases in that court</td>
<td></td>
</tr>
<tr>
<td>Extradition of Criminals - Uniform Criminal Extradition Act. Bail provisions apply only to</td>
<td></td>
</tr>
<tr>
<td>criminal proceedings involving adjudication of criminal charges pending in Virginia and not</td>
<td></td>
</tr>
<tr>
<td>to civil extradition proceedings. Court has no authority to admit individual to bail once</td>
<td></td>
</tr>
<tr>
<td>governor's warrant of extradition issues. Fugitive from demanding state held in Virginia jail</td>
<td></td>
</tr>
<tr>
<td>pursuant to such warrant is not entitled to release on bail pending resolution of his challenge</td>
<td></td>
</tr>
<tr>
<td>to extradition</td>
<td>141</td>
</tr>
<tr>
<td>Extradition of Criminals - Uniform Criminal Extradition Act. Governor's grant of extradition</td>
<td></td>
</tr>
<tr>
<td>is prima facie evidence that constitutional and statutory requirements have been met; judicial</td>
<td></td>
</tr>
<tr>
<td>review is limited</td>
<td>141</td>
</tr>
<tr>
<td>Extradition of Criminals - Uniform Criminal Extradition Act. Limitations on courts in extradition</td>
<td></td>
</tr>
<tr>
<td>process</td>
<td>141</td>
</tr>
<tr>
<td>Extradition of Criminals - Uniform Criminal Extradition Act. Purpose of extradition process</td>
<td></td>
</tr>
<tr>
<td>is to ensure speedy transfer of fugitive from justice in asylum state to demanding state</td>
<td></td>
</tr>
<tr>
<td>where fugitive must face criminal charges. Protections afforded by due process, including</td>
<td></td>
</tr>
<tr>
<td>consideration for release on bail, are best addressed in jurisdiction where individual</td>
<td></td>
</tr>
<tr>
<td>is charged</td>
<td>141</td>
</tr>
<tr>
<td>Proceedings on Question of Insanity. Circuit court has no authority to order individual</td>
<td></td>
</tr>
<tr>
<td>applying for concealed handgun permit to undergo psychosocial assessment</td>
<td>130</td>
</tr>
<tr>
<td>Proceedings on Question of Insanity. General Assembly has not authorized circuit court to</td>
<td></td>
</tr>
<tr>
<td>require additional information for determining advisability of granting concealed handgun</td>
<td></td>
</tr>
<tr>
<td>permit to applicant for reasons not enumerated in statute. Circuit court is prohibited from</td>
<td></td>
</tr>
<tr>
<td>prescribing rule that is inconsistent with any statutory provision, or that has effect of</td>
<td></td>
</tr>
<tr>
<td>abridging substantive right of persons appearing before such court. Court lacks authority to add</td>
<td></td>
</tr>
<tr>
<td>exclusion to grant concealed handgun permit based on applicant's refusal to submit to</td>
<td></td>
</tr>
<tr>
<td>psychosocial assessment or on results of such assessment. Court has no authority to require</td>
<td></td>
</tr>
<tr>
<td>permit applicants to submit to psychosocial assessments</td>
<td>130</td>
</tr>
<tr>
<td>Sentence; Judgment; Execution of Sentence. Agreement on Detainers requires sending state</td>
<td></td>
</tr>
<tr>
<td>to credit prisoner's sentence with all time prisoner is physically in Virginia jail awaiting</td>
<td></td>
</tr>
<tr>
<td>trial pursuant to Agreement; prisoner remains in custody of sending state for purposes of</td>
<td></td>
</tr>
<tr>
<td>computing time served on sentence imposed by that state. Prisoner returned to Virginia under</td>
<td></td>
</tr>
<tr>
<td>Agreement may not receive duplication of credit for time spent in jail awaiting trial on</td>
<td></td>
</tr>
<tr>
<td>criminal charges pending in Virginia; may be allowed concurrent credit on Virginia sentence for</td>
<td></td>
</tr>
<tr>
<td>time spent in Virginia jail awaiting trial on criminal charges only when expressly ordered by</td>
<td>219</td>
</tr>
<tr>
<td>Virginia court</td>
<td></td>
</tr>
</tbody>
</table>
**CRIMINAL PROCEDURE (contd.)**

| Taxation and Allowance of Costs. Convicted defendant who necessitated calling of jurors by having requested jury trial is liable for expenses of jurors, including those discharged or excused during *voir dire* | 144 |
| Taxation and Allowance of Costs. Court may not waive jury costs required to be paid by defendant who pleads guilty after jury has been called, whether pursuant to plea agreement or otherwise. Defendant may be excused from paying costs required to be reimbursed to Commonwealth only when accused waives trial by jury, at least ten days before trial | 144 |
| Taxation and Allowance of Costs. Court may not waive jury costs, as part of defendant’s guilty plea agreement, when jurors already have been summoned | 144 |
| Taxation and Allowance of Costs. Defendant should be held responsible for cost of two juries when first jury results in hung jury, and for cost of jury dismissed when Commonwealth’s attorney postpones case because of missing witness | 144 |
| Taxation and Allowance of Costs. Jurors are entitled to compensation for each day’s attendance at term of court, even those not selected as part of jury panel | 144 |
| Taxation and Allowance of Costs. Medical facility may charge for expenses of retrieving, copying and mailing items provided in response to subpoena issued in criminal case at request of Commonwealth’s attorney. Expenses associated with discreet individual criminal cases resulting from issuance of subpoena, and which are not incurred on continuing or predictable basis, properly may be considered expenses compensable by order of court, when authorized by statute and there is no designated source of payment other than state treasury from appropriations for criminal charges | 22 |
| Taxation and Allowance of Costs. Payment of costs in criminal case is not part of court sentence, nor part of penalty or punishment prescribed for offense | 144 |
| Taxation and Allowance of Costs. Requisites necessary for payment of allowable costs for services rendered in criminal cases | 22 |
| Taxation and Allowance of Costs. Right to enforce payment of costs is mere incident to conviction; purpose of enforcing payment is to replace amount in treasury defendant caused to be withdrawn from it | 144 |

**Uniform Criminal Extradition Act (see supra Extradition of Criminals - Uniform Criminal Extradition) Act**

**DEFINITIONS**

<p>| Adult care residence is not medical care facility | 286 |
| Agency | 39 |
| An - singular descriptive adjective | 116 |</p>
<table>
<thead>
<tr>
<th>DEFINITIONS (contd.)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority facilities</td>
<td>44, 77</td>
</tr>
<tr>
<td>Cable service</td>
<td>93</td>
</tr>
<tr>
<td>Cable television service</td>
<td>93</td>
</tr>
<tr>
<td>Candidate</td>
<td>170</td>
</tr>
<tr>
<td>Certificate</td>
<td>199</td>
</tr>
<tr>
<td>Certificate of title</td>
<td>238</td>
</tr>
<tr>
<td>Certificated motor vehicle carrier</td>
<td>278</td>
</tr>
<tr>
<td>Classification</td>
<td>265</td>
</tr>
<tr>
<td>Commercial and industrial property</td>
<td>274</td>
</tr>
<tr>
<td>Commercial motor vehicle</td>
<td>195</td>
</tr>
<tr>
<td>Commissioner of revenue</td>
<td>242</td>
</tr>
<tr>
<td>Compensation arrangements (existence of, under federal law)</td>
<td>235</td>
</tr>
<tr>
<td>Conservators of the peace - meet statutory definition of “law enforcement officer[s]”</td>
<td>205</td>
</tr>
<tr>
<td>Controlled substance(s)</td>
<td>192</td>
</tr>
<tr>
<td>Cost</td>
<td>31</td>
</tr>
<tr>
<td>Costs</td>
<td>59</td>
</tr>
<tr>
<td>Cultural</td>
<td>74</td>
</tr>
<tr>
<td>Data subject</td>
<td>281</td>
</tr>
<tr>
<td>Delinquent act</td>
<td>111</td>
</tr>
<tr>
<td>Delinquent child</td>
<td>111</td>
</tr>
<tr>
<td>Domicile</td>
<td>268, 270</td>
</tr>
<tr>
<td>Election district</td>
<td>181</td>
</tr>
<tr>
<td>Eminent domain</td>
<td>15</td>
</tr>
<tr>
<td>Employ</td>
<td>205</td>
</tr>
<tr>
<td>Definition</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Engaged in business</td>
<td>245</td>
</tr>
<tr>
<td>Entirely separate and removed from adults</td>
<td>109</td>
</tr>
<tr>
<td>Executive sedan</td>
<td>199</td>
</tr>
<tr>
<td><em>Ex officio</em></td>
<td>160</td>
</tr>
<tr>
<td>Exotic animals</td>
<td>264</td>
</tr>
<tr>
<td>Extradition - summary and mandatory executive proceeding, requiring asylum state to deliver fugitive from justice to state from which he fled on demand of state's executive authority</td>
<td>141</td>
</tr>
<tr>
<td>Farm animals</td>
<td>264</td>
</tr>
<tr>
<td>Fiction of law</td>
<td>146</td>
</tr>
<tr>
<td>Financial relationship (existence of under federal law)</td>
<td>235</td>
</tr>
<tr>
<td>Foreign judgment</td>
<td>26</td>
</tr>
<tr>
<td>Fringe benefit - distinct from salary</td>
<td>162</td>
</tr>
<tr>
<td>Governmental agency</td>
<td>2</td>
</tr>
<tr>
<td>Gross receipts</td>
<td>250, 276</td>
</tr>
<tr>
<td>Handgun</td>
<td>123</td>
</tr>
<tr>
<td>Hazardous materials</td>
<td>195</td>
</tr>
<tr>
<td>Heir at law</td>
<td>291</td>
</tr>
<tr>
<td>Hotel generally is not used to describe condominiums</td>
<td>260</td>
</tr>
<tr>
<td>Illegal gambling</td>
<td>133</td>
</tr>
<tr>
<td>Industrial development authority</td>
<td>44</td>
</tr>
<tr>
<td><em>In pari materia</em></td>
<td>199</td>
</tr>
<tr>
<td>Intangible property</td>
<td>238</td>
</tr>
<tr>
<td>Jail - court-related facility, whether or not it is connected to courthouse or it contains other court facilities within its structure</td>
<td>57</td>
</tr>
<tr>
<td>Definition</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Jus publicum</td>
<td>15</td>
</tr>
<tr>
<td>Knowingly</td>
<td>136</td>
</tr>
<tr>
<td>Law-enforcement officer</td>
<td>205</td>
</tr>
<tr>
<td>Licensure by endorsement - procedure for accepting licenses from other jurisdictions</td>
<td>228</td>
</tr>
<tr>
<td>Limousine</td>
<td>199</td>
</tr>
<tr>
<td>Local correctional facility</td>
<td>219, 221</td>
</tr>
<tr>
<td>Lodging</td>
<td>260</td>
</tr>
<tr>
<td>Lodging facility</td>
<td>260</td>
</tr>
<tr>
<td>Lottery</td>
<td>133</td>
</tr>
<tr>
<td>Machinery</td>
<td>274</td>
</tr>
<tr>
<td>Machinery and tools used in a manufacturing business</td>
<td>274</td>
</tr>
<tr>
<td>Mandated benefits</td>
<td>187</td>
</tr>
<tr>
<td>Mandated offers</td>
<td>187</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>254, 257</td>
</tr>
<tr>
<td>Manufacturing - includes generation of electricity or steam</td>
<td>265</td>
</tr>
<tr>
<td>May - grants permissive, rather than mandatory, term</td>
<td>18, 69, 116</td>
</tr>
<tr>
<td>May - permissive term</td>
<td>116, 121, 205</td>
</tr>
<tr>
<td>May - permissive, discretionary term</td>
<td>123</td>
</tr>
<tr>
<td>Mobilia sequuntur personam</td>
<td>268</td>
</tr>
<tr>
<td>Motel generally is not used to describe condominiums</td>
<td>260</td>
</tr>
<tr>
<td>On hand</td>
<td>289</td>
</tr>
<tr>
<td>Only - connotes limiting language</td>
<td>111</td>
</tr>
<tr>
<td>Operate</td>
<td>205</td>
</tr>
<tr>
<td>Ore tenus</td>
<td>123</td>
</tr>
</tbody>
</table>
### Definitions (contd.)

<table>
<thead>
<tr>
<th>Term</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organization</td>
<td>133</td>
</tr>
<tr>
<td>Owner</td>
<td>33, 205</td>
</tr>
<tr>
<td>Pawnbroker</td>
<td>238</td>
</tr>
<tr>
<td>Penal</td>
<td>192</td>
</tr>
<tr>
<td>Penal law</td>
<td>192</td>
</tr>
<tr>
<td>Personal property</td>
<td>238</td>
</tr>
<tr>
<td>Persons having “legitimate interest” in child protective services records of local departments of social services</td>
<td>281</td>
</tr>
<tr>
<td>Political committee</td>
<td>170</td>
</tr>
<tr>
<td>Practice of engineering</td>
<td>225</td>
</tr>
<tr>
<td>Practice of land surveying</td>
<td>225</td>
</tr>
<tr>
<td>Practice of medicine or osteopathic medicine</td>
<td>235</td>
</tr>
<tr>
<td>Practice of pharmacy</td>
<td>235</td>
</tr>
<tr>
<td>Prepared</td>
<td>7</td>
</tr>
<tr>
<td>Proof</td>
<td>18</td>
</tr>
<tr>
<td>Public body</td>
<td>37, 39</td>
</tr>
<tr>
<td>Public contract</td>
<td>37</td>
</tr>
<tr>
<td>Public utility(-ies)</td>
<td>93</td>
</tr>
<tr>
<td>Raffle</td>
<td>133</td>
</tr>
<tr>
<td>Repair service</td>
<td>254</td>
</tr>
<tr>
<td>Residence</td>
<td>270</td>
</tr>
<tr>
<td>Restaurant</td>
<td>7</td>
</tr>
<tr>
<td>Retail sale</td>
<td>260</td>
</tr>
<tr>
<td>Retail store</td>
<td>7</td>
</tr>
</tbody>
</table>
### DEFINITIONS (contd.)

<table>
<thead>
<tr>
<th>Term</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Runoff</td>
<td>91</td>
</tr>
<tr>
<td>Salary</td>
<td>162</td>
</tr>
<tr>
<td>Securities</td>
<td>238</td>
</tr>
<tr>
<td>Sending state</td>
<td>219</td>
</tr>
<tr>
<td>Shall - generally connotes mandatory act</td>
<td>63, 187</td>
</tr>
<tr>
<td>Shall - mandatory term</td>
<td>116, 121, 146, 205</td>
</tr>
<tr>
<td>Shall - mandatory, rather than permissive or directive, term</td>
<td>118, 123</td>
</tr>
<tr>
<td>Shall - ordinarily, but not always, connotes provisions are mandatory</td>
<td>22</td>
</tr>
<tr>
<td>State agency</td>
<td>213</td>
</tr>
<tr>
<td>State correctional facility</td>
<td>221</td>
</tr>
<tr>
<td><em>Sua sponte</em></td>
<td>130</td>
</tr>
<tr>
<td>Sufficient</td>
<td>18</td>
</tr>
<tr>
<td>Tangible property</td>
<td>238</td>
</tr>
<tr>
<td>Technician</td>
<td>205</td>
</tr>
<tr>
<td>Tool</td>
<td>274</td>
</tr>
<tr>
<td>Traffic infraction</td>
<td>205</td>
</tr>
<tr>
<td>Traffic light signal violation-monitoring system</td>
<td>205</td>
</tr>
<tr>
<td>Transient</td>
<td>260</td>
</tr>
<tr>
<td>Value</td>
<td>31</td>
</tr>
<tr>
<td>Wild animals</td>
<td>264</td>
</tr>
<tr>
<td>Writing</td>
<td>170</td>
</tr>
</tbody>
</table>

### DOMESTIC RELATIONS

Uniform Child Custody Jurisdiction Act. Uniform Enforcement of Foreign Judgments Act authorizes circuit court clerks to accept properly authenticated copies of nonmonetary foreign judgments, in addition to monetary decrees or awards. 26
EDUCATION

Division Superintendents. County school board simultaneously may terminate by mutual
consent employment agreement of division superintendent and reappoint superintendent to
office, provided such action creating vacancy in office does not occur within statutorily des-
ignated 60-day period for appointment of superintendents ........................................... 146

Literary Fund. Voter approval is not required before school board obtains loan from Liter-
ary Fund and issues its bonds or notes to secure loan ......................................................... 44

Literary Fund. Voter referendum is not required to fund school construction through county
bonds sold to Virginia Public School Authority or to Literary Fund or through bonds issued
by industrial development authority that leases school facilities to Warren County .......... 44

Powers and Duties of School Boards. Authority to provide health insurance for their officers
and employees ....................................................................................................................... 162

Powers and Duties of School Boards. General Assembly may circumscribe broad authority
of school boards .................................................................................................................... 162

Powers and Duties of School Boards. School board’s provision of health care coverage for
its members does not contravene intent of General Assembly that local governing bodies
may provide same benefits to members as are provided to their employees, so long as funds
have been appropriated by local governing body to pay health insurance premiums. School
board’s payment of premiums is fringe benefit that need not be deducted from board mem-
bers’ salaries ....................................................................................................................... 162

Public School Funds. Voter approval is not required before school board obtains loan from
Literary Fund and issues its bonds or notes to secure loan ......................................................... 44

Public School Funds. Voter referendum is not required to fund school construction through
county bonds sold to Virginia Public School Authority or to Literary Fund or through bonds
issued by industrial development authority that leases school facilities to Warren County .. 44

Public schools. Use of term “Christmas break” by county public schools to denote period
of vacation taken by students in late December of each year, when schools customarily are
closed is not prohibited ........................................................................................................... 1

Public schools must avoid impermissible state sponsorship of religion ................................ 1
Pupil Transportation. Neither federal nor state constitution prohibits local governing body or local school board from transporting students on public school buses to and from sectarian and nonsectarian private schools as part of general public transportation program for all students. Fact that tax dollars are expended or that religious group receives public benefit is not sufficient to render program invalid, when such program is of neutral, general benefit; i.e., providing safe and reliable bus transportation for all school-age children. Constitutionality of particular transportation program requires examination of purpose of program, its primary effect, and whether administration of program fosters excessive religious entanglement. Local governing bodies and local school boards must have express statutory authority permitting use of public school transportation facilities and equipment to transport private school students pursuant to constitutional authority.

School boards. County school board simultaneously may terminate by mutual consent employment agreement of division superintendent and reappoint superintendent to office, provided such action creating vacancy in office does not occur within statutorily designated 60-day period for appointment of superintendents.

School Boards; Selection, etc. Advisory committee members are not considered members of school board.

School Boards; Selection, etc. Boards of supervisors that create at-large school board positions retain ability to abolish those positions.

School Boards; Selection, etc. Campbell County board of supervisors may abolish existing appointed at-large seats on school board before initial election of school board at November 1995 general election. Supervisors may reappoint any member whose term expires before December 31, 1995, or appoint replacement, to serve on school board until elected member’s term begins. Terms of appointed school board members who will not be replaced by elected member at November 1997 general election are extended until expiration on December 31, 1997.

School Boards; Selection, etc. Members are public officers.

School Boards; Selection, etc. School board should not delegate its power of appointment.

School Boards; Selection, etc. School board, in exercising its powers of appointment, may appoint teacher(s) recommended by board’s licensed instructional personnel to serve on advisory committee to board, but is not authorized to appoint to its membership ex officio, nonvoting teacher representative.

School Boards; Selection, etc. School board’s provision of health care coverage for its members does not contravene intent of General Assembly that local governing bodies may provide same benefits to members as are provided to their employees, so long as funds have
been appropriated by local governing body to pay health insurance premiums. School board's payment of premiums is fringe benefit that need not be deducted from board members' salaries .......................................................... 162

School Boards; Selection, etc. - Popular Election of School Board. Giles County electoral board may assign by lot which successful at-large school board candidate will serve four-year term and which will serve two-year term, on day after and upon certification of results of November 1995 general election in which term of at-large members of school board will occur simultaneously with first election of staggered board of supervisors. Candidates for at-large seats should be notified that term for which he or she will be elected is unknown until after election ........................................................................... 180

School Boards; Selection, etc. - Popular Election of School Board. Optional authority granted to boards of supervisors to create at-large seats on school board includes implied authority to abolish those seats after their creation ............................................. 158

School Boards; Selection, etc. - Popular Election of School Board. Pittsylvania County board of supervisors may enact ordinance providing for seven-member school board, representing each county election district, before November 1995 initial election of school board; may abolish two at-large seats and eliminate three town seats on its appointed school board to conform composition of school board to seven-member board of supervisors before election. Resident voters of incorporated towns within county may participate in election of school board members of county election districts in which towns are situated, assuring representation on school board that is apportioned on population basis ............................................. 158

Virginia Public School Authority. Voter referendum is not required for county to issue bonds for school construction if bonds are sold to Authority ............................................. 44

Virginia Public School Authority. Voter referendum is not required to fund school construction through county bonds sold to Virginia Public School Authority or to Literary Fund or through bonds issued by industrial development authority that leases school facilities to Warren County .................................................................

ELECTIONS

Campaign Finance Disclosure Act. Statutory provision requiring disclosure of identity of person(s) responsible for writings concerning referendum issue(s) to be submitted to voters would likely not survive constitutional challenge, based on U.S. Supreme Court's decision in McIntyre v. Ohio Elections Commission; such disclosure of identity of person(s) responsible for writings concerning candidate elections would survive constitutional challenge, given narrow construction accorded statutes imposing criminal sanctions. Requiring identification of source of person(s) supporting election or defeat of candidates and of campaign advertising is governmental interest that clearly outweighs First Amendment right to anonymity. Requiring identification of individuals and groups of individuals who advocate in writing election or defeat of candidate(s) promotes interests of Commonwealth in fully informing electorate and in avoiding circumvention of other
statutory provisions, and is thus not over-broad in regard to persons and entities encompassed within statute. Statute encompassing writings related to clearly identified candidate(s) in particular election is not unconstitutionally overbroad. Criterion for determining whether identity is required is whether writing advocates election or defeat of candidate(s) or whether writing advocates political issues. Decision whether facts in particular instance support prosecution for violation of statutory identification requirements concerning elections is within discretion of local Commonwealth’s attorney.

Candidates for Office - Nomination of Candidates by Political Parties. Fact that political party, and its nominating primary, is regulated by state law, does not make it creature of state, nor does it make party’s officials, officers or employees of state.

Candidates for Office - Nomination of Candidates by Political Parties. Political parties are not creatures of government.

Candidates for Office - Nomination of Candidates by Political Parties. Political parties are subject to reasonable government regulation; methods of nominating candidates are controlled by detailed legislation.

Candidates for Office - Nomination of Candidates by Political Parties. Political party is creation of free men, acting according to their own wisdom, and is not creation of any department of government.

Candidates for Office - Nomination of Candidates by Political Parties. Political party, within certain bounds, is free to control selection of its candidates for public office.

Candidates for Office - Nomination of Candidates by Political Parties. Statute limiting when political party, once having chosen to nominate federal officeholder by primary, may revert to convention or other method of nomination, burdens party’s associational rights and raises serious constitutional questions; however, requiring or favoring primaries as means of conducting nomination contests while providing mechanism for returning to nomination by convention provides protection for voters deprived of opportunity to vote in future primaries, thereby serving compelling governmental interest in enhancing democratic character of election process. Court, in reviewing matter, may not find burden on party so great or governmental interest so slight as to justify invalidating statute. Because Virginia Attorneys General historically have refrained from issuing opinions declaring statute unconstitutional, and they have not been vested with power to invalidate state statute, and because every reasonable doubt is to be resolved in favor of statute’s constitutionality, Attorney General cannot conclude beyond reasonable doubt that statute limiting associational rights guaranteed by First and Fourteenth Amendments is violative of U.S. Constitution.

Election Offenses Generally; Penalties. General Assembly’s designation that courts and incumbent officeholders may receive lists of voters registered in Commonwealth or persons who voted for purpose of either jury selection or reporting to constituents does not extend to entities or persons not so classified. Persons/groups seeking to further candidacy of others may obtain lists to be used for legislatively ordained political and official purposes, but not
ELECTIONS (contd.)

for commercial purposes or to harass voters. Confining organizations that may obtain lists to nonprofit organizations would be subject to constitutional attack; organization must have political purpose and use list for political, rather than commercial, purpose. State Board of Elections may provide lists of persons who voted in two preceding primary or general elections to persons or entities involved in election process only for specific statutory purposes. If such lists are provided to other persons or entities for their districts, State Board should interpret term “district” in manner that fulfills statutory intent and purpose. Lists may not be provided to commercial vendor for commercial purpose. State Board should forward to appropriate Commonwealth’s attorney any information concerning alleged violation of statutory oath ........................................ 181

Election Offenses Generally; Penalties. Statutory provision requiring disclosure of identity of person(s) responsible for writings concerning referendum issue(s) to be submitted to voters would likely not survive constitutional challenge, based on U.S. Supreme Court’s decision in McIntyre v. Ohio Elections Commission; such disclosure of identity of person(s) responsible for writings concerning candidate elections would survive constitutional challenge, given narrow construction accorded statutes imposing criminal sanctions. Requiring identification of source of person(s) supporting election or defeat of candidates and of campaign advertising is governmental interest that clearly outweighs First Amendment right to anonymity. Requiring identification of individuals and groups of individuals who advocate in writing election or defeat of candidate(s) promotes interests of Commonwealth in fully informing electorate and in avoiding circumvention of other statutory provisions, and is thus not overbroad in regard to persons and entities encompassed within statute. Statute encompassing writings related to clearly identified candidate(s) in particular election is not unconstitutionally overbroad. Criterion for determining whether identity is required is whether writing advocates election or defeat of candidate(s) or whether writing advocates political issues. Decision whether facts in particular instance support prosecution for violation of statutory identification requirements concerning elections is within discretion of local Commonwealth’s attorney .................................. 170

Election Offenses Generally; Penalties. Test to apply in determining whether restrictions on political advertising in candidate elections violate First Amendment rights ............................... 170

Fair and effective representation may be achieved by assuring each person’s vote has same effect .......................................................... 158

Federal, Commonwealth and Local Officers - Constitutional and Local Officers. Giles County electoral board may assign by lot which successful at-large school board candidate will serve four-year term and which will serve two-year term, on day after and upon certification of results of November 1995 general election in which term of at-large members of school board will occur simultaneously with first election of staggered board of supervisors. Candidates for at-large seats should be notified that term for which he or she will be elected is unknown until after election ........................................ 180

Federal, Commonwealth and Local Officers - Removal of Public Officers from Office. Forfeiture of office provision is not invoked until all rights of appeal have ended for public official convicted of felony ........................................ 243
Federal, Commonwealth and Local Officers - Removal of Public Officers from Office. Local elected official convicted of felony may continue to hold office pending filing and review of petition for rehearing in Supreme Court of Virginia, following denial of petition for appeal. Once Court issues mandate, official has no further avenue of appeal of felony conviction and must forfeit office .................. 243

General Provisions and Administration. Local tax official must consider and weigh all relevant facts in determining whether locality in which college or university student is registered to vote constitutes student’s domicile for purposes of imposing motor vehicle license fees and personal property taxes. Person’s domicile is matter of subjective intent known only to that person .................. 270

Political parties (see supra Candidates for Office - Nomination of Candidates by Political Parties)

Popular election of school board. Pittsylvania County board of supervisors may enact ordinance providing for seven-member school board, representing each county election district, before November 1995 initial election of school board; may abolish two at-large seats and eliminate three town seats on its appointed school board to conform composition of school board to seven-member board of supervisors before election. Resident voters of incorporated towns within county may participate in election of school board members of county election districts in which towns are situated, assuring representation on school board that is apportioned on population basis .................. 158

The Election - Special Elections. Voter approval is not required as condition for industrial development authority to issue bonds or for county or county school board to enter into lease with such authority .................. 44

The Election - Special Elections. Voter approval is not required before school board obtains loan from Literary Fund and issues its bonds or notes to secure loan .................. 44

The Election - Special Elections. Voter referendum is not required for county to issue bonds for school construction if bonds are sold to Virginia Public School Authority .................. 44

The Election - Special Elections. Voter referendum is not required to fund school construction through county bonds sold to Virginia Public School Authority or to Literary Fund or through bonds issued by industrial development authority that leases school facilities to Warren County .................. 44

Voter Registration. General Assembly’s designation that courts and incumbent officeholders may receive lists of voters registered in Commonwealth or persons who voted for purpose of either jury selection or reporting to constituents does not extend to entities or persons not so classified. Persons/groups seeking to further candidacy of others may obtain lists to be used for legislatively ordained political and official purposes, but not for commercial purposes or to harass voters. Confining organizations that may obtain lists to nonprofit organizations would be subject to constitutional attack; organization must have political
ELECTIONS (contd.)
purpose and use list for political, rather than commercial, purpose. State Board of Elections may provide lists of persons who voted in two preceding primary or general elections to persons or entities involved in election process only for specific statutory purposes. If such lists are provided to other persons or entities for their districts, State Board should interpret term “district” in manner that fulfills statutory intent and purpose. Lists may not be provided to commercial vendor for commercial purpose. State Board should forward to appropriate Commonwealth’s attorney any information concerning alleged violation of statutory oath ........................................ 181

Voter Registration. Local registrar determines person’s domicile from objective criteria that either confirm or rebut person’s stated subjective intent ......................... 270

EXtradition
(See CRIMINAL PROCEDURE: Extradition of Criminals - Uniform Criminal Extradition Act)

FEDERAL MEAT INSPECTION ACT
Central kitchen of retail grocer prepares meals made from inspected product that are sold in grocer’s commonly owned retail outlets to customers for consumption in seating areas within outlets or for takeout, and are kept segregated from retail store’s inspected product; operations of kitchen do not involve slaughtering, canning, salting, packing or rendering of its meat products, and are not subject to continuous federal inspection. Central kitchen operation does not meet federal “retail store” exemption because kitchen is not place where products are sold to consumers; its operation is not exempt from continuous inspection because exemption applies only to operations at single retail establishments. Federal “restaurant” exemption is not limited to single establishment. Because retail grocer meets restaurant exemption, its central kitchen operation is exempt from continuous federal inspection . . . . 7

Retail establishments that do exclusively intrastate business in meat products are not similar to slaughtering, meat-packing, canning or rendering plant, and are not subject to federal inspection ........................................ 7

FEDERAL POULTRY PRODUCTS INSPECTION ACT
Central kitchen of retail grocer prepares meals made from inspected product that are sold in grocer’s commonly owned retail outlets to customers for consumption in seating areas within outlets or for takeout, and are kept segregated from retail store’s inspected product; operations of kitchen do not involve slaughtering, canning, salting, packing or rendering of its meat products, and are not subject to continuous federal inspection. Central kitchen operation does not meet federal “retail store” exemption because kitchen is not place where products are sold to consumers; its operation is not exempt from continuous inspection because exemption applies only to operations at single retail establishments. Federal “restaurant” exemption is not limited to single establishment. Because retail grocer meets restaurant exemption, its central kitchen operation is exempt from continuous federal inspection . . . . 7
FEDERAL POULTRY PRODUCTS INSPECTION ACT (contd.)

Retail establishments that do exclusively intrastate business in meat products are not similar to slaughtering, meat-packing, canning or rendering plant, and are not subject to federal inspection ................................................................. 7

FEDERAL/STATE LAWS

Body known as federal law customarily is accepted as including federal regulations properly promulgated ................................................................. 192

Federal regulations promulgated pursuant to authority delegated by Congress have full force and effect of law ................................................................. 192

Federal regulations properly promulgated have full force and effect of federal law. Statutory mandate that DMV Commissioner revoke driver's license of Virginia citizen convicted of possession of cocaine in federal district court, under federal regulation substantially similar to Virginia law, is administratively imposed requirement, denying citizen's privilege to drive on Virginia's highways, and is not penal in nature ................................................................. 192

Governmental interests are accorded particular weight when free functioning of our national institutions is involved .................................................................................. 170

To be substantially conforming to corresponding Virginia law, another state's law or federal law need not substantially conform in every respect to Virginia law ................................................................. 192

Violation of federal regulations is violation of federal law under substantially similar provisions of Virginia law ................................................................. 192

FREEDOM OF INFORMATION

(See ADMINISTRATION OF GOVERNMENT GENERALLY: Virginia Freedom of Information Act)

GENERAL ASSEMBLY

Amendment. Presumption that in amending statute, General Assembly had full knowledge of existing law and construction placed upon it by courts, and intended to change then existing law .................................................................................. 130

Appeals. When legislature prescribes method for exercise of right of appeal or supervision, such method is exclusive; neither court nor judge may modify these rules without express statutory authority, and then only to extent specified .................................................................................. 103

Appointment of outside counsel. When General Assembly wishes to grant exemption from statutory provisions governing appointment of outside private counsel for state entities, it does so explicitly .................................................................................. 213
Assembly has granted power of eminent domain to joint airport commission for safe and efficient operation of airport; has not granted commission power to relinquish, surrender or barter away that power. Absent legislative authority, commission may not surrender by court order its right to condemn tract of land required for public safety purposes.

Delegation of its power of eminent domain to political subdivisions and governmental bodies, to be exercised at its direction.

Did not intend to delegate tax assessment appeal power to local governing bodies or power to provide separate appeals procedure that may be implied from power delegated by governing body’s general laws or charter.

Eminent domain. General Assembly may delegate its power of eminent domain to political subdivisions and governmental bodies, to be exercised at direction of Assembly.

Eminent domain. No constitutional right to hearing on issue of necessity of state’s condemnation efforts. Necessity or expediency of condemnor’s project is legislative question not reviewable by courts.

General Assembly knows how to express its intention to preempt field.

Has provided limited number of situations in which private attorneys are authorized to prosecute criminal charges.

In enacting statutes defining powers of county, water and sewer authority, and State Water Control Board, legislature did not intend to establish system that would create conflict between local, state and federal law regarding water pollution controls.

Intended pawned items to be tangible personal property.

Intent in enacting statutes defining powers of county, water and sewer authority, and State Water Control Board to establish consistency in regulation of water pollution and control.

Intention to retain authority to regulate water pollution in certain waters.

Legislative intent is determined from plain meaning of words used.

Legislative intent that governing body retain power to regulate water and sewer services, despite existence of water and sewer authority with same powers.

Legislature is presumed to be cognizant of statutes previously enacted.

Legislature is presumed to have had knowledge of Attorney General’s interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in Attorney General’s view.
GENERAL ASSEMBLY (contd.)

May circumscribe broad authority of school boards ........................................ 162

May delegate its power of eminent domain to political subdivisions and governmental bod-
ies, to be exercised at its direction ................................................................. 15

Opinions of Attorney General. General Assembly is presumed to have acquiesced in long-
standing opinions of Attorney General .............................................................. 149

Ordinances may not operate to forbid what legislature expressly has licensed, authorized or
required .................................................................................................................. 66

Outside counsel appointment. When General Assembly wishes to grant exemption from
statutory provisions governing appointment of outside private counsel for state entities, it
does so explicitly ....................................................................................................... 213

Pawned items. Intended to be tangible personal property ...................................... 238

Preemption. When General Assembly intends to preempt field, it knows how to
express its intention ................................................................................................. 85

Presumed to be aware of construction of statutes by courts; modification or nonmodification
of such statutory construction demonstrates own legislative intent ....................... 257

Presumed to be cognizant of administrative agency’s construction of statute .............. 250

Presumed to be cognizant of statutes previously enacted ...................................... 69, 121

Presumed to have acquiesced in long-standing opinions of Attorney General .......... 149

Presumed to have had knowledge of Attorney General’s interpretations of statutes, and its
failure to make corrective amendments evinces legislative acquiescence in Attorney Gener-
al’s view .................................................................................................................. 63

Presumption that in amending statute, General Assembly had full knowledge of existing law
and construction placed upon it by courts, and intended to change then existing law .... 130

Published opinions of Attorney General interpreting legislation are presumptively indicative
of legislative intent .................................................................................................... 219

School board’s provision of health care coverage for its members does not contravene intent
of General Assembly that local governing bodies may provide same benefits to members as
are provided to their employees, so long as funds have been appropriated by local governing
body to pay health insurance premiums. School board’s payment of premiums is fringe ben-
efit that need not be deducted from board members’ salaries ................................. 162
GENERAL ASSEMBLY (contd.)

State Water Control Law. By its enactment, legislature did not intend to negate authority of counties to adopt ordinance requiring groundwater monitoring of facilities that may pollute their waters or to occupy entire field of safeguarding Commonwealth’s waters from pollution. .......................................................... 66

State Water Control Law. When state and county have concurrent jurisdiction for safeguarding Commonwealth’s waters from pollution, power of State Water Control Board is paramount .............................................. 66

Tax exemptions. Legislature may not expand constitutionally authorized exemptions except when Constitution specifically provides for such expansion ...................... 265

When General Assembly intends to preempt field, it knows how to express its intention . . 85

When General Assembly wishes to grant exemption from statutory provisions governing appointment of outside private counsel for state entities, it does so explicitly .... 213

When legislature prescribes method for exercise of right of appeal or supervision, such method is exclusive; neither court nor judge may modify these rules without express statutory authority, and then only to extent specified .................. 103

When legislature provides no definition of term, it intends term to have its ordinary meaning .......... 91

GENERAL PROVISIONS

Common Law, Statutes and Rules of Construction (see also STATUTORY CONSTRUCTION)

Common Law, Statutes and Rules of Construction. County has authority to adopt ordinance requiring groundwater monitoring of facility that may cause pollution of county’s waters. Ordinance must not be inconsistent with general laws of Commonwealth embodied in State Water Control Law. Locality may not, by ordinance, require facility to install groundwater monitoring wells when State Water Control Board’s VPA permit does not require groundwater monitoring, but may require facility to report measurements from well to county when permit requires groundwater monitoring ............................................. 66

Common Law, Statutes and Rules of Construction. Given narrow construction accorded statutes imposing criminal sanctions, statutory provision requiring disclosure of identity of those responsible for writings concerning candidate elections would survive constitutional challenge ......................................................... 170

Common Law, Statutes and Rules of Construction. Local ordinance requiring groundwater monitoring of facility that may cause pollution of county’s waters must not be inconsistent with Commonwealth’s general laws pertaining to pollution of state waters ............ 66
GENERAL PROVISIONS (contd.)

Common Law, Statutes and Rules of Construction. Locality may not legislate in area where state regulations are so comprehensive that state may be considered to occupy entire field of regulation ....................................................... 85

Common Law, Statutes and Rules of Construction. 1995 amendment removing authority of Board of Dentistry to recognize licenses issued by other jurisdictions as full or partial fulfillment of qualifications for licensure in Virginia does not apply to applications received before effective date of amendment—July 1, 1995; applications received by Board before July 1 should be processed according to law in effect before effective date of amendment. Board’s written notification to applicants requiring all applications to be postmarked by midnight, June 30, 1995, before July 1 deadline, is reasonable and entitled to great weight. Board may not license dentists licensed in other jurisdictions whose applications for licensure by endorsement were postmarked and received after July 1, 1995 ......................... 228

Common Law, Statutes and Rules of Construction. Ordinance is inconsistent with state law if state law preempts any local regulation in area ....................................................... 85

Common Law, Statutes and Rules of Construction. State Lottery Law relates to licensing of agents and not to uses of land. Local governments are authorized to impose reasonable restrictions on sale of lottery tickets at specific sites to further legitimate land use goal. Ordinance prohibiting sale of lottery tickets on premises of retail store as condition for obtaining special use permit is neither in conflict with, nor preempted by, State Lottery Law ....................................................... 85

Common Law, Statutes and Rules of Construction. Statutory provision requiring disclosure of identity of person(s) responsible for writings concerning referendum issue(s) to be submitted to voters would likely not survive constitutional challenge, based on U.S. Supreme Court’s decision in McIntyre v. Ohio Elections Commission; such disclosure of identity of person(s) responsible for writings concerning candidate elections would survive constitutional challenge, given narrow construction accorded statutes imposing criminal sanctions. Requiring identification of source of person(s) supporting election or defeat of candidates and of campaign advertising is governmental interest that clearly outweighs First Amendment right to anonymity. Requiring identification of individuals and groups of individuals who advocate in writing election or defeat of candidate(s) promotes interests of Commonwealth in fully informing electorate and in avoiding circumvention of other statutory provisions, and is thus not overbroad in regard to persons and entities encompassed within statute. Statute encompassing writings related to clearly identified candidate(s) in particular election is not unconstitutionally overbroad. Criterion for determining whether identity is required is whether writing advocates election or defeat of candidate(s) or whether writing advocates political issues. Decision whether facts in particular instance support prosecution for violation of statutory identification requirements concerning elections is within discretion of local Commonwealth’s attorney ....................................................... 170
HEALTH

Regulation of Medical Care Facilities. Medical facility may charge for expenses of retrieving, copying and mailing items provided in response to subpoena issued in criminal case at request of Commonwealth's attorney. Expenses associated with discreet individual criminal cases resulting from issuance of subpoena, and which are not incurred on continuing or predictable basis, properly may be considered expenses compensable by order of court, when authorized by statute and there is no designated source of payment other than state treasury from appropriations for criminal charges .................................................. 22

Regulation of Medical Care Facilities. Patient has no property right in his own medical records, absent some state law that grants it ................................................................. 22

Regulation of Medical Care Facilities - Hospice Program Licensing. Richmond is not required, but may adopt zoning ordinance, to provide single-family zoning treatment to adult group homes for 8 or fewer unrelated, aged, infirm or disabled persons same as is provided in homes in county operating under county manager plan that house mentally ill, mentally retarded, or developmentally disabled persons. Richmond Aids Ministry may not operate unlicensed adult care residence for 8 unrelated adults. Ministry must satisfy all statutory and regulatory requirements to obtain licensure as ACR; may receive such license without obtaining hospice license if it does not provide intravenous therapy to its residents, but must obtain hospice licensure prior to ACR licensure if it intends to care for residents requiring intravenous drug therapy ................................................................. 286

HIGHWAYS, BRIDGES AND FERRIES

Commonwealth Transportation Board, etc. - Secondary System of State Highways. City of Colonial Heights may not permit civic organization to create roadblock to conduct fund-raising activity by stopping motorists to solicit monetary contributions for organization’s charitable cause; may create common law nuisance by impeding lawful use of highway .......... 203

Highways (see also supra Commonwealth Transportation Board, etc. - Secondary System of State Highways)

Highways. Unauthorized obstruction that unnecessarily impedes or incommodes lawful use of highway is public nuisance at common law; exception exists when closure of highway is necessary for repair or other exigencies ...................................................... 203

Secondary System of State Highways (see supra Commonwealth Transportation Board, etc.)

HOSPITALS
(See generally PROFESSIONS AND OCCUPATIONS: Medicine and Other Healing Arts - Health Care Decisions Act)
HOUSING

Housing Authorities Law. Industrial development authority is not prohibited from issuing bonds to finance residential housing for § 501(c)(3) organization exempt from federal income taxation, so long as such organization is not organized and operated exclusively for religious purposes. Authority makes factual determination whether § 501(c)(3) organization is organized exclusively for religious purposes, and whether financing of such organization violates establishment of religion clause of U.S. Constitution and similar limitations within Virginia Constitution. Section 501(c)(3) organization affiliated with religious denomination that is not organized and operated exclusively for religious purposes, whose facility will be used to advance secular purpose, would not be disqualified from obtaining financing for facility through authority. Voter referendum is not required to authorize IDA to issue bonds to finance acquisition and improvement of low-income rental housing by such organization ............................................ 77

INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT
(See COUNTIES, CITIES AND TOWNS: Industrial Development and Bonds)

INSURANCE

Accident and Sickness Insurance - Mandated Benefits. Health insurer that offers and makes available in its standard package of benefits coverage subject to a mandated offer requirement also may satisfy statutory obligation by offering and making coverage available in package of benefit options. Insurer may offer and make available low-dose screening mammograms in combination with other benefit options under health insurance policy, contract or plan coverage ............................................ 187

Employer’s payment of insurance premiums is fringe benefit distinct from salary ........ 162

School board’s provision of health care coverage for its members does not contravene intent of General Assembly that local governing bodies may provide same benefits to members as are provided to their employees, so long as funds have been appropriated by local governing body to pay health insurance premiums. School board’s payment of premiums is fringe benefit that need not be deducted from board members’ salaries .................. 162

INTERSTATE COMMERCE ACT

Act prohibits discrimination against motor carrier transportation property used in interstate commerce vis-a-vis other commercial and industrial property .......................... 274

JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 1974

Commonwealth must comply with regulations promulgated pursuant to Act to continue receiving federal funding .................................................. 109

LAW-ENFORCEMENT OFFICERS
(See also COUNTIES, CITIES AND TOWNS: Police and Public Order; POLICE (STATE))
Auxiliary police officers possess powers and authority of full-time police officers only during time they are called into service to assist regular police officers of locality; such service is supplemental and exists under limited circumstances. When not in service, auxiliary police officers retain status as private citizens, and may not use police identification or weapons to exercise police powers and authority when observing crime in progress. Statutory restrictions applicable to auxiliary police officers who are not in service do not apply to auxiliary deputy sheriffs. Extent and scope of authority of such deputy sheriffs is within discretion of sheriff.

No distinction between authority of constable at common law and authority of full-time law-enforcement officer.

**LIBRARIES**

Law Libraries. Clerk of court of original jurisdiction shall collect fees assessed at commencement of civil action or chancery cause; clerk of circuit court to which venue of action or suit is transferred may not charge additional filing fees. Circuit court receiving transferred case retains right to assess costs, even though costs may have been assessed by transferor court. Transferee clerk must assess costs against losing party upon final disposition of case, as allowed by local ordinance.

**METROPOLITAN PLANNING ORGANIZATION**

Boundary of Richmond Area MPO may be expanded to include Charles City County without having to redesignate MPO because county is part of Richmond nonattainment area for ozone that is to be included within MPO boundaries, unless Governor and MPO agree to different arrangement. If Governor and MPO agree, entire area of New Kent County, which is expected to be urbanized within 20-year forecast period and made part of MPO, may, but need not, be included in MPO. When counties are added as MPO members, each county should have appropriate representation on MPO policy board and other committees. Previous designations of such organizations, state and local law, and organizational bylaws should be reviewed to determine if addition of new members may be accomplished without formal redesignation. Because MPO bylaws address procedure for adding nonvoting members only, bylaws must be amended to allow addition of two counties as voting members; if bylaws cannot be amended, MPO must formally redesignate to add two counties.

**MOTOR CARRIER ACT OF 1980**

Act prohibits discrimination against motor carrier transportation property used in interstate commerce vis-a-vis other commercial and industrial property.

**MOTOR VEHICLES**

Commercial Driver's Licenses (see infra Licensure of Drivers - Commercial Driver's Licenses)
Department of Motor Vehicles. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor’s receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute “other recorded images” inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective.

General Provisions. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor’s receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute “other recorded images” inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective.
License revocation (see generally infra Licensure of Drivers)

Licensure of Drivers. Administratively imposed license revocation is separate and apart from criminal procedures that lead to criminal conviction; is civil and not criminal in nature ............................................ 192

Licensure of Drivers. DMV Commissioner is required to revoke driver’s license of individual convicted in federal court criminal case under federal law substantially similar to one of requisite Virginia provisions ..................................... 192

Licensure of Drivers. Federal regulations properly promulgated have full force and effect of federal law. Statutory mandate that DMV Commissioner revoke driver’s license of Virginia citizen convicted of possession of cocaine in federal district court, under federal regulation substantially similar to Virginia law, is administratively imposed requirement, denying citizen’s privilege to drive on Virginia’s highways, and is not penal in nature ........ 192

Licensure of Drivers. License revocation is civil and not criminal in nature ............ 192

Licensure of Drivers. Revocation of one’s license is denial of privilege to drive automobile on Virginia’s highways and not imposition of penalty ........................................... 192

Licensure of Drivers - Commercial Driver’s Licenses. Individual issued commercial driver’s license and/or regular driver’s license may be convicted of driving under influence of alcohol intoxicants while operating personal vehicle with BAC between 0.04 and 0.08%. Commonwealth must obtain credible proof of intoxication other than test result when BAC is less than 0.08% and must overcome presumption that individual was not under influence when BAC measures less than 0.05% to obtain conviction. Individual operating private vehicle with BAC of 0.04% or more may be prosecuted under Virginia Commercial Driver’s License Act only when vehicle is used as “commercial motor vehicle” to transport “hazardous materials,” as both terms are defined in Act ......................................................... 195

Licensure of Drivers - Suspension and Revocation of Licenses, Generally; Additional Penalties. Entry of judgment pursuant to conviction for drug offense(s) automatically results in six-month license forfeiture from date of judgment; general district court imposes such license forfeiture at time of entry of disposition order. DMV Commissioner’s revocation of defendant’s driver’s license for six months, after receiving notice of conviction of drug offense or deferral of proceedings, is not formal prerequisite for such revocation .. 114

Licensure of Drivers - Suspension and Revocation of Licenses, Generally; Additional Penalties. Purpose of license revocation is not to punish offender but to remove from highways operation who is potential danger to other users ................................................................. 114

Powers of Local Governments. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who executes certificate proving statutory
MOTOR VEHICLES (contd.)

violation, may be employee of local governing body or employee of contractor. Locality
must initially determine whether technician has required qualifications to inspect and
interpret recorded images produced by traffic light signal violation monitoring system.
Employees of private entity sworn as conservators of peace may access Department of
Motor Vehicle records to determine registered owner of vehicle operated in violation of
statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected
violators. Locality may not share or split monetary penalties received from traffic infractions
with private entities that provide photo-monitoring equipment; may not include payment
provisions in contract of purchase based on amount received from monetary penalties
enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitor-
ing equipment conditioned on donor’s receiving statistical information regarding demonstra-
tion program. Police department employees and persons with whom locality contracts to
operate demonstration program must be sworn as conservators of peace before issuing traffic
summonses for traffic infractions. Digitally recorded images may constitute “other recorded
images” inspected by technician as proof of statutory violation sworn to or affirmed in cer-
tificate. Violations of demonstration programs imposing monetary liability for failure to
comply with traffic light signals constitute traffic infractions. Statute that does not refer to
statute specifying colors of traffic light and their meaning as failing to obey traffic lights is
not defective .......................................................... 205

Private security guards who are not qualified as conservators of peace may not
enforce motor vehicle statutes ........................................ 205

Regulation of Limousines and Executive Sedans. Limousine and executive sedan carries are
subject to exclusive control, supervision and regulation by Department of Motor Vehicles,
except that intracity or intratown operations are subject to licensing and regulatory authority
of municipality that has adopted ordinance regulating such vehicles. Virginia Beach may,
by ordinance, regulate limousine and executive sedans operated primarily, although
not exclusively, within city’s corporate limits, by carrier located in city .......... 199

Regulation of Motor Vehicle Carriers. Limousine and executive sedan carries are subject
to exclusive control, supervision and regulation by Department of Motor Vehicles, except
that intracity or intratown operations are subject to licensing and regulatory authority of
municipality that has adopted ordinance regulating such vehicles. Virginia Beach may,
by ordinance, regulate limousine and executive sedans operated primarily, although not exclu-
sively, within city’s corporate limits, by carrier located in city .......... 199

Regulation of Traffic. City of Colonial Heights may not permit civic organization to create
roadblock to conduct fund-raising activity by stopping motorists to solicit monetary contri-
butions for organization’s charitable cause; may create common law nuisance by impeding
lawful use of highway ................................................. 203

Regulation of Traffic - Legal Procedures and Requirements. Local ordinance imposing
monetary penalties on motor vehicle operators who violate traffic light signals may not
provide that written warnings be mailed to violators identified by traffic light photo-
monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who
executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor's receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute "other recorded images" inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective.

Regulation of Traffic - Traffic Signs, Lights, and Markings. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor's receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute "other recorded images" inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective.

Revocation of license (see generally supra Licensure of Drivers)
MOTOR VEHICLES (contd.)

Titling and Registration of Motor Vehicles. Local tax official determines domicile of student on case-by-case basis, considering all relevant facts. Student domiciled in Virginia but attending out-of-state institution remains subject to personal property tax on his vehicle in Virginia jurisdiction where he is domiciled. Situs for taxation of vehicle owned by student's parent is locality where vehicle is normally parked or garaged 268

Titling and Registration of Motor Vehicles - State and Local Motor Vehicle Registration. Factors in determining domiciliary intent of college or university student for purposes of imposing motor vehicle license fees and personal property taxes 270

Titling and Registration of Motor Vehicles - State and Local Motor Vehicle Registration. Local tax official determines situs of motor vehicle for local license and personal property tax purposes, including domicile of owner of vehicle 270

Titling and Registration of Motor Vehicles - State and Local Motor Vehicle Registration. Local tax official must consider and weigh all relevant facts in determining whether locality in which college or university student is registered to vote constitutes student's domicile for purposes of imposing motor vehicle license fees and personal property taxes. Person's domicile is matter of subjective intent known only to that person 270

OPINIONS OF THE ATTORNEY GENERAL

(See ADMINISTRATION OF GOVERNMENT GENERALLY: Attorney General and Department of Law (official opinions of Attorney General))

PAWNBROKERS

(See PROFESSIONS AND OCCUPATIONS)

PENSIONS, BENEFITS, AND RETIREMENT

Virginia Retirement System. Designation of Virginia Retirement System as agency independent of executive, legislative and judicial branches of state government does not exempt VRS from procedural statutory or regulatory requirements generally applicable to state agencies. VRS must submit budget estimate to Department of Planning and Budget and Governor for approval, and must use appropriated funds for purposes specified in Appropriation Act. Any purchases that fall outside services related to authorized investments, including actuarial services, must be obtained pursuant to Virginia Public Procurement Act and any applicable rules and regulations. VRS must procure banking services in accordance with Procurement Act; all public funds must clear through Comptroller's Office. VRS is not bound by Virginia Personnel Act in determining employee compensation, but may not increase Director's salary without Governor's approval. VRS must comply with Comptroller's regulations and procedures governing official travel expense reimbursement; Board may not implement its own policies on travel expense reimbursement. VRS may not contract with private legal counsel without prior approval of Attorney General 213
POLICE (STATE)

Basic State Police Communication System. Local ordinance imposing monetary penalties on motor vehicle operators who violate traffic light signals may not provide that written warnings be mailed to violators identified by traffic light photo-monitoring demonstration program, in lieu of issuing traffic summonses. Technician, who executes certificate proving statutory violation, may be employee of local governing body or employee of contractor. Locality must initially determine whether technician has required qualifications to inspect and interpret recorded images produced by traffic light signal violation monitoring system. Employees of private entity sworn as conservators of peace may access Department of Motor Vehicle records to determine registered owner of vehicle operated in violation of statute, prepare summonses, cause summonses to be issued, or mail summonses to suspected violators. Locality may not share or split monetary penalties received from traffic infractions with private entities that provide photo-monitoring equipment; may not include payment provisions in contract of purchase based on amount received from monetary penalties enforced for violations of traffic ordinances. Locality may not accept gift of photo-monitoring equipment conditioned on donor’s receiving statistical information regarding demonstration program. Police department employees and persons with whom locality contracts to operate demonstration program must be sworn as conservators of peace before issuing traffic summonses for traffic infractions. Digitally recorded images may constitute “other recorded images” inspected by technician as proof of statutory violation sworn to or affirmed in certificate. Violations of demonstration programs imposing monetary liability for failure to comply with traffic light signals constitute traffic infractions. Statute that does not refer to statute specifying colors of traffic light and their meaning as failing to obey traffic lights is not defective ........................................ 205

PRISONS AND OTHER METHODS OF CORRECTION

Administration Generally - Department of Corrections and Director of Corrections. Director of Department of Corrections is not required to provide statutorily specified programs to persons confined in local correctional facilities. Earned sentence credits are conditioned only in part on participation by inmates assigned to such programs. Inmates incarcerated in local correctional facilities are not required to participate in programs that are nonexistent to earn sentence credits. Sentence credits may be earned for each 30 days' service and may be applied to weekend service, but may not be prorated .................. 221

Agreement on Detainers. Agreement requires sending state to credit prisoner’s sentence with all time prisoner is physically in Virginia jail awaiting trial pursuant to Agreement; prisoner remains in custody of sending state for purposes of computing time served on sentence imposed by that state. Prisoner returned to Virginia under Agreement may not receive duplication of credit for time spent in jail awaiting trial on criminal charges pending in Virginia; may be allowed concurrent credit on Virginia sentence for time spent in Virginia jail awaiting trial on criminal charges only when expressly ordered by Virginia court .......................... 219

Commencement of Terms; Credits and Allowances. Agreement on Detainers requires sending state to credit prisoner’s sentence with all time prisoner is physically in Virginia jail awaiting trial pursuant to Agreement; prisoner remains in custody of sending state for purposes of computing time served on sentence imposed by that state. Prisoner returned to
Virginia under Agreement may not receive duplication of credit for time spent in jail awaiting trial on criminal charges pending in Virginia; may be allowed concurrent credit on Virginia sentence for time spent in Virginia jail awaiting trial on criminal charges only when expressly ordered by Virginia court.

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Commencement of Terms; Credits and Allowances. Inmate must be given credit for all time spent in jail awaiting trial regardless of jurisdiction so long as there is no duplication.

Commencement of Terms; Credits and Allowances. Inmate must not receive duplication of credit for time spent in jail awaiting trial.

Department of Corrections (see supra Administration Generally - Department of Corrections and Director of Corrections)

Local Correctional Facilities. Agreement on Detainers requires sending state to credit prisoner's sentence with all time prisoner is physically in Virginia jail awaiting trial pursuant to Agreement; prisoner remains in custody of sending state for purposes of computing time served on sentence imposed by that state. Prisoner returned to Virginia under Agreement may not receive duplication of credit for time spent in jail awaiting trial on criminal charges pending in Virginia; may be allowed concurrent credit on Virginia sentence for time spent in Virginia jail awaiting trial on criminal charges only when expressly ordered by Virginia court.

Local Correctional Facilities - Duties of Sheriffs. Inmate ineligible for parole may not earn good conduct credit when mandatory minimum sentence is imposed. Intent of General Assembly is to ensure that inmate convicted of crime carrying mandated minimum sentence must serve entire time. Inmate is ineligible to receive good conduct credit for 30 days of 90-day sentence served as mandatory minimum sentence for third conviction of driving motor vehicle while intoxicated within five-year period, but is eligible to earn good conduct credit on last 60 days of three-month sentence.

State Correctional Facilities. Director of Department of Corrections is not required to provide statutorily specified programs to persons confined in local correctional facilities. Earned sentence credits are conditioned only in part on participation by inmates assigned to such programs. Inmates incarcerated in local correctional facilities are not required to participate in programs that are nonexistent to earn sentence credits. Sentence credits may be earned for each 30 days' service and may be applied to weekend service, but may not be prorated.
PROCUREMENT
(See CONTRACTS: Virginia Public Procurement Act)

PROFESSIONS AND OCCUPATIONS

Architects, Engineers, Surveyors, Landscape Architects and Interior Designers. Political subdivision that employs certified professional engineer, or person other than licensed land surveyor engaged in practice of engineering or surveying whose employment position is exempted from statutory licensure requirements, is authorized to accept for recordation plats of property owned by local government when preparation of such plats is incidental to governmental engineering project and is not for general public or as independent contractor .......................................................... 225

Attorneys. Disciplinary proceedings against attorneys are civil, and not criminal, in nature; proceedings are for purpose of protecting public and not for purpose of punishment .... 69

Dentistry - Licensure of Dentists. 1995 amendment removing authority of Board of Dentistry to recognize licenses issued by other jurisdictions as full or partial fulfillment of qualifications for licensure in Virginia does not apply to applications received before effective date of amendment—July 1, 1995; applications received by Board before July 1 should be processed according to law in effect before effective date of amendment. Board’s written notification to applicants requiring all applications to be postmarked by midnight, June 30, 1995, before July 1 deadline, is reasonable and entitled to great weight. Board may not license dentists licensed in other jurisdictions whose applications for licensure by endorsement were postmarked and received after July 1, 1995 ................... 228

Drug Control Act. DMV Commissioner is required to revoke driver’s license of individual convicted in federal court criminal case under federal law substantially similar to one of requisite Virginia provisions ..................................................... 192

Drug Control Act. Federal regulations properly promulgated have full force and effect of federal law. Statutory mandate that DMV Commissioner revoke driver’s license of Virginia citizen convicted of possession of cocaine in federal district court, under federal regulation substantially similar to Virginia law, is administratively imposed requirement, denying citizen’s privilege to drive on Virginia’s highways, and is not penal in nature .......... 192

Drug Control Act - Permitting of Pharmacies. For-profit subsidiary corporations, wholly owned by general hospital operated by nonprofit tax-exempt hospital corporation, will not be engaging in unlawful practice of medicine or in unlawful practice of pharmacy by paying salaries of licensed physicians and pharmacists employed by them, as long as physicians exercise exclusive control over decisions requiring professional medical judgment, and pharmacists exercise independent professional judgment in dispensing drugs .................. 235

General Provisions Relating to Regulatory Boards. 1995 amendment removing authority of Board of Dentistry to recognize licenses issued by other jurisdictions as full or partial fulfillment of qualifications for licensure in Virginia does not apply to applications received before effective date of amendment—July 1, 1995; applications received by Board before July 1 should be processed according to law in effect before effective date of amendment.
PROFESSIONS AND OCCUPATIONS (contd.)

Board's written notification to applicants requiring all applications to be postmarked by midnight, June 30, 1995, before July 1 deadline, is reasonable and entitled to great weight. Board may not license dentists licensed in other jurisdictions whose applications for licensure by endorsement were postmarked and received after July 1, 1995.

Medicine and Other Healing Arts. For-profit subsidiary corporations, wholly owned by general hospital operated by nonprofit tax-exempt hospital corporation, will not be engaging in unlawful practice of medicine or in unlawful practice of pharmacy by paying salaries of licensed physicians and pharmacists employed by them, as long as physicians exercise exclusive control over decisions requiring professional medical judgment, and pharmacists exercise independent professional judgment in dispensing drugs.

Medicine and Other Healing Arts. Nonprofit hospital corporation and foundation organized as nonstock, nonprofit corporation having no members may employ physicians to provide medical care without being deemed to be practicing medicine unlawfully if physicians' exercise of professional judgment is not controlled or influenced by either corporation.

Medicine and Other Healing Arts - Health Care Decisions Act. Private health care provider may rely on written advance directive of mentally competent inmate to refuse certain medical treatment, even though inmate later may become mentally incompetent. Federal law has no impact on inmate's refusal to be admitted to private hospital for inpatient care subsequent to inmate's receiving emergency care in private hospital's emergency room. Aside from federal and state constitutional and statutory rights, patient also may have rights under accredited hospital policies on withholding of life-support treatments and ethical review procedures.

 Pawnbrokers. General Assembly intended pawned items to be tangible personal property. Motor vehicle is personal property that may be pawned; certificate of title, which constitutes written proof of indebtedness and evidences ownership of vehicle, is intangible property with no intrinsic and marketable value, and is not proper subject of pawn.

Pharmacy (see also supra Drug Control Act - Permitting of Pharmacies)

Pharmacy. For-profit subsidiary corporations, wholly owned by general hospital operated by nonprofit tax-exempt hospital corporation, will not be engaging in unlawful practice of medicine or in unlawful practice of pharmacy by paying salaries of licensed physicians and pharmacists employed by them, as long as physicians exercise exclusive control over decisions requiring professional medical judgment, and pharmacists exercise independent professional judgment in dispensing drugs.

PROPERTY AND CONVEYANCES

Eminent domain. No constitutional right to hearing on issue of necessity of state's condemnation efforts. Necessity or expediency of condemnor's project is legislative question not reviewable by courts.

Page
PROPERTY AND CONVEYANCES (contd.)

Manufactured Home Lot Rental Act. County governing body may enact ordinance prohibiting owner of manufactured home park to resell to his tenants water supplied and sold to park by county, thereby protecting county water system’s exclusive service area. Attorney General does not interpret language of county ordinance as to whether park owner is actually selling water purchased from county water system .............................. 240

Virginia Residential Landlord and Tenant Act. Apartment building/complex is not considered facility that provides nightly accommodations for transients. City of Fall Church is not authorized to impose transient room rentals tax on apartment facilities. City may not enact tax by charter that is prohibited by laws of Commonwealth .......................... 260

PUBLIC OFFICERS/OFFICES

Domiciliary intent is factual matter to be determined on case-by-case basis by considering and weighing all relevant facts ........................................ 270

Dual officeholding. Absent specific statutory or constitutional prohibition, common law doctrine of compatibility of dual officeholding may preclude such officeholding if two offices are inherently incompatible ......................................... 42

Local elected official convicted of felony may continue to hold office pending filing and review of petition for rehearing in Supreme Court of Virginia, following denial of petition for appeal. Once Court issues mandate, official has no further avenue of appeal of felony conviction and must forfeit office ........................................ 243

Local tax official determines situs of motor vehicle for local license and personal property tax purposes, including domicile of owner of vehicle .................................................. 270

Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth’s attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress .......................................................... 47

Public office continues only so long as law to which it owes its existence remains in force .......................................................... 46

Spouses of public officers simultaneously may hold public office ................. 41

Whether contractor is engaged in business within locality is question of fact for determination by appropriate local tax official ........................................ 245

PUBLIC PROCUREMENT ACT, VIRGINIA

(See CONTRACTS: Virginia Public Procurement Act)
PUBLIC SERVICE COMPANIES

General Provisions. County governing body may enact ordinance prohibiting owner of manufactured home park to resell to his tenants water supplied and sold to park by county, thereby protecting county water system’s exclusive service area. Attorney General does not interpret language of county ordinance as to whether park owner is actually selling water purchased from county water system .................................................. 240

Public service corporation may deny service for resale where it has regularly promulgated regulation that its service supplied shall not be resold .......................................................... 240

Public Utilities (see infra State Operation of Public Utilities)

State Operation of Public Utilities. Statutory authority for localities to own and operate public utilities other than those specified is not broad enough to encompass communications system, which, in addition to providing cable television service, may provide other services that are not normally provided by local governments or are not clearly within meaning of term “public utility.” Localities may not own and operate such system ......................... 93

RELIGIOUS AND CHARITABLE MATTERS; CEMETERIES

Cemeteries. Commissioner of revenue in each locality where portion of cemetery lies is responsible for regulating company that operates cemetery, regardless of location of company’s principal place of business .......................................................... 242

RULES OF SUPREME COURT OF VIRGINIA

Appeals Pursuant to the Administrative Process Act. Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected .......................................................... 103

Criminal Practice and Procedure - Appeals. General district court may determine and set new bail, including imposition of new conditions or denial of bail, after defendant has been convicted and sentenced to jail, before case is transferred to circuit court for de novo hearing. District court’s decision to deny, or increase conditions for, bail after conviction does not infringe on defendant’s constitutional rights or any statutory right of appeal or retrial .......................................................... 106

Criminal Practice and Procedure - Subpoena. Medical facility may charge for expenses of retrieving, copying and mailing items provided in response to subpoena issued in criminal case at request of Commonwealth’s attorney. Expenses associated with discreet individual criminal cases resulting from issuance of subpoena, and which are not incurred on continuing or predictable basis, properly may be considered expenses compensable by order of court, when authorized by statute and there is no designated source of payment other than state treasury from appropriations for criminal charges ............................................. 22
## RULES OF SUPREME COURT OF VIRGINIA (contd.)

<table>
<thead>
<tr>
<th>Clause</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equity Practice and Procedure - Commencement of Suits in Equity (The Bill of Complaint). Clerk of court of original jurisdiction shall collect fees assessed at commencement of civil action or chancery cause; clerk of circuit court to which venue of action or suit is transferred may not charge additional filing fees. Circuit court receiving transferred case retains right to assess costs, even though costs may have been assessed by transferor court. Transferee clerk must assess costs against losing party upon final disposition of case, as allowed by local ordinance</td>
<td>59</td>
</tr>
<tr>
<td>General District Courts - In General. Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected</td>
<td>103</td>
</tr>
<tr>
<td>General Rules Applicable to all Proceedings. Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected</td>
<td>103</td>
</tr>
<tr>
<td>Integration of the State Bar - Canons of Judicial Conduct for the State of Virginia. No constitutional provision or Virginia statute prohibits spouses from simultaneously serving as judge and clerk of circuit court in same jurisdiction</td>
<td>41</td>
</tr>
<tr>
<td>Integration of the State Bar - Virginia Code of Professional Responsibility. Disciplinary proceedings against attorneys are civil, and not criminal, in nature; proceedings are for purpose of protecting public and not for purpose of punishment</td>
<td>69</td>
</tr>
<tr>
<td>Practice and Procedure in Actions at Law - The Notice of Motion for Judgment. Clerk of court of original jurisdiction shall collect fees assessed at commencement of civil action or chancery cause; clerk of circuit court to which venue of action or suit is transferred may not charge additional filing fees. Circuit court receiving transferred case retains right to assess costs, even though costs may have been assessed by transferor court. Transferee clerk must assess costs against losing party upon final disposition of case, as allowed by local ordinance</td>
<td>59</td>
</tr>
<tr>
<td>Pretrial Procedures, Depositions and Production at Trial - Physical and Mental Examination of Persons. General Assembly has not authorized circuit court to require additional information for determining advisability of granting concealed handgun permit to applicant for reasons not enumerated in statute. Circuit court is prohibited from prescribing rule that is inconsistent with any statutory provision, or that has effect of abridging substantive right of persons appearing before such court. Court lacks authority to add exclusion to grant concealed handgun permit based on applicant’s refusal to submit to psychosocial assessment or on results of such assessment. Court has no authority to require permit applicants to submit to psychosocial assessments</td>
<td>130</td>
</tr>
</tbody>
</table>
The Court of Appeals. Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected .................................................. 103

The Supreme Court. Circuit court clerk is responsible for serving notice on appellee that appeal of general district court decision has been perfected. Notice of appeal is not analogous to motion for new trial. Appellant has right to trial de novo in circuit court once appeal is perfected .............................................. 103

The Supreme Court. Issuance of mandate marks conclusion of appeal of conviction; criminal defendant has no further avenue of direct appeal of felony conviction .................. 243

The Supreme Court. Local elected official convicted of felony may continue to hold office pending filing and review of petition for rehearing in Supreme Court of Virginia, following denial of petition for appeal. Once Court issues mandate, official has no further avenue of appeal of felony conviction and must forfeit office ...................... 243

SHERIFFS

Auxiliary police officers possess powers and authority of full-time police officers only during time they are called into service to assist regular police officers of locality; such service is supplemental and exists under limited circumstances. When not in service, auxiliary police officers retain status as private citizens, and may not use police identification or weapons to exercise police powers and authority when observing crime in progress. Statutory restrictions applicable to auxiliary police officers who are not in service do not apply to auxiliary deputy sheriffs. Extent and scope of authority of such deputy sheriffs is within discretion of sheriff ........................................ 88

Commonwealth or locality that pays sheriff’s salary is exempt from paying sheriff’s fees for services rendered. Conclusion does not affect sheriff’s fees and mileage allowances clerk of circuit or general district court is required to collect in civil and criminal matters .... 61

Compatibility of offices of sheriff and high constable .................. 42

Constitutional and statutory bar to dual officeholding does not apply to sheriff serving simultaneously as high constable ................................ 42

Director of Department of Corrections is not required to provide statutorily specified programs to persons confined in local correctional facilities. Earned sentence credits are conditioned only in part on participation by inmates assigned to such programs. Inmates incarcerated in local correctional facilities are not required to participate in programs that are nonexistent to earn sentence credits. Sentence credits may be earned for each 30 days’ service and may be applied to weekend service, but may not be prorated .......... 221

Duties include enforcement of all criminal laws within jurisdiction of sheriff’s office, and preservation of peace and order .................. 88
<table>
<thead>
<tr>
<th><strong>SHERIFFS (contd.)</strong></th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforce all criminal laws within jurisdiction of office, and preserve peace and order</td>
<td>88</td>
</tr>
<tr>
<td>Exclusive control over daily operations of office and assignment of personnel</td>
<td>88</td>
</tr>
<tr>
<td>Fees and mileage allowances accruing to sheriff in connection with civil or criminal matter are collected by clerk of circuit or general district court in which case is heard</td>
<td>63</td>
</tr>
<tr>
<td>Inmate ineligible for parole may not earn good conduct credit when mandatory minimum sentence is imposed. Intent of General Assembly is to ensure that inmate convicted of crime carrying mandated minimum sentence must serve entire time. Inmate is ineligible to receive good conduct credit for 30 days of 90-day sentence served as mandatory minimum sentence for third conviction of driving motor vehicle while intoxicated within five-year period, but is eligible to earn good conduct credit on last 60 days of three-month sentence</td>
<td>224</td>
</tr>
<tr>
<td>Juvenile previously tried and convicted in circuit court as adult, who again is charged with commission of offense classified as felony, does not have to be housed entirely separate and apart from adult inmates. Juvenile who remains within jurisdiction of juvenile court and whose disruptive behavior necessitates removal from juvenile detention facility to adult facility must be physically separated from adults in jails and other detention facilities</td>
<td>109</td>
</tr>
<tr>
<td>No authority to appoint special deputies, regardless of whether such individuals receive compensation</td>
<td>88</td>
</tr>
<tr>
<td>Offices of sheriff and high constable are not incompatible. Norfolk city sheriff may serve simultaneously as Norfolk high constable. Fees collected by sheriff as high constable must be deposited in city treasury for use in operation of city government</td>
<td>42</td>
</tr>
<tr>
<td>Part-time deputies are deputies of sheriff, and are not special deputies</td>
<td>88</td>
</tr>
</tbody>
</table>

**STATE BAR, VIRGINIA**
*(See RULES OF SUPREME COURT OF VIRGINIA: Integration of the State Bar)*

**STATE WATER CONTROL LAW**
*(See STATE WATERS, PORTS AND HARBORS)*

**STATE WATERS, PORTS AND HARBORS**

State Water Control Law. By its enactment, legislature did not intend to negate authority of counties to adopt ordinance requiring groundwater monitoring of facilities that may pollute their waters or to occupy entire field of safeguarding Commonwealth's waters from pollution | 66 |

State Water Control Law. County has authority to adopt ordinance requiring groundwater monitoring of facility that may cause pollution of county's waters. Ordinance must not be inconsistent with general laws of Commonwealth embodied in State Water Control Law.
STATE WATERS, PORTS AND HARBORS (contd.)

Locality may not, by ordinance, require facility to install groundwater monitoring wells when State Water Control Board’s VPA permit does not require groundwater monitoring, but may require facility to report measurements from well to county when permit requires groundwater monitoring ........................................ 66

State Water Control Law - Regulation of Industrial Establishments. Fauquier County board of supervisors may enact ordinance, consistent with regulations of Fauquier Water and Sanitation Authority, State Water Control Board and Environmental Protection Agency, requiring pretreatment of wastewater by industrial users of Authority’s facilities. Ordinance may impose penalties required by federal and state law for violation of its provisions .... 100

STATUTORY CONSTRUCTION
(See also GENERAL PROVISIONS: Common Law, Statutes and Rules of Construction)

A. Absence of article indicates that words are to be read together as phrase ............... 57

Absence of article “a” indicates that words are to be read together as phrase ............... 57

Absurdity. Statutes should not be interpreted in ways that produce absurd or irrational consequences; should be harmonized with other existing statutes where possible to produce consistently logical result that gives effect to legislative intent .................. 4, 118

Accepted meanings. Words in statute are to be given their common, ordinary and accepted meanings, unless contrary legislative intent is manifest ......................... 54

Administrative agency interpretation. Interpretation given statute by administrative agency charged with its administration and enforcement is entitled to great weight; General Assembly is presumed to be cognizant of administrative construction of statute ....................... 250

Administrative interpretation. Interpretation given to statute by state agency charged with its administration is entitled to great weight ........................................ 254

Agency interpretation. Interpretation given to statute by state agency charged with its administration is entitled to great weight ........................................... 228, 254

Ambiguity. Primary goal in construing ambiguous statute is to discern and give effect to legislative intent ................................................................. 118

Ambiguity. Primary goal in construing ambiguous statute is to discern and give effect to legislative intent; reading of statute as whole influences proper construction of ambiguous individual provisions ............................................. 116

Ambiguity. Primary goal of statutory construction is to determine intent of legislature, with reading of statute as whole influencing proper construction of ambiguous individual provisions .................................................. 57
### STATUTORY CONSTRUCTION (contd.)

<p>| Ambiguity. Statutes are to be afforded their plain meaning where there is no ambiguity | 221 |
| Ambiguity. Words in statute are to be given effect of their plain meaning when there is no ambiguity | 243 |
| Amendment. Presumption that in amending statute, General Assembly had full knowledge of existing law and construction placed upon it by Attorney General/courts, and intended to change then existing law | 123, 130 |
| Amendment. When new provisions are added to existing legislation by amendatory act, presumption normally arises that change in law was intended | 63, 130 |
| Amendments. New statutes may not be applied retroactively to modify existing substantive rights | 228 |
| Amendments. Presumption normally arises that change in law was intended when new provisions are added to prior legislation by amendatory act | 228 |
| Amendments. When language of statutory amendment is clear and unambiguous, effect must be given to plain and ordinary meaning of its provisions | 253 |
| Amendments. When new provisions are added to existing statutes by amendatory act, presumption normally arises that change in law was intended | 253 |
| An - singular descriptive adjective | 116 |
| Analysis of legislative intent includes appraisal of subject matter and purpose of statute, in addition to its express terms | 4 |
| Ascertainment of legislative intention involves appraisal of subject matter, purposes, objects and effects of statute, in addition to its express terms | 118 |
| Broad construction. General statutory authority granted counties to regulate traditional aspects of public health and safety is broadly construed. Broad construction is appropriate when county ordinance relates to power expressly recognized in statute | 100 |
| Chapters in Code that relate generally to same subject must be read together, to extent possible, to ascertain intent of General Assembly in enacting interrelated provisions | 199 |
| Charter. When charter and statute conflict, charter controls, except when statute specifically expresses its control over conflicting charter provisions | 155 |
| Clear, definite meaning. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it | 61, 121, 141 |</p>
<table>
<thead>
<tr>
<th>STATUTORY CONSTRUCTION (contd.)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear, definite meaning. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it. It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In those situations, statute's plain meaning and intent govern</td>
<td>195</td>
</tr>
<tr>
<td>Clear, unambiguous language. When language of statute is clear and unambiguous, effect must be given to its plain and ordinary meaning</td>
<td>91, 253</td>
</tr>
<tr>
<td>Clear, unambiguous language. When language of statute is clear and unambiguous, rules of statutory construction are not required</td>
<td>242, 274</td>
</tr>
<tr>
<td>Clear, unambiguous language. When language of statutory amendment is clear and unambiguous, effect must be given to plain and ordinary meaning of its provisions</td>
<td>253</td>
</tr>
<tr>
<td>Clear, unambiguous provision. When statutory provision is clear and unambiguous, plain meaning of provision must be accepted</td>
<td>21</td>
</tr>
<tr>
<td>Common, ordinary and accepted meanings. Words in statute are to be given their common, ordinary and accepted meanings, unless contrary legislative intent is manifest</td>
<td>54</td>
</tr>
<tr>
<td>Commonly understood meaning. Words in statute are to be given usual, commonly understood meaning</td>
<td>18, 63, 221, 242</td>
</tr>
<tr>
<td>Concurrent jurisdiction. When state and county have concurrent jurisdiction, state law controls</td>
<td>66</td>
</tr>
<tr>
<td>Conflict. Statute prohibiting disclosure of information, except as otherwise prohibited by law, is not in conflict with statute that permits such disclosure</td>
<td>289</td>
</tr>
<tr>
<td>Conflict. When charter and statute conflict, charter controls, except when statute specifically expresses its control over conflicting charter provisions</td>
<td>155</td>
</tr>
<tr>
<td>Constitutionality. Every presumption is to be made in favor of constitutionality of statute</td>
<td>170</td>
</tr>
<tr>
<td>Constitutionality. Reasonable doubt as to statute's constitutionality is resolved in favor of validity of law</td>
<td>170</td>
</tr>
<tr>
<td>Costs. Statutes prescribing costs are construed as remedial and are liberally and beneficially expounded for sake of remedy they administer</td>
<td>144</td>
</tr>
<tr>
<td>Court interpretation. General Assembly is presumed to be aware of construction of statutes by courts; modification or nonmodification of such statutory construction demonstrates its own legislative intent</td>
<td>257</td>
</tr>
<tr>
<td>Criminal sanctions. Statute that carries criminal sanctions must be narrowly construed</td>
<td>170</td>
</tr>
<tr>
<td>Statutory Construction (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Criminal sanctions. Statute that imposes criminal sanctions must provide adequate notice whether contemplated conduct is illegal</td>
<td>170</td>
</tr>
<tr>
<td>Definitions. In absence of statutory definition, statutory term is given its ordinary meaning, given context in which it is used</td>
<td>289</td>
</tr>
<tr>
<td>Definitions. In absence of statutory definition, term must be given common, ordinary meaning</td>
<td>93</td>
</tr>
<tr>
<td>Definitions. In absence of statutory definition, words in statutes are to be given their ordinary meaning within statutory context</td>
<td>123</td>
</tr>
<tr>
<td>Definitions. In absence of statutory or judicial definition, term given its plain and ordinary meaning</td>
<td>33</td>
</tr>
<tr>
<td>Definition. In absence of statutory or judicial definition, term should be given its plain and ordinary meaning, given context in which used</td>
<td>205</td>
</tr>
<tr>
<td>Definitions. Statutory definition of “raffle” must be strictly construed</td>
<td>133</td>
</tr>
<tr>
<td>Definitions. When no statutory definition of term is provided, legislature intends term to have its ordinary meaning</td>
<td>91</td>
</tr>
<tr>
<td>Doubtful words. If legislative intent or meaning of statute is not clear, meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases</td>
<td>18</td>
</tr>
<tr>
<td>Every presumption is to be made in favor of constitutionality of statute</td>
<td>170</td>
</tr>
<tr>
<td>Exclusion. Mention of one item/thing in statute implies exclusion of another</td>
<td>51, 111, 123, 130, 141, 279</td>
</tr>
<tr>
<td>Exclusion. When legislature expresses things through list, it is assumed that what is not listed is excluded</td>
<td>130</td>
</tr>
<tr>
<td>Exclusion. When statute creates specific grant of authority, authority exists only to extent specifically granted; mention of one thing in statute implies exclusion of another</td>
<td>123</td>
</tr>
<tr>
<td>Exemptions to statutory licensing and permit requirements must be strictly construed</td>
<td>130</td>
</tr>
<tr>
<td>Expressio unius est exclusio alterius</td>
<td>264</td>
</tr>
<tr>
<td>Expression of one thing means exclusion of another</td>
<td>264</td>
</tr>
<tr>
<td>General Assembly is presumed to be aware of construction of statutes by courts; modification or nonmodification of such statutory construction demonstrates its own legislative intent</td>
<td>257</td>
</tr>
</tbody>
</table>
STATUTORY CONSTRUCTION (contd.)

General Assembly is presumed to have had knowledge of Attorney General's interpretations of statutes, and its failure to make corrective amendments evinces legislative acquiescence in Attorney General's view .............................................. 63

Harmony. Statutes relating to same subject are not to be considered in isolation, but must be construed together to produce harmonious result that gives effect to all provisions if possible ............................................. 146, 199

Harmony. Statutes should not be interpreted in ways that produce absurd or irrational consequences; instead, they should be harmonized with other existing statutes where possible to produce consistently logical result that gives effect to legislative intent .................................................................................. 118

Homogenous system. Statutes relating to same subject are not to be considered as isolated fragments of law, but as whole, or as parts of great connected, homogenous system, or single and complete statutory arrangement .................................................. 69

If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it ............................................................... 61, 121, 160

If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it. It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In those situations, statute's plain meaning and intent govern ........................................................................................................ 195, 221

If language of statute is plain and unambiguous, legislature should be assumed to have intended to mean what it plainly has expressed; statutory construction is unnecessary .......... 59

If legislative intent or meaning of statute is not clear, meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases ...................................................... 18

If statute is unclear, doubtful words are determined by reference to relationship with other associated words and phrases ......................................................................................... 123

If statutory language is not ambiguous but has usual and plain meaning, rules of construction do not apply and resort to legislative history is both unnecessary and improper; legislative intent is determined from plain meaning of words used ........................................................................ 33, 187

In absence of statutory definition, statutory term is given its ordinary meaning, given context in which it is used ........................................................................................................ 289

In absence of statutory definition, term must be given common, ordinary meaning ............................................... 93

In absence of statutory definition, words in statutes are to be given their ordinary meaning within statutory context .......................................................................................................................... 123

In absence of statutory or judicial definition, term given its plain and ordinary meaning ......................... 33
<table>
<thead>
<tr>
<th>STATUTORY CONSTRUCTION (contd.)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>In absence of statutory or judicial definition, term should be given its plain and ordinary meaning, given context in which used</td>
<td>205, 289</td>
</tr>
<tr>
<td>In giving effect to intent of legislature, statutes bearing on same subject matter are to be read together</td>
<td>180</td>
</tr>
<tr>
<td>Intent. Primary goal of statutory construction is to determine intent of legislature, with reading of statute as whole influencing proper construction of ambiguous individual provisions</td>
<td>57</td>
</tr>
<tr>
<td>Interpretation given statute by administrative agency charged with its administration and enforcement is entitled to great weight; General Assembly is presumed to be cognizant of administrative construction of statute</td>
<td>250</td>
</tr>
<tr>
<td>Interpretation given to statute by state agency charged with its administration is entitled to great weight</td>
<td>228, 254</td>
</tr>
<tr>
<td>Irrationality. Statutes should not be interpreted in ways that produce absurd or irrational consequences; should be harmonized with other existing statutes where possible to produce consistently logical result that gives effect to legislative intent</td>
<td>4, 118</td>
</tr>
<tr>
<td>Isolation. Statutes relating to same subject are not to be considered as isolated fragments of law, but as whole, or as parts of great connected, homogenous system, or single and complete statutory arrangement</td>
<td>69</td>
</tr>
<tr>
<td>Isolation. Statutes relating to same subject are not to be considered in isolation, but must be construed together to produce harmonious result that gives effect to all provisions if possible</td>
<td>146, 199</td>
</tr>
<tr>
<td>It is unnecessary to resort to rules of statutory construction when language of statute is unambiguous; statute's plain meaning and intent govern</td>
<td>18, 22, 111, 144, 162, 221</td>
</tr>
<tr>
<td>Legislative intent. Analysis of legislative intent includes appraisal of subject matter and purpose of statute, in addition to its express terms</td>
<td>4</td>
</tr>
<tr>
<td>Legislative intent. Ascertainment of legislative intention involves appraisal of subject matter, purposes, objects and effects of statute, in addition to its express terms</td>
<td>118</td>
</tr>
<tr>
<td>Legislative intent. Determined from plain meaning of words used</td>
<td>21</td>
</tr>
<tr>
<td>Legislative intent. If legislative intent or meaning of statute is not clear, meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases</td>
<td>18</td>
</tr>
<tr>
<td>Legislative intent. If statutory language is not ambiguous but has usual and plain meaning, rules of construction do not apply and resort to legislative history is both unnecessary and improper; legislative intent is determined from plain meaning of words used</td>
<td>33, 187</td>
</tr>
</tbody>
</table>
STATUTORY CONSTRUCTION (contd.)

Legislative intent. In giving effect to intent of legislature, statutes bearing on same subject matter are to be read together ........................................ 180

Legislative intent. It is unnecessary to resort to rules of statutory construction when language of statute is unambiguous; statute's plain meaning and intent govern .... 18, 22, 144

Legislative intent. Primary goal in construing ambiguous statute is to discern and give effect to legislative intent ...................................................... 18, 118

Legislative intent. Primary goal in construing ambiguous statute is to discern and give effect to legislative intent; reading of statute as whole influences proper construction of ambiguous individual provisions ........................................ 116

Legislative intent. Primary goal of statutory construction is to determine intent of legislature, with reading of statute as whole influencing proper construction of ambiguous individual provisions ........................................... 57

Legislative intent. Primary goal of statutory construction is to give effect to intent of legislature ................................................................. 260

Legislative intent. Primary goal of statutory interpretation is to ascertain and give effect to intent of legislature; analysis of legislative intent includes appraisal of subject matter and purpose of statute, in addition to its express terms ...................... 4

Legislative intent. Primary object of statutory construction and interpretation is to ascertain and give effect to legislative intent ................................ 195, 205

Legislative intent. Primary object of statutory construction is to ascertain and give effect to intent of legislature .............................................. 180

Legislative intent. Primary object of statutory construction is to ascertain and give effect to legislative intent .................................................. 93, 146

Legislative intent. Purpose underlying statute's enactment is particularly significant in construing it ............................................................... 4

Legislative intent. Statute specifying method by which something shall be done indicates legislative intent that it not be done otherwise ......................... 11, 123

Legislative intent. Statutes dealing with same subject matter must be read together to ascertain legislative intent ................................................... 203

Legislative intent. Statutes should be harmonized with other existing statutes where possible to produce consistently logical result that gives effect to legislative intent .................. 4
**STATUTORY CONSTRUCTION** (contd.)

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative intent. Statutes should not be interpreted in ways that produce absurd or irrational consequences; instead, they should be harmonized with other existing statutes where possible to produce consistently logical result that gives effect to legislative intent</td>
</tr>
<tr>
<td>Legislative intent. Statutory grant of power requires that exercise of implied authority be reasonable and consistent with legislative intent</td>
</tr>
<tr>
<td>Legislative intent. To determine legislative intent, statutes dealing with same subject matter should, to extent possible, be read together</td>
</tr>
<tr>
<td>Legislative intent. When statute is expressed in plain and unambiguous terms, whether general or limited, legislature is assumed to mean what it plainly has expressed; no room is left for construction</td>
</tr>
<tr>
<td>Legislative intent. When statute specifies how something is to be done, it evinces intent of General Assembly that it not be done another way</td>
</tr>
<tr>
<td>Legislative intent. Where law is expressed in plain and unambiguous terms, whether those terms are general or limited, legislature should be intended to mean what they have plainly expressed; consequently, no room is left for construction</td>
</tr>
<tr>
<td>Legislative intent. Words in statute are to be given their common, ordinary and accepted meanings, unless contrary legislative intent is manifest</td>
</tr>
<tr>
<td>Limits. Statute limiting thing to be done in particular manner, or by prescribed person or tribunal, implies that it shall not be done otherwise, or by different person or tribunal</td>
</tr>
<tr>
<td>Limits. When legislative enactment limits manner in which something may be done, enactment also evinces intent that it shall not be done another way</td>
</tr>
<tr>
<td>May - permissive language/term</td>
</tr>
<tr>
<td>May. Statutes using word grant permissive rather than mandatory, authority</td>
</tr>
<tr>
<td>May. Word should be given ordinary meaning—permission, importing discretion—unless legislature uses word in sense of “shall” or “must”</td>
</tr>
<tr>
<td>Meaning. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it</td>
</tr>
<tr>
<td>Meaning. In absence of statutory definition, words in statutes are to be given their ordinary meaning within statutory context</td>
</tr>
<tr>
<td>Meaning. Statutory words must be given meaning they have acquired from customary usage</td>
</tr>
<tr>
<td>Meaning. Words in statute are to be given usual, commonly understood meaning</td>
</tr>
</tbody>
</table>
STATUTORY CONSTRUCTION (contd.)

Meaning of phrase "with the sender retaining sufficient proof of mailing" is established by its relationship to associated words and phrases ........................................ 18

Meaning of word(s) finds expression from purport of entire phrase of which it is part .......................................................... 18, 33, 123, 205

Mention of one item/thing in statute implies exclusion of another .................................................. 51, 111, 123, 130, 141, 279

Mention of specific item in statute implies that omitted items were not intended to be included within scope of statute .............................................................. 118, 228

Narrow construction. Plain, obvious and rational meaning of statute is always to be preferred to any curious, narrow or strained construction ........................................ 118

New statutes may not be applied retroactively to modify existing substantive rights .................. 228

Only. Use of word "only" in statute connotes limiting language ............................................. 111

Ordinary and accepted meanings. Words in statute are to be given their common, ordinary and accepted meanings, unless contrary legislative intent is manifest ........................................ 54

Ordinary meaning. In absence of statutory definition, statutory term is given its ordinary meaning, given context in which it is used ........................................ 289

Ordinary meaning. In absence of statutory definition, words in statutes are to be given their ordinary meaning within statutory context .......................................... 123

Ordinary meaning. In absence of statutory or judicial definition, term given its plain and ordinary meaning ................................................................. 33

Ordinary meaning. When language of statute is clear and unambiguous, effect must be given to its plain and ordinary meaning ........................................ 91

Ordinary meaning. When language of statutory amendment is clear and unambiguous, effect must be given to plain and ordinary meaning of its provisions .......... 253

Ordinary meaning. Words in statute must be afforded their plain and ordinary meaning unless context demands different result ........................................ 51, 162

Penal statute is strictly construed against state and in favor of liberty of citizen. Such statutes cannot be extended by implication or construction, or be made to embrace cases not within their letter or spirit. Intent of General Assembly must govern construction of penal statutes; those statutes are not to be so strictly construed as to defeat obvious intention of General Assembly ........................................ 123
STATUTORY CONSTRUCTION (contd.)

Penal statutes must be construed strictly against Commonwealth and in favor of criminal defendant ................................................................. 192

Phrase. Absence of article “a” indicates that words are to be read together as phrase . . . . 57

Phrases. If legislative intent or meaning of statute is not clear, meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases ........................................ 18

Phrases. If statute is unclear, doubtful words are determined by reference to relationship with other associated words and phrases .................... 123

Phrases. Meaning of phrase “with the sender retaining sufficient proof of mailing” is established by its relationship to associated words and phrases ........... 18

Phrases. Meaning of word finds expression from purport of entire phrase of which it is part ................................................................. 33

Phrases. Rules of statutory construction analyze structure of text and relationship of words and phrases within text to determine meaning .................. 57

Phrases. Words and phrases must be considered in context used to arrive at construction that promotes object and purpose of statute .................. 18, 33, 123, 205

Phrases. Words are to be analyzed in relationship with associated words and phrases ........ 57

Plain language. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it. It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In those situations, statute’s plain meaning and intent govern .................... 221

Plain meaning. If statutory language is not ambiguous but has usual and plain meaning, rules of construction do not apply and resort to legislative history is both unnecessary and improper; legislative intent is determined from plain meaning of words used ............ 187

Plain meaning. It is unnecessary to resort to rules of statutory construction when language of statute is unambiguous; statute’s plain meaning and intent govern .. 18, 22, 111, 144, 221

Plain meaning. Statutes are to be afforded their plain meaning where there is no ambiguity ................................................................. 221

Plain meaning. When language of statute is unambiguous, its plain meaning controls; resorting to rules of construction or legislative history is both unnecessary and improper ........... 219

Plain meaning. When statutory provision is clear and unambiguous, plain meaning of provision must be accepted ........................................ 21
### STATUTORY CONSTRUCTION (contd.)

<p>| Plain meaning. Words in statute are to be given effect of their plain meaning when there is no ambiguity | 243 |
| Plain meaning and intent. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it. It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In those situations, statute’s plain meaning and intent govern | 195 |
| Plain meaning and intent. When language of statute is unambiguous, statute’s plain meaning and intent govern, making resort to any rules of statutory construction unnecessary | 116 |
| Plain, obvious and rational meaning of statute is always to be preferred to any curious, narrow or strained construction | 118 |
| Plain, ordinary meaning. In absence of statutory or judicial definition, term given its plain and ordinary meaning | 33 |
| Plain, ordinary meaning. When language of statute is clear and unambiguous, effect must be given to its plain and ordinary meaning | 91 |
| Plain, ordinary meaning. When language of statutory amendment is clear and unambiguous, effect must be given to plain and ordinary meaning of its provisions | 253 |
| Plain, ordinary meaning. Words in statute must be afforded their plain and ordinary meaning unless context demands different result | 51, 162 |
| Plain, unambiguous language. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it | 61, 121, 160 |
| Plain, unambiguous language. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it. It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In those situations, statute’s plain meaning and intent govern | 195 |
| Plain, unambiguous language. If language of statute is plain and unambiguous, legislature should be assumed to have intended to mean what it plainly has expressed; statutory construction is unnecessary | 59 |
| Plain, unambiguous language. When language of statute is plain and unambiguous and its meaning clear and definite, it must be given effect | 88, 141 |
| Plain, unambiguous language. When statutory language is plain and unambiguous, legislature is presumed to have intended what it plainly has expressed; statutory construction is unnecessary | 33 |</p>
<table>
<thead>
<tr>
<th>STATUTORY CONSTRUCTION (contd.)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plain, unambiguous meaning. If statutory language is not ambiguous but has usual and plain meaning, rules of construction do not apply and resort to legislative history is unnecessary and improper; legislative intent determined from plain meaning of words used</td>
<td>33</td>
</tr>
<tr>
<td>Plain, unambiguous terms. When law/statute is expressed in plain and unambiguous terms, whether general or limited, legislature is assumed to mean what it plainly has expressed; no room is left for construction</td>
<td>276</td>
</tr>
<tr>
<td>Plain, unambiguous terms. Where law is expressed in plain and unambiguous terms, whether those terms are general or limited, legislature should be intended to mean what they have plainly expressed; consequently, no room is left for construction</td>
<td>118, 123</td>
</tr>
<tr>
<td>Power of political subdivision to create separate administration or joint board for exercise of powers it enjoys is derived from other powers expressly granted by statute</td>
<td>72</td>
</tr>
<tr>
<td>Powers. Exercise of local regulatory power must be reasonable and nondiscriminatory</td>
<td>240</td>
</tr>
<tr>
<td>Powers. Statutory grant of power requires that exercise of implied authority be reasonable and consistent with legislative intent</td>
<td>72</td>
</tr>
<tr>
<td>Presumption normally arises that change in law was intended when new provisions are added to prior legislation by amendatory act</td>
<td>228</td>
</tr>
<tr>
<td>Presumption that in amending statute, General Assembly had full knowledge of existing law and construction placed upon it by Attorney General/courts, and intended to change then existing law</td>
<td>123, 130</td>
</tr>
<tr>
<td>Primary goal in construing ambiguous statute is to discern and give effect to legislative intent</td>
<td>118</td>
</tr>
<tr>
<td>Primary goal in construing ambiguous statute is to discern and give effect to legislative intent; reading of statute as whole influences proper construction of ambiguous individual provisions</td>
<td>116</td>
</tr>
<tr>
<td>Primary goal of statutory construction is to determine intent of legislature, with reading of statute as whole influencing proper construction of ambiguous individual provisions</td>
<td>57</td>
</tr>
<tr>
<td>Primary goal of statutory construction is to give effect to intent of legislature</td>
<td>260</td>
</tr>
<tr>
<td>Primary goal of statutory interpretation is to ascertain and give effect to intent of legislature; analysis of legislative intent includes appraisal of subject matter and purpose of statute, in addition to its express terms</td>
<td>4</td>
</tr>
<tr>
<td>Primary object of statutory construction and interpretation is to ascertain and give effect to legislative intent</td>
<td>18, 93, 146, 195, 205</td>
</tr>
</tbody>
</table>
## STATUTORY CONSTRUCTION (contd.)

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary object of statutory construction is to ascertain and give effect to intent of legislature</td>
<td>180</td>
</tr>
<tr>
<td>Prospective construction. New statutes may not be applied retroactively to modify existing substantive rights</td>
<td>228</td>
</tr>
<tr>
<td>Prospective construction. Unless statutory provision clearly states legislature’s intention that it operate retrospectively, such application cannot be made, and statute will have only prospective effect</td>
<td>228</td>
</tr>
<tr>
<td>Purpose for which statute is enacted is of primary importance in its interpretation or construction</td>
<td>146, 195</td>
</tr>
<tr>
<td>Purpose for which statute is enacted is of primary importance in its interpretation or construction; statute often speaks as plainly by inference, and by means of purpose underlying it, as in any other manner</td>
<td>18, 205</td>
</tr>
<tr>
<td>Purpose underlying statute’s enactment is particularly significant in construing it</td>
<td>4</td>
</tr>
<tr>
<td>Raffle. Statutory definition must be strictly construed</td>
<td>133</td>
</tr>
<tr>
<td>Reasonable doubt as to statute’s constitutionality is resolved in favor of validity of law</td>
<td>170</td>
</tr>
<tr>
<td>Regulatory powers. Exercise of local regulatory power must be reasonable and nondiscriminatory</td>
<td>240</td>
</tr>
<tr>
<td>Remedial statutes. Statutes prescribing costs are construed as remedial and are liberally and beneficially expounded for sake of remedy they administer</td>
<td>59, 144</td>
</tr>
<tr>
<td>Retroactive application of statute affecting vested interest or contractual rights is prohibited, but not of statute affecting merely procedural matters</td>
<td>228</td>
</tr>
<tr>
<td>Retroactive construction. New statutes may not be applied retroactively to modify existing substantive rights</td>
<td>228</td>
</tr>
<tr>
<td>Retroactive construction. Statute may be applied retroactively only if such application does not impair substantive rights</td>
<td>228</td>
</tr>
<tr>
<td>Retrospective construction. Unless statutory provision clearly states legislature’s intention that it operate retrospectively, such application cannot be made, and statute will have only prospective effect</td>
<td>228</td>
</tr>
<tr>
<td>Rules of statutory construction analyze structure of text and relationship of words and phrases within text to determine meaning</td>
<td>57</td>
</tr>
</tbody>
</table>
### STATUTORY CONSTRUCTION (contd.)

<table>
<thead>
<tr>
<th>Same subject. Chapters in Code that relate generally to same subject must be read together, to extent possible, to ascertain intent of General Assembly in enacting interrelated provisions</th>
<th>199</th>
</tr>
</thead>
<tbody>
<tr>
<td>Same subject. Statutes dealing with same subject matter should, to extent possible, be read together to determine legislative intent</td>
<td>203</td>
</tr>
<tr>
<td>Same subject. Statutes relating to same subject are not to be considered as isolated fragments of law, but as whole, or as parts of great connected, homogenous system, or single and complete statutory arrangement</td>
<td>69</td>
</tr>
<tr>
<td>Same subject. Statutes relating to same subject are not to be considered in isolation, but must be construed together to produce harmonious result that gives effect to all provisions if possible</td>
<td>146, 199</td>
</tr>
<tr>
<td>Same subject matter. Statutes dealing with same subject matter must be read together to ascertain legislative intent</td>
<td>203</td>
</tr>
<tr>
<td>Same subject matter. To determine legislative intent, statutes dealing with same subject matter should, to extent possible, be read together</td>
<td>146, 195, 221</td>
</tr>
<tr>
<td>Shall - mandatory term</td>
<td>116</td>
</tr>
<tr>
<td>Shall. Ordinarily, but not always, implies that statute's provisions are mandatory</td>
<td>22</td>
</tr>
<tr>
<td>Shall. Use in statute generally indicates procedure is mandatory, while “may” indicates it is permissive</td>
<td>121</td>
</tr>
<tr>
<td>Shall in statute generally connotes mandatory act</td>
<td>63, 187, 205</td>
</tr>
<tr>
<td>Shall in statute generally implies that its terms are intended to be mandatory, rather than permissive or directive</td>
<td>118, 123</td>
</tr>
<tr>
<td>Shall in statute generally indicates its procedures are intended to be mandatory</td>
<td>146</td>
</tr>
<tr>
<td>Specific grant of authority. Mention of specific item in statute implies that omitted items were not intended to be included within scope of statute</td>
<td>228</td>
</tr>
<tr>
<td>Specific grant of authority. When statute contains specific grant of authority, authority exists only to extent specifically granted in statute. Mention of specific item in statute implies that omitted items were not intended to be included within scope of statute</td>
<td>51, 228</td>
</tr>
<tr>
<td>Specific grant of authority. When statute creates specific grant of authority, authority/power exists only to extent specifically granted in statute</td>
<td>123, 130, 141</td>
</tr>
<tr>
<td>Specific items. Mention of specific item in statute implies that omitted items were not intended to be included within scope of statute</td>
<td>118</td>
</tr>
</tbody>
</table>
**STATUTORY CONSTRUCTION** (contd.)

<table>
<thead>
<tr>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific statute establishing situs for business license tax overrides general situs provisions</td>
<td>249</td>
</tr>
<tr>
<td>Specific statute establishing situs for business license tax purposes supersedes general situs provisions</td>
<td>245</td>
</tr>
<tr>
<td>State agency interpretation. Interpretation given to statute by state agency charged with its administration is entitled to great weight</td>
<td>228</td>
</tr>
<tr>
<td>Statute infringing First Amendment rights must be narrowly drawn to accomplish government interest</td>
<td>170</td>
</tr>
<tr>
<td>Statute limiting thing to be done in particular manner, or by prescribed person or tribunal, implies that it shall not be done otherwise, or by different person or tribunal</td>
<td>111</td>
</tr>
<tr>
<td>Statute prohibiting disclosure of information, except as otherwise prohibited by law, is not in conflict with statute that permits such disclosure</td>
<td>289</td>
</tr>
<tr>
<td>Statute specifying method by which something shall be done indicates legislative intent that it not be done otherwise</td>
<td>11, 123</td>
</tr>
<tr>
<td>Statute that carries criminal sanctions must be narrowly construed</td>
<td>170</td>
</tr>
<tr>
<td>Statute that imposes criminal sanctions must provide adequate notice whether contemplated conduct is illegal</td>
<td>170</td>
</tr>
<tr>
<td>Statute which is plain needs no interpretation</td>
<td>121, 160</td>
</tr>
<tr>
<td>Statutes are to be afforded their plain meaning where there is no ambiguity</td>
<td>221</td>
</tr>
<tr>
<td>Statutes dealing with same subject matter must be read together to ascertain legislative intent</td>
<td>203</td>
</tr>
<tr>
<td>Statutes dealing with same subject matter should, to extent possible, be read together to determine legislative intent</td>
<td>146, 195</td>
</tr>
<tr>
<td>Statutes imposing taxes are strictly construed, with any reasonable doubt resolved against taxation</td>
<td>253</td>
</tr>
<tr>
<td>Statutes prescribing costs are construed as remedial and are liberally and beneficially expounded for sake of remedy they administer</td>
<td>144</td>
</tr>
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<td>Statutes relating to same subject are not to be considered as isolated fragments of law, but as whole, or as parts of great connected, homogenous system, or single and complete statutory arrangement</td>
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</table>
STATUTORY CONSTRUCTION (contd.)

| Statutes relating to same subject are not to be considered in isolation, but must be construed together to produce harmonious result that gives effect to all provisions if possible | 146, 199 |
| Statutes should be harmonized with other existing statutes where possible to produce consistently logical result that gives effect to legislative intent | 4 |
| Statutes should not be interpreted in ways that produce absurd or irrational consequences; should be harmonized with other existing statutes where possible to produce consistently logical result that gives effect to legislative intent | 4, 118 |
| Statutes using word “may” grant permissive, rather than mandatory, authority | 18, 69, 116 |
| Statutory definition of “raffle” must be strictly construed | 133 |
| Statutory grant of power requires that exercise of implied authority be reasonable and consistent with legislative intent | 72 |
| Statutory words must be given meaning they have acquired from customary usage | 192, 289 |
| Strict construction. Statutes imposing taxes are strictly construed, with any reasonable doubt resolved against taxation | 133, 253 |
| Strict construction. Statutory definition of “raffle” must be strictly construed | 133 |
| Tax exemptions must be strictly construed; any doubt is to be resolved against allowing exemption | 264 |
| Tax statutes are strictly construed, with any reasonable doubt resolved against taxation | 253 |
| Tax statutes are to be construed against government and in favor of citizens when there is doubt as to their meaning or scope | 260 |
| Tax statutes are to be narrowly construed | 260 |
| Taxation. Statutes imposing taxes are strictly construed, with any reasonable doubt resolved against taxation | 253 |
| To determine legislative intent, statutes dealing with same subject matter should, to extent possible, be read together | 146, 195, 221 |
| Unambiguous language. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it | 61, 121, 141, 160 |
STATUTORY CONSTRUCTION (contd.)

<p>| Unambiguous language. If language of statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it. It is unnecessary to resort to any rules of statutory construction when language of statute is unambiguous. In those situations, statute’s plain meaning and intent govern | 195, 221 |
| Unambiguous language. If language of statute is plain and unambiguous, legislature should be assumed to have intended to mean what it plainly has expressed; statutory construction is unnecessary | 59 |
| Unambiguous language. If statutory language is not ambiguous but has usual and plain meaning, rules of construction do not apply and resort to legislative history is both unnecessary and improper; legislative intent is determined from plain meaning of words used | 33, 187 |
| Unambiguous language. It is unnecessary to resort to rules of statutory construction when language of statute is unambiguous; statute’s plain meaning and intent govern | 18, 22, 111, 144, 162, 221 |
| Unambiguous language. When language of statute is clear and unambiguous, effect must be given to its plain and ordinary meaning | 91 |
| Unambiguous language. When language of statute is clear and unambiguous, rules of statutory construction are not required | 242, 274 |
| Unambiguous language. When language of statute is plain and unambiguous and its meaning clear and definite, it must be given effect | 88 |
| Unambiguous language. When language of statute is unambiguous, its plain meaning controls; resorting to rules of construction or legislative history is both unnecessary and improper | 219 |
| Unambiguous language. When language of statute is unambiguous, statute’s plain meaning and intent govern, making resort to any rules of statutory construction unnecessary | 116 |
| Unambiguous language. When language of statutory amendment is clear and unambiguous, effect must be given to plain and ordinary meaning of its provisions | 253 |
| Unambiguous language. When statutory language is plain and unambiguous, legislature is presumed to have intended what it plainly has expressed; statutory construction is unnecessary | 33 |
| Unambiguous terms. When law/statute is expressed in plain and unambiguous terms, whether general or limited, legislature is assumed to mean what it plainly has expressed; no room is left for construction | 276 |</p>
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unambiguous terms. Where law is expressed in plain and unambiguous</td>
<td>118,</td>
</tr>
<tr>
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<td>123</td>
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<td>should be intended to mean what they have plainly expressed;</td>
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<tr>
<td>consequently, no room is left for construction</td>
<td></td>
</tr>
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<td>Unless statutory provision clearly states legislature’s intention</td>
<td>228</td>
</tr>
<tr>
<td>that it operate retrospectively, such application cannot be made,</td>
<td></td>
</tr>
<tr>
<td>and statute will have only prospective effect</td>
<td></td>
</tr>
<tr>
<td>Use of “only” in statute connotes limiting language</td>
<td>111</td>
</tr>
<tr>
<td>Use of “shall” in statute generally implies that its terms are</td>
<td>118</td>
</tr>
<tr>
<td>intended to be mandatory, rather than permissive or directive</td>
<td></td>
</tr>
<tr>
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<td>116</td>
</tr>
<tr>
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<td>121</td>
</tr>
<tr>
<td>while “may” indicates it is permissive</td>
<td></td>
</tr>
<tr>
<td>Usual, commonly understood meaning. Words in statute are to be given</td>
<td>18,</td>
</tr>
<tr>
<td>usual, commonly understood meaning</td>
<td>63,</td>
</tr>
<tr>
<td>Usual, plain meaning. If statutory language is not ambiguous but has</td>
<td>221,</td>
</tr>
<tr>
<td>usual and plain meaning, rules of construction do not apply and</td>
<td>242</td>
</tr>
<tr>
<td>resort to legislative history is both unnecessary and improper;</td>
<td></td>
</tr>
<tr>
<td>legislative intent is determined from plain meaning of words used</td>
<td>33,</td>
</tr>
<tr>
<td>Weight must be given to object of statute and purpose to be</td>
<td>187</td>
</tr>
<tr>
<td>accomplished; reasonable construction of statute must be made so</td>
<td></td>
</tr>
<tr>
<td>purpose of statute is not limited or defeated, but instead is</td>
<td>205</td>
</tr>
<tr>
<td>promoted</td>
<td></td>
</tr>
<tr>
<td>When charter and statute conflict, charter controls, except when</td>
<td>155</td>
</tr>
<tr>
<td>statute specifically expresses its control over conflicting charter</td>
<td></td>
</tr>
<tr>
<td>provisions</td>
<td></td>
</tr>
<tr>
<td>When language of statute is clear and unambiguous, resort to rules</td>
<td>224</td>
</tr>
<tr>
<td>of statutory construction is unnecessary</td>
<td></td>
</tr>
<tr>
<td>When language of statute is clear and unambiguous, rules of statutory</td>
<td>242,</td>
</tr>
<tr>
<td>construction are not required</td>
<td>274</td>
</tr>
<tr>
<td>When language of statute is plain and unambiguous and its meaning</td>
<td>88,</td>
</tr>
<tr>
<td>clear and definite, it must be given effect</td>
<td>141</td>
</tr>
<tr>
<td>When language of statute is unambiguous, it is unnecessary to resort</td>
<td>18</td>
</tr>
<tr>
<td>to any rules of statutory construction</td>
<td></td>
</tr>
<tr>
<td>When language of statute is unambiguous, it is unnecessary to resort</td>
<td>162</td>
</tr>
<tr>
<td>to any rules of statutory construction; statute’s plain meaning and</td>
<td></td>
</tr>
<tr>
<td>intent govern</td>
<td></td>
</tr>
<tr>
<td>STATUTORY CONSTRUCTION (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>When language of statute is unambiguous, its plain meaning controls; resorting to rules of</td>
<td>219</td>
</tr>
<tr>
<td>construction or legislative history is both unnecessary and improper</td>
<td></td>
</tr>
<tr>
<td>When language of statute is unambiguous, statute’s plain meaning and intent govern, making</td>
<td>116</td>
</tr>
<tr>
<td>resort to any rules of statutory construction unnecessary</td>
<td></td>
</tr>
<tr>
<td>When language of statutory amendment is clear and unambiguous, effect must be given to</td>
<td>253</td>
</tr>
<tr>
<td>plain and ordinary meaning of its provisions</td>
<td></td>
</tr>
<tr>
<td>When law/statute is expressed in plain and unambiguous terms, whether general or limited,</td>
<td></td>
</tr>
<tr>
<td>legislature is assumed to mean what it plainly has expressed; no room is left for construction</td>
<td>276</td>
</tr>
<tr>
<td>When legislative enactment limits manner in which something may be done, enactment also</td>
<td>21, 111</td>
</tr>
<tr>
<td>evinces intent that it shall not be done another way</td>
<td></td>
</tr>
<tr>
<td>When legislature expresses things through list, it is assumed that what is not listed is</td>
<td>130</td>
</tr>
<tr>
<td>excluded</td>
<td></td>
</tr>
<tr>
<td>When new provisions are added to existing legislation/statutes by amendatory act, presump-</td>
<td>63, 130, 253</td>
</tr>
<tr>
<td>tion normally arises that change in law was intended</td>
<td></td>
</tr>
<tr>
<td>When state and county have concurrent jurisdiction, state law controls</td>
<td>66</td>
</tr>
<tr>
<td>When statute contains specific grant of authority, authority exists only to extent specifically</td>
<td>228</td>
</tr>
<tr>
<td>granted in statute. Mention of specific item in statute implies that omitted items were not</td>
<td></td>
</tr>
<tr>
<td>intended to be included within scope of statute</td>
<td></td>
</tr>
<tr>
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<td>51, 123, 130, 141</td>
</tr>
<tr>
<td>ically granted in statute</td>
<td></td>
</tr>
<tr>
<td>When statute specifies how something is to be done, it evinces intent of General Assembly</td>
<td>130</td>
</tr>
<tr>
<td>that it not be done another way</td>
<td></td>
</tr>
<tr>
<td>When statutory language is plain and unambiguous, legislature is presumed to have intended</td>
<td>33</td>
</tr>
<tr>
<td>what it plainly has expressed; statutory construction is unnecessary</td>
<td></td>
</tr>
<tr>
<td>When statutory provision is clear and unambiguous, plain meaning of provision must be accepted</td>
<td>21</td>
</tr>
<tr>
<td>Where law is expressed in plain and unambiguous terms, whether those terms are general or</td>
<td>118, 123, 276</td>
</tr>
<tr>
<td>limited, legislature should be intended to mean what they have plainly expressed; conse-</td>
<td></td>
</tr>
<tr>
<td>quently, no room is left for construction</td>
<td></td>
</tr>
<tr>
<td>Words and phrases. If legislative intent or meaning of statute is not clear, meaning of dou-</td>
<td>18</td>
</tr>
<tr>
<td>tful words may be determined by reference to their relationship with other associated words</td>
<td></td>
</tr>
<tr>
<td>and phrases</td>
<td></td>
</tr>
</tbody>
</table>
STATUTORY CONSTRUCTION (contd.)

Words and phrases. If statute is unclear, doubtful words are determined by reference to relationship with other associated words and phrases .................................................. 123

Words and phrases. Meaning of phrase “with the sender retaining sufficient proof of mailing” is established by its relationship to associated words and phrases .................. 18

Words and phrases. Rules of statutory construction analyze structure of text and relationship of words and phrases within text to determine meaning ................................. 57

Words and phrases. Words are to be analyzed in relationship with associated words and phrases ................................................................. 57

Words and phrases must be considered in context used to arrive at construction that promotes object and purpose of statute .............................................. 18, 33, 123, 205

Words are to be analyzed in relationship with associated words and phrases .................................................. 57

Words in statute are to be given effect of their plain meaning when there is no ambiguity .................................................................................. 243

Words in statute are to be given their common, ordinary and accepted meanings, unless contrary legislative intent is manifest ........................................ 54

Words in statute must be afforded their plain and ordinary meaning unless context demands different result .................................................. 162

Words must be given meaning they have acquired from customary use .................................................. 192

Words used in statute must be afforded their plain and ordinary meaning unless context demands different result .................................................. 31, 51

TAXATION

Exemptions. Designating particular type of personal property as separate classification for tax purposes is not equivalent to exempting that type of property from taxation altogether .................................................. 265

Exemptions. General Assembly may not expand constitutionally authorized exemptions except when Constitution specifically provides for such expansion .................................................. 265

Exemptions must be strictly construed; any doubt is to be resolved against allowing exemption .................................................. 264

Exemptions of property from taxation shall be strictly construed .................................................. 265
TAXATION (contd.)

General Provisions of Title 58.1 - In General (secrecy of information; penalties). Statute prohibiting disclosure of information, except as otherwise prohibited by law, is not in conflict with statute that permits such disclosure ................................................................. 289

General Provisions of Title 58.1 - In General (secrecy of information; penalties). Upon request from Department of Social Services, commissioners of revenue must provide Department with names, social security account numbers, addresses and types of licenses of individuals who have business licenses on file in their offices. Commissioners are required to provide Department with information pertaining to holders of professional licenses identified by Department as noncustodial parents who are failing to support their children ........................................................................................................................................ 289

License Taxes. Charter tour bus company holding certificate of public convenience and necessity for special or charter party carrier does not operate such carriers over regular routes, and is not "certificated motor vehicle carrier" exempt from personal property taxation. Charter party carrier is not public service corporation for purposes of local license tax exemption, and is not exempt from such tax ................................................................. 278

License Taxes. Company is classified as engaging in single business activity if substantial portion of business consists of that activity, for tax purposes ........................................................................................................ 276

License Taxes. Contractor must include receipts from work performed in locality in which no license tax was paid when reporting gross receipts to town where contractor has principal place of business. Town may not tax contractor who has principal place of business in another Virginia locality that may or may not impose business license tax, unless revenue from business performed within town exceeds $25,000. Town may impose license tax on contractor engaged in business within town but with no definite place of business within Commonwealth, even if gross receipts attributable to work done within town does not exceed $25,000 annually ........................................................................................................ 249

License Taxes. Contractor with principal place of business in town may deduct gross receipts for work done in another locality only when contractor pays license tax on those receipts in other locality ........................................................................................................ 245

License Taxes. County may assess license tax on full gross receipts of contractor whose place of business is in town within county and whose receipts from work done in county and outside town boundaries exceed $25,000 annually ........................................................................................................ 249

License Taxes. Definition of "manufacturing" in Virginia Retail Sales and Use Tax Act is not controlling in interpreting exemption from local license taxes for manufacturers ........................................................................................................ 254, 257

License Taxes. Denial of business license limited to individual operating sole proprietorship who fails to establish evidence that delinquent taxes related to business of sole proprietorship have been paid ........................................................................................................ 253
License Taxes. Gross receipts are not subject to tax when taxpayer acts as agent or fiduciary in receiving or disbursing money for another person or entity. Company that serves as clients' agent in management of investments, for which it receives management fees or commissions, has gross receipts only on fees and commissions it receives. Assets managed and invested by company remain funds of clients and should not constitute gross receipts of taxpayer entity. Assets of mutual fund and real estate investment trust are not subject to gross receipts tax upon relocation of their management company. Such company may be subject to local gross receipts tax only on fees it receives for services rendered in managing assets of fund and trust ........................................ 250

License Taxes. If person's place of business is in town, authority of county in which town is located to assess license tax on person is limited ........................................ 249

License Taxes. Locality may deny business license to individual operating sole proprietorship who fails to establish evidence of payment of delinquent taxes related to sole proprietorship; may not deny license to proprietor delinquent in payment of personal property taxes for property not used in business ........................................ 253

License Taxes. Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth's attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress .................. 47

License Taxes. No specific procedures are mandated for assessing local license taxes ...... 47

License Taxes. Process of pasteurization of milk and production of buttermilk do not constitute manufacturing in context of local license tax ........................................ 257

License Taxes. Processes of electroplating and electropainting that do not involve transformation of raw material into product of substantially different character are not considered manufacturing for purposes of local license tax exemption. State agency has determined that process of electroplating is repair service ........................................ 254

License Taxes. Processes of pasteurization, homogenization, butterfat adjustment or vitamin fortification of, and addition of sugar and flavorings to, milk do not constitute manufacturing for purposes of local license tax exemption. Transformation of plain water into fruit-flavored liquid drink or sweetened tea through addition of flavored powders or powdered tea and sugar constitutes manufacturing for purposes of exemption from business license tax. Addition of water to orange juice concentrate is not manufacturing for purposes of assessing local business license taxes ........................................ 257
TAXATION (contd.)

License Taxes. Public service corporations that conduct several separate business activities, which are ancillary to providing applicable utility service, are assessed public utility rate of one-half of one percent of total corporate gross receipts, consistent with statutory definition of “gross receipts” ......................................................... 276

License Taxes. Purpose of specific statute establishing situs for business license tax purposes is to apportion gross receipts of contractor among localities in which he does business, with $25,000 threshold prompting apportionment; gross receipts of less than $25,000 are included in receipts reportable to locality of contractor’s place of business ........................................ 245

License Taxes. State classification of brokerage business is binding on city, which may not divide business activities and tax each part separately ........................................ 276

License Taxes. Three required elements necessary for determining business to be manufacturer, exempt from local license taxation ........................................ 254, 257

License Taxes. To be considered manufacturer, exempt from local license taxation, business must transform raw material into product of substantially different character, and not merely blend together various ingredients ........................................ 254, 257

License Taxes. To be considered manufacturer, exempt from local license taxation, business must transform raw material into product of substantially different character, and not merely blend together various ingredients ........................................ 254, 257

License Taxes. Town may impose business license tax on gross receipts of contractor who engages in business within town and has no place of business within Commonwealth . . . 245

License Taxes. Town may impose business license tax on contractor with principal place of business in another locality only when gross receipts from business done within town exceed $25,000 ........................................ 245

Local Officers - Commissioners of the Revenue. Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth’s attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress ......................................................... 47

Local Officers - Treasurers. Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth’s attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress ......................................................... 47
TAXATION (contd.)

Miscellaneous Taxes - Transient Occupancy Tax. Apartment building/complex is not considered facility that provides nightly accommodations for transients. City of Fall Church is not authorized to impose transient room rentals tax on apartment facilities. City may not enact tax by charter that is prohibited by laws of Commonwealth ........................................... 260

Miscellaneous Taxes - Transient Occupancy Tax. Requirements necessary for qualification as transient room rentals for purposes of imposing tax .................................................. 260

Real Property Tax - Reassessment/Assessment (Valuation) Procedure and Practice. At 1995 reassessment of real property, commissioner of revenue must assess manufactured homes installed on land at same time real estate is assessed, using fair market value method. After completion of reassessment, commissioner must assess any manufactured home not previously assessed in locality and add value to previously charged land value .......... 273

Retail Sales and Use Tax. Act's definition of "manufacturing" is not controlling in interpreting exemption from local license taxes for manufacturers ............................................. 254, 257

Retail Sales and Use Tax. Apartment building/complex is not considered facility that provides nightly accommodations for transients. City of Fall Church is not authorized to impose transient room rentals tax on apartment facilities. City may not enact tax by charter that is prohibited by laws of Commonwealth .................................................. 260

Review of Local Taxes - Collection by Distress, Suit, Lien, etc. Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth's attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress .................................................. 47

Review of Local Taxes - Correction of Assessments, Remedies and Refunds. Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth's attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress .................................................. 47

Secrecy of information (see supra General Provisions of Title 58.1 - In General (secrecy of information; penalties))
State Lottery Law. Law relates to licensing of agents and not to uses of land. Local governments are authorized to impose reasonable restrictions on sale of lottery tickets at specific sites to further legitimate land use goal. Ordinance prohibiting sale of lottery tickets on premises of retail store as condition for obtaining special use permit is neither in conflict with, nor preempted by, Law.

Statutes imposing taxes are strictly construed, with any reasonable doubt resolved against taxation.

Tangible Personal Property, etc. Amendment that does not expand permitted scope of cogeneration property tax exemption is not unconstitutional.

Tangible Personal Property, etc. Designating particular type of personal property as separate classification for tax purposes is not equivalent to exempting that type of property from taxation altogether.

Tangible Personal Property, etc. Exotic animals such as ostriches, giraffes, camels and monkeys do not fall within classification of "farm animals" exempt from taxation. Any doubt whether such animals fall within categories of exempt animals is to be resolved against allowing exemption. Determination is factual matter to be decided by local commissioner of revenue.

Tangible Personal Property, etc. General Assembly intended pawned items to be tangible personal property. Motor vehicle is personal property that may be pawned; certificate of title, which constitutes written proof of indebtedness and evidences ownership of vehicle, is intangible property with no intrinsic and marketable value, and is not proper subject of pawn.

Tangible Personal Property, etc. 1992 amendment expanding separate classification of certain equipment purchased by firms engaged in cogeneration of steam or electricity, which is taxed at rate that does not exceed locality’s tax rate applicable to machinery and tools, does not violate constitutional requirement for uniformity in property taxation, and is within General Assembly’s power to classify property for local taxation purposes.

Tangible Personal Property, etc. Particular type of property, once placed in separate statutory classification, may be taxed at different rate from other classes of personal property, without violating constitutional requirement for uniformity in property taxation.

Tangible Personal Property, etc. Property placed in same classification and assessed by same methodology does not violate constitutional uniformity requirement.

Tangible Personal Property, etc. - Situs for Taxation. Factors in determining domiciliary intent of college or university student for purposes of imposing motor vehicle license fees and personal property taxes.
TANGIBLE PERSONAL PROPERTY, etc. - Situs for Taxation. Local tax official determines domicile of student on case-by-case basis, considering all relevant facts. Student domiciled in Virginia but attending out-of-state institution remains subject to personal property tax on his vehicle in Virginia jurisdiction where he is domiciled. Situs for taxation of vehicle owned by student's parent is locality where vehicle is normally parked or garaged.

TANGIBLE PERSONAL PROPERTY, etc. - Situs for Taxation. Local tax official determines situs of motor vehicle for local license and personal property tax purposes, including domicile of owner of vehicle.

TANGIBLE PERSONAL PROPERTY, etc. - Situs for Taxation. Local tax official must consider and weigh all relevant facts in determining whether locality in which college or university student is registered to vote constitutes student's domicile for purposes of imposing motor vehicle license fees and personal property taxes. Person's domicile is matter of subjective intent known only to that person.

TANGIBLE PERSONAL PROPERTY, etc. - Situs for Taxation. Situs for taxation of movable personal property is domicile of owner.

TANGIBLE PERSONAL PROPERTY, etc. - Special Provisions for Mobile Homes. At 1995 reassessment of real property, commissioner of revenue must assess manufactured homes installed on land at same time real estate is assessed, using fair market value method. After completion of reassessment, commissioner must assess any manufactured home not previously assessed in locality and add value to previously charged land value.

Tax Exempt Property. Amendment that does not expand permitted scope of cogeneration property tax exemption is not unconstitutional.

Tax Exempt Property. Exemptions of property from taxation shall be strictly construed.

Tax Exempt Property. 1992 amendment expanding separate classification of certain equipment purchased by firms engaged in cogeneration of steam or electricity, which is taxed at rate that does not exceed locality's tax rate applicable to machinery and tools, does not violate constitutional requirement for uniformity in property taxation, and is within General Assembly's power to classify property for local taxation purposes.

Tax exemptions must be strictly construed; any doubt is to be resolved against allowing exemption.

Tax statutes are strictly construed, with any reasonable doubt resolved against taxation.

Tax statutes are to be construed against government and in favor of citizens when there is doubt as to their meaning or scope.

Tax statutes are to be narrowly construed.
<table>
<thead>
<tr>
<th>TAXATION (contd.)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxation of Public Service Corporations. Charter tour bus company holding certificate of public convenience and necessity for special or charter party carrier does not operate such carriers over regular routes, and is not &quot;certificated motor vehicle carrier&quot; exempt from personal property taxation. Charter party carrier is not public service corporation for purposes of local license tax exemption, and is not exempt from such tax</td>
<td>278</td>
</tr>
<tr>
<td>Taxation of Public Service Corporations. Charter tour bus company holding certificate of public convenience and necessity for special or charter party carrier does not operate such carriers over regular routes, and is not &quot;certificated motor vehicle carrier&quot; exempt from personal property taxation. Charter party carrier is not public service corporation for purposes of local license tax exemption, and is not exempt from such tax</td>
<td>278</td>
</tr>
<tr>
<td>Taxation of Public Service Corporations. Public service corporations that conduct several separate business activities, which are ancillary to providing applicable utility service, are assessed public utility rate of one-half of one percent of total corporate gross receipts, consistent with statutory definition of “gross receipts”</td>
<td>276</td>
</tr>
<tr>
<td>Taxation of Public Service Corporations. Taxing property classified as machinery and tools, which is encompassed within federal definition of “commercial and industrial property,” at rate of $20 per 100 of assessed value while taxing motor carrier tractors and trailers at rate of $4.25 per $100 of assessed value violates federal law. State tax rate on rolling stock of certificated motor vehicle carriers that does not exceed rate applied to “commercial and industrial property” does not violate federal law</td>
<td>274</td>
</tr>
<tr>
<td>Taxes may be levied, assessed and collected only in mode provided expressly by statute</td>
<td>253</td>
</tr>
<tr>
<td>Transient Occupancy Tax (see supra Miscellaneous Taxes - Transient Occupancy Tax)</td>
<td></td>
</tr>
</tbody>
</table>

**TREASURERS**

Commonwealth or locality that pays sheriff’s salary is exempt from paying sheriff’s fees for services rendered. Conclusion does not affect sheriff’s fees and mileage allowances clerk of circuit or general district court is required to collect in civil and criminal matters | 61 |

Constitutional offices in City of South Boston will cease to exist, and city’s incumbent constitutional officers will not continue to hold office, when city reverts to town status on July 1, 1995 | 46 |

Manassas Park city council may not, in its ordinance, specify duties inconsistent with duties of commissioner of revenue as prescribed by General Assembly, nor may it implement procedure for appealing tax assessments made by commissioner. Commissioner of revenue may refer businesses that refuse to obtain local business license to Commonwealth’s attorney for prosecution. Failure of business to obtain local business license is unlawful. Treasurers may use all statutory means available to enforce collection of delinquent local license taxes. No statutory authority for local tax official to close down business for nonpayment of local taxes, except possibly through distress | 47 |

**UNIFORM CRIMINAL EXTRADITION ACT**

(See CRIMINAL PROCEDURE: Extradition of Criminals - Uniform Criminal Extradition Act)

**VIRGINIA FREEDOM OF INFORMATION ACT**

(See ADMINISTRATION OF GOVERNMENT GENERALLY)
VIRGINIA PUBLIC PROCUREMENT ACT
(See CONTRACTS)

VIRGINIA RETAIL SALES AND USE TAX ACT
(See TAXATION: Retail Sales and Use Tax)

VIRGINIA STATE BAR
(See RULES OF SUPREME COURT OF VIRGINIA: Integration of the State Bar)

WELFARE (SOCIAL SERVICES)

Adoption. Attorney in Virginia may not place child for adoption without first obtaining license as child-placing agency ........................................... 279

Adoption. Attorney who represents birth mother is not prohibited from assisting her in locating prospective adoptive families. Attorney may not charge for such services; may only charge usual and customary fees for legal services relating to adoption proceedings . . . 279

Adoption. Individual, including attorney, who may not be authorized to place child for adoption may be involved in activities related to placement of child for adoption; remuneration restricted to usual and customary fees for legal services .................................. 279

Child Abuse and Neglect. Local department of social services may release personal information contained in CPS complaint and foster care records to data subject who has legitimate interest in such information or records, or to authorized agent of such person, upon presentation of proper identification. Requester, other than person who is data subject, must justify need for information, which must be directly connected to administration of public welfare program. Release of information is mandatory when personal information concerning data subject is contained in agency records. Department exercises discretion in deciding appropriateness of releasing child abuse and neglect information that does not pertain to requester. Department may refuse access to records by data subject against whom are pending criminal charges arising out of events that gave rise to CPS investigation involving same child ................................................. 281

Child Welfare, Homes, Agencies, etc. Local department of social services may release personal information contained in CPS complaint and foster care records to data subject who has legitimate interest in such information or records, or to authorized agent of such person, upon presentation of proper identification. Requester, other than person who is data subject, must justify need for information, which must be directly connected to administration of public welfare program. Release of information is mandatory when personal information concerning data subject is contained in agency records. Department exercises discretion in deciding appropriateness of releasing child abuse and neglect information that does not pertain to requester. Department may refuse access to records by data subject against whom are pending criminal charges arising out of events that gave rise to CPS investigation involving same child ................................................. 281

Homes for Aged, Infirm, Disabled, etc. Richmond is not required, but may adopt zoning ordinance, to provide single-family zoning treatment to adult group homes for 8 or fewer unrelated, aged, infirm or disabled persons same as is provided in homes in county operat-
WELFARE (SOCIAL SERVICES) (contd.)

ing under county manager plan that house mentally ill, mentally retarded, or developmentally disabled persons. Richmond Aids Ministry may not operate unlicensed adult care residence for 8 unrelated adults. Ministry must satisfy all statutory and regulatory requirements to obtain licensure as ACR; may receive such license without obtaining hospice license if it does not provide intravenous therapy to its residents, but must obtain hospice licensure prior to ACR licensure if it intends to care for residents requiring intravenous drug therapy .......................................................... 286

Local Boards of Public Welfare. Local department of social services may release personal information contained in CPS complaint and foster care records to data subject who has legitimate interest in such information or records, or to authorized agent of such person, upon presentation of proper identification. Requester, other than person who is data subject, must justify need for information, which must be directly connected to administration of public welfare program. Release of information is mandatory when personal information concerning data subject is contained in agency records. Department exercises discretion in deciding appropriateness of releasing child abuse and neglect information that does not pertain to requester. Department may refuse access to records by data subject against whom are pending criminal charges arising out of events that gave rise to CPS investigation involving same child .......................................................... 281

Local Boards of Public Welfare. Person who has “legitimate interest” has no right to access records that do not relate directly to administration of public welfare program ........ 281

Support of Dependent Children. Upon request from Department of Social Services, commissioners of revenue must provide Department with names, social security account numbers, addresses and types of licenses of individuals who have business licenses on file in their offices. Commissioners are required to provide Department with information pertaining to holders of professional licenses identified by Department as noncustodial parents who are failing to support their children .................................................. 289

WILLS AND DECEDENTS' ESTATES

Administration of Estates. Heirs at law include grand or great nieces and nephews who must be provided written notice of qualification or probate by personal representative of decedent’s estate or proponent of decedent’s will ......................... 291

Descent and Distribution. Heirs at law include grand or great nieces and nephews who must be provided written notice of qualification or probate by personal representative of decedent’s estate or proponent of decedent’s will ......................... 291
### STATUTES, CONSTITUTIONAL PROVISIONS AND RULES OF COURT
- REFERENCED IN OPINIONS -

<table>
<thead>
<tr>
<th>ACTS OF ASSEMBLY</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acts of 1932</td>
<td></td>
</tr>
<tr>
<td>Ch. 416</td>
<td>158-160</td>
</tr>
<tr>
<td>Acts of 1940</td>
<td></td>
</tr>
<tr>
<td>Ch. 389</td>
<td>160</td>
</tr>
<tr>
<td>Acts of 1942</td>
<td></td>
</tr>
<tr>
<td>Ch. 386</td>
<td>62, 63</td>
</tr>
<tr>
<td>Acts of 1950</td>
<td></td>
</tr>
<tr>
<td>Ch. 323</td>
<td>263</td>
</tr>
<tr>
<td>Acts of 1954</td>
<td></td>
</tr>
<tr>
<td>Ch. 708</td>
<td>152</td>
</tr>
<tr>
<td>Acts of 1956</td>
<td></td>
</tr>
<tr>
<td>Ch. 1</td>
<td>152</td>
</tr>
<tr>
<td>Acts of 1958</td>
<td></td>
</tr>
<tr>
<td>Ch. 512</td>
<td>157</td>
</tr>
<tr>
<td>Acts of 1959</td>
<td></td>
</tr>
<tr>
<td>Ch. 49</td>
<td>155</td>
</tr>
<tr>
<td>Acts of 1964</td>
<td></td>
</tr>
<tr>
<td>Ch. 11</td>
<td>155</td>
</tr>
<tr>
<td>Acts of 1966</td>
<td></td>
</tr>
<tr>
<td>Ch. 671</td>
<td>57</td>
</tr>
<tr>
<td>Acts of 1972</td>
<td></td>
</tr>
<tr>
<td>Ch. 485</td>
<td>38</td>
</tr>
<tr>
<td>Ch. 719</td>
<td>25</td>
</tr>
<tr>
<td>Acts of 1975</td>
<td></td>
</tr>
<tr>
<td>Ch. 495</td>
<td>25</td>
</tr>
<tr>
<td>Acts of 1976</td>
<td></td>
</tr>
<tr>
<td>Ch. 721</td>
<td>4</td>
</tr>
<tr>
<td>Acts of 1977</td>
<td></td>
</tr>
<tr>
<td>Ch. 554</td>
<td>71</td>
</tr>
<tr>
<td>Acts of 1980</td>
<td></td>
</tr>
<tr>
<td>Ch. 488</td>
<td>71</td>
</tr>
<tr>
<td>Acts of 1982</td>
<td></td>
</tr>
<tr>
<td>Ch. 318</td>
<td>71</td>
</tr>
<tr>
<td>Acts of 1984</td>
<td></td>
</tr>
<tr>
<td>Ch. 647</td>
<td>38</td>
</tr>
<tr>
<td>Acts of 1985</td>
<td></td>
</tr>
<tr>
<td>Ch. 700</td>
<td>82</td>
</tr>
<tr>
<td>Acts of 1986</td>
<td></td>
</tr>
<tr>
<td>Ch. 82</td>
<td>71</td>
</tr>
<tr>
<td>Ch. 87</td>
<td>238</td>
</tr>
<tr>
<td>Ch. 625</td>
<td>123</td>
</tr>
<tr>
<td>Acts of 1988</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Ch. 433</td>
<td>20</td>
</tr>
<tr>
<td>Ch. 539</td>
<td>27</td>
</tr>
<tr>
<td>Ch. 841</td>
<td>71</td>
</tr>
<tr>
<td>Ch. 848</td>
<td>71</td>
</tr>
<tr>
<td>Ch. 906</td>
<td>291</td>
</tr>
<tr>
<td>Acts of 1989</td>
<td></td>
</tr>
<tr>
<td>Ch. 647</td>
<td>280</td>
</tr>
<tr>
<td>Ch. 727</td>
<td>204</td>
</tr>
<tr>
<td>Acts of 1990</td>
<td></td>
</tr>
<tr>
<td>Ch. 868</td>
<td>85</td>
</tr>
<tr>
<td>S. Doc. 15</td>
<td>189</td>
</tr>
<tr>
<td>Acts of 1991</td>
<td></td>
</tr>
<tr>
<td>Ch. 6</td>
<td>81, 82</td>
</tr>
<tr>
<td>Ch. 28</td>
<td>73</td>
</tr>
<tr>
<td>Acts of 1992</td>
<td></td>
</tr>
<tr>
<td>Ch. 253</td>
<td>123</td>
</tr>
<tr>
<td>Ch. 680</td>
<td>267, 268</td>
</tr>
<tr>
<td>Ch. 780</td>
<td>228</td>
</tr>
<tr>
<td>Acts of 1993</td>
<td></td>
</tr>
<tr>
<td>Ch. 265</td>
<td>242</td>
</tr>
<tr>
<td>Ch. 912</td>
<td>50</td>
</tr>
<tr>
<td>Ch. 934</td>
<td>254</td>
</tr>
<tr>
<td>H. Doc. 9</td>
<td>189</td>
</tr>
<tr>
<td>Acts of 1994</td>
<td></td>
</tr>
<tr>
<td>Ch. 4</td>
<td>218</td>
</tr>
<tr>
<td>Ch. 85</td>
<td>218</td>
</tr>
<tr>
<td>Ch. 859</td>
<td>110</td>
</tr>
<tr>
<td>Ch. 938</td>
<td>33</td>
</tr>
<tr>
<td>Ch. 943</td>
<td>287, 288</td>
</tr>
<tr>
<td>Ch. 949</td>
<td>110</td>
</tr>
<tr>
<td>Ch. 966</td>
<td>218</td>
</tr>
<tr>
<td>H.B. 1272</td>
<td>31-33</td>
</tr>
<tr>
<td>H. Doc. 6</td>
<td>189</td>
</tr>
<tr>
<td>S. Doc. 26</td>
<td>189</td>
</tr>
<tr>
<td>Acts of 1995</td>
<td></td>
</tr>
<tr>
<td>Ch. 7</td>
<td>285</td>
</tr>
<tr>
<td>Ch. 30</td>
<td>71</td>
</tr>
<tr>
<td>Ch. 51</td>
<td>56, 62, 63, 65</td>
</tr>
<tr>
<td>Ch. 492</td>
<td>211</td>
</tr>
<tr>
<td>Ch. 608</td>
<td>231</td>
</tr>
<tr>
<td>Ch. 627</td>
<td>231</td>
</tr>
<tr>
<td>Ch. 744</td>
<td>202</td>
</tr>
<tr>
<td>Ch. 754</td>
<td>24</td>
</tr>
<tr>
<td>Ch. 803</td>
<td>202</td>
</tr>
<tr>
<td>Ch. 829</td>
<td>118, 120, 127, 128, 132</td>
</tr>
<tr>
<td>Ch. 839</td>
<td>138</td>
</tr>
<tr>
<td>Ch. 853</td>
<td>25</td>
</tr>
</tbody>
</table>
1995 REPORT OF THE ATTORNEY GENERAL

ACTS OF 1995 (contd.)

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 966</td>
<td>63</td>
</tr>
<tr>
<td>H.B. 1868</td>
<td>256, 259</td>
</tr>
<tr>
<td>H. Doc. 3</td>
<td>188, 189</td>
</tr>
<tr>
<td>S.B. 753</td>
<td>160, 162</td>
</tr>
<tr>
<td>S.B. 1067</td>
<td>136-138</td>
</tr>
</tbody>
</table>

CODE OF VIRGINIA

CODE OF 1942

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 3487(1)(b)</td>
<td>63</td>
</tr>
<tr>
<td>§ 4987f7</td>
<td>106</td>
</tr>
<tr>
<td>§ 6036</td>
<td>106</td>
</tr>
</tbody>
</table>

CODE OF 1949

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 14-82</td>
<td>63</td>
</tr>
</tbody>
</table>

CODE OF 1950

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 1-12(A)</td>
<td>231</td>
</tr>
<tr>
<td>§ 1-12(D)</td>
<td>231</td>
</tr>
<tr>
<td>§ 1-13.17</td>
<td>68, 87</td>
</tr>
<tr>
<td>§ 1-16</td>
<td>229, 231</td>
</tr>
<tr>
<td>§ 1-17.1</td>
<td>179</td>
</tr>
<tr>
<td>Tit. 2.1, Ch. 21</td>
<td>291</td>
</tr>
<tr>
<td>Tit. 2.1, Ch. 32, Art. 5.1</td>
<td>70, 71</td>
</tr>
<tr>
<td>§ 2.1-21</td>
<td>2</td>
</tr>
<tr>
<td>§ 2.1-114.2(B)</td>
<td>216</td>
</tr>
<tr>
<td>§ 2.1-118</td>
<td>17, 288</td>
</tr>
<tr>
<td>§ 2.1-121</td>
<td>218</td>
</tr>
<tr>
<td>§ 2.1-122</td>
<td>218</td>
</tr>
<tr>
<td>§ 2.1-124</td>
<td>138</td>
</tr>
<tr>
<td>§ 2.1-195</td>
<td>216</td>
</tr>
<tr>
<td>§ 2.1-224</td>
<td>216</td>
</tr>
<tr>
<td>§§ 2.1-340 to -346.1</td>
<td>4, 291</td>
</tr>
<tr>
<td>§ 2.1-340.1</td>
<td>6</td>
</tr>
<tr>
<td>§ 2.1-342(A)</td>
<td>291</td>
</tr>
<tr>
<td>§ 2.1-379(3)</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.1-382(A)(3)</td>
<td>282, 285</td>
</tr>
<tr>
<td>§ 2.1-382(A)(4)(b)(ii)</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.1-382(A)(4)(c)</td>
<td>285</td>
</tr>
<tr>
<td>§ 2.1-442</td>
<td>216</td>
</tr>
<tr>
<td>§§ 2.1-526.1 to -526.8</td>
<td>70</td>
</tr>
<tr>
<td>§ 2.1-526.1</td>
<td>71</td>
</tr>
<tr>
<td>§§ 2.1-526.8:1 to -526.11:1</td>
<td>71</td>
</tr>
<tr>
<td>§ 2.1-526.8:1</td>
<td>70, 71</td>
</tr>
<tr>
<td>§ 2.1-526.8:1(A)</td>
<td>70</td>
</tr>
<tr>
<td>§ 2.1-526.8:1(B)</td>
<td>71</td>
</tr>
<tr>
<td>§ 2.1-526.9</td>
<td>71</td>
</tr>
<tr>
<td>§ 2.1-526.9:1</td>
<td>71</td>
</tr>
<tr>
<td>§ 2.1-526.10</td>
<td>71</td>
</tr>
<tr>
<td>§ 2.1-526.11</td>
<td>71</td>
</tr>
<tr>
<td>Code</td>
<td>Page</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>§ 2.1-526.11:1</td>
<td>71</td>
</tr>
<tr>
<td>§§ 2.1-639.1 to -639.24</td>
<td>2</td>
</tr>
<tr>
<td>§ 2.1-639.2</td>
<td>3, 4</td>
</tr>
<tr>
<td>§ 2.1-639.7</td>
<td>3</td>
</tr>
<tr>
<td>§ 2.1-639.7(A)</td>
<td>3</td>
</tr>
<tr>
<td>§ 2.1-639.9</td>
<td>44</td>
</tr>
<tr>
<td>§ 2.1-639.18(B)</td>
<td>3, 4</td>
</tr>
<tr>
<td>§§ 3.1-884.17 to -884.36</td>
<td>7</td>
</tr>
<tr>
<td>§ 3.1-884.19</td>
<td>10</td>
</tr>
<tr>
<td>Tit. 4.1</td>
<td>119</td>
</tr>
<tr>
<td>§ 4.1-206(3)</td>
<td>120</td>
</tr>
<tr>
<td>§ 4.1-207(4)</td>
<td>120</td>
</tr>
<tr>
<td>§ 4.1-208(5)</td>
<td>120</td>
</tr>
<tr>
<td>§ 4.1-208(6)</td>
<td>121</td>
</tr>
<tr>
<td>§ 4.1-208(7)</td>
<td>120</td>
</tr>
<tr>
<td>§ 4.1-209(1)</td>
<td>120</td>
</tr>
<tr>
<td>§ 4.1-209(2)-(5)</td>
<td>120</td>
</tr>
<tr>
<td>§ 4.1-209(5)</td>
<td>121</td>
</tr>
<tr>
<td>§ 4.1-209(6)</td>
<td>120</td>
</tr>
<tr>
<td>§ 4.1-209(7)</td>
<td>120</td>
</tr>
<tr>
<td>Tit. 5.1, Ch. 3, Art. 1</td>
<td>12</td>
</tr>
<tr>
<td>§ 5.1-31</td>
<td>13, 16</td>
</tr>
<tr>
<td>§ 5.1-32</td>
<td>16, 17</td>
</tr>
<tr>
<td>§ 5.1-34</td>
<td>16</td>
</tr>
<tr>
<td>§ 5.1-35</td>
<td>12-14, 16, 17</td>
</tr>
<tr>
<td>§ 5.1-36</td>
<td>12-14, 16, 17</td>
</tr>
<tr>
<td>§ 8.01-4</td>
<td>132</td>
</tr>
<tr>
<td>§ 8.01-27.1(A)</td>
<td>21, 22</td>
</tr>
<tr>
<td>§ 8.01-27.1(B)</td>
<td>21, 22</td>
</tr>
<tr>
<td>§ 8.01-27.2</td>
<td>18-20, 22</td>
</tr>
<tr>
<td>§ 8.01-262</td>
<td>31</td>
</tr>
<tr>
<td>§ 8.01-262(10)</td>
<td>30</td>
</tr>
<tr>
<td>§ 8.01-265</td>
<td>59-61</td>
</tr>
<tr>
<td>§ 8.01-266</td>
<td>60</td>
</tr>
<tr>
<td>§ 8.01-328.1</td>
<td>28, 29</td>
</tr>
<tr>
<td>§ 8.01-328.1(A)</td>
<td>30</td>
</tr>
<tr>
<td>§ 8.01-413</td>
<td>23, 26</td>
</tr>
<tr>
<td>§ 8.01-413(A)</td>
<td>24</td>
</tr>
<tr>
<td>§ 8.01-413(A)-(B)</td>
<td>25</td>
</tr>
<tr>
<td>§ 8.01-413(A)-(C)</td>
<td>24</td>
</tr>
<tr>
<td>§ 8.01-413(B)</td>
<td>24</td>
</tr>
<tr>
<td>§ 8.01-413(C)</td>
<td>24</td>
</tr>
<tr>
<td>§ 8.01-413(D)</td>
<td>24</td>
</tr>
<tr>
<td>§§ 8.01-465.1 to -465.5</td>
<td>26</td>
</tr>
<tr>
<td>§ 8.01-465.1</td>
<td>26, 27</td>
</tr>
<tr>
<td>§ 8.01-465.2</td>
<td>28</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>-----------------------</td>
<td>------</td>
</tr>
<tr>
<td>§§ 8.01-465.3 to -465.5</td>
<td>27</td>
</tr>
<tr>
<td>§ 8.01-626</td>
<td>121, 122</td>
</tr>
<tr>
<td>§ 9-6.14:4(A)</td>
<td>39</td>
</tr>
<tr>
<td>§ 9-6.14:7.1</td>
<td>32, 33</td>
</tr>
<tr>
<td>§ 9-6.14:7.1(G)</td>
<td>32, 33</td>
</tr>
<tr>
<td>§ 9-6.14:7.1(H)</td>
<td>33</td>
</tr>
<tr>
<td>§ 9-180</td>
<td>90</td>
</tr>
<tr>
<td>Tit. 10.1, Ch. 5, Art. 3</td>
<td>38</td>
</tr>
<tr>
<td>Tit. 10.1, Ch. 6, Art. 1.1</td>
<td>92</td>
</tr>
<tr>
<td>Tit. 10.1, Ch. 6, Art. 3</td>
<td>34, 37</td>
</tr>
<tr>
<td>Tit. 10.1, Ch. 17</td>
<td>39</td>
</tr>
<tr>
<td>Tit. 10.1, Ch. 18</td>
<td>39</td>
</tr>
<tr>
<td>§ 10.1-523</td>
<td>35</td>
</tr>
<tr>
<td>§§ 10.1-603.1 to -603.15</td>
<td>92</td>
</tr>
<tr>
<td>§ 10.1-603.2</td>
<td>92</td>
</tr>
<tr>
<td>§§ 10.1-614 to -635</td>
<td>34, 37</td>
</tr>
<tr>
<td>§ 10.1-614</td>
<td>37, 38</td>
</tr>
<tr>
<td>§ 10.1-615(A)</td>
<td>34</td>
</tr>
<tr>
<td>§ 10.1-616</td>
<td>36</td>
</tr>
<tr>
<td>§ 10.1-617</td>
<td>34-36</td>
</tr>
<tr>
<td>§ 10.1-618</td>
<td>34</td>
</tr>
<tr>
<td>§ 10.1-619</td>
<td>35, 36</td>
</tr>
<tr>
<td>§ 10.1-625</td>
<td>36</td>
</tr>
<tr>
<td>§§ 10.1-1182 to -1187</td>
<td>68</td>
</tr>
<tr>
<td>§ 10.1-1316(B)</td>
<td>103</td>
</tr>
<tr>
<td>§§ 10.1-1700 to -1705</td>
<td>39</td>
</tr>
<tr>
<td>§ 10.1-1700</td>
<td>40</td>
</tr>
<tr>
<td>§ 10.1-1702(A)(1)</td>
<td>40</td>
</tr>
<tr>
<td>§ 10.1-1705</td>
<td>40</td>
</tr>
<tr>
<td>§§ 10.1-1800 to -1804</td>
<td>39</td>
</tr>
<tr>
<td>§ 10.1-1800</td>
<td>40</td>
</tr>
<tr>
<td>§ 10.1-1801</td>
<td>40</td>
</tr>
<tr>
<td>§ 10.1-1801(1)</td>
<td>40</td>
</tr>
<tr>
<td>§ 10.1-1801(3)</td>
<td>39</td>
</tr>
<tr>
<td>§ 10.1-1801(5)</td>
<td>40</td>
</tr>
<tr>
<td>§ 10.1-1802</td>
<td>40</td>
</tr>
<tr>
<td>§ 10.1-1803</td>
<td>40</td>
</tr>
<tr>
<td>Tit. 11, Ch. 7</td>
<td>52</td>
</tr>
<tr>
<td>§ 11-17</td>
<td>38</td>
</tr>
<tr>
<td>§§ 11-35 to -80</td>
<td>37, 52, 213</td>
</tr>
<tr>
<td>§ 11-35(B)</td>
<td>37</td>
</tr>
<tr>
<td>§ 11-35(H)</td>
<td>216</td>
</tr>
<tr>
<td>§ 11-37</td>
<td>38, 54</td>
</tr>
<tr>
<td>§ 11-41</td>
<td>54</td>
</tr>
<tr>
<td>§ 11-41.2:1</td>
<td>51, 52</td>
</tr>
<tr>
<td>§ 11-41.2:1(v)</td>
<td>52</td>
</tr>
<tr>
<td>§ 11-41(A)</td>
<td>37, 54</td>
</tr>
</tbody>
</table>
## Code of 1950 (contd.)

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 11-41(C)(1)</td>
<td>54</td>
</tr>
<tr>
<td>§ 11-41(D)</td>
<td>37, 38</td>
</tr>
<tr>
<td>§ 11-42(A)</td>
<td>54</td>
</tr>
<tr>
<td>§ 11-45</td>
<td>54</td>
</tr>
<tr>
<td>§ 11-45(B)(i)</td>
<td>218</td>
</tr>
<tr>
<td>§ 11-45(G)</td>
<td>52-54</td>
</tr>
<tr>
<td>§ 11-52</td>
<td>53, 54</td>
</tr>
<tr>
<td>§ 11-52(C)</td>
<td>53, 54</td>
</tr>
<tr>
<td>§ 11-70(C)</td>
<td>38, 39</td>
</tr>
<tr>
<td>Tit. 12.1</td>
<td>218</td>
</tr>
<tr>
<td>§ 12.1-6</td>
<td>218</td>
</tr>
<tr>
<td>§ 12.1-15.1</td>
<td>218</td>
</tr>
<tr>
<td>§ 13.1-501(A)</td>
<td>240</td>
</tr>
<tr>
<td>§ 13.1-620(F)</td>
<td>242, 278</td>
</tr>
<tr>
<td>§ 13.1-620(G)</td>
<td>242</td>
</tr>
<tr>
<td>§ 14-116</td>
<td>57</td>
</tr>
<tr>
<td>§ 14-175</td>
<td>57</td>
</tr>
<tr>
<td>Tit. 14.1</td>
<td>24</td>
</tr>
<tr>
<td>§ 14.1-2</td>
<td>217</td>
</tr>
<tr>
<td>§ 14.1-5</td>
<td>217</td>
</tr>
<tr>
<td>§ 14.1-10</td>
<td>217</td>
</tr>
<tr>
<td>§ 14.1-46.01-1(4)</td>
<td>164</td>
</tr>
<tr>
<td>§ 14.1-47.2</td>
<td>164</td>
</tr>
<tr>
<td>§ 14.1-53</td>
<td>25</td>
</tr>
<tr>
<td>§ 14.1-64</td>
<td>71</td>
</tr>
<tr>
<td>§ 14.1-65</td>
<td>24</td>
</tr>
<tr>
<td>§ 14.1-66</td>
<td>25</td>
</tr>
<tr>
<td>§ 14.1-69</td>
<td>55, 56, 61-65</td>
</tr>
<tr>
<td>§ 14.1-105</td>
<td>55-57, 61-65</td>
</tr>
<tr>
<td>§ 14.1-105.1</td>
<td>43, 44</td>
</tr>
<tr>
<td>§ 14.1-112(17)</td>
<td>59, 60</td>
</tr>
<tr>
<td>§ 14.1-112(33)</td>
<td>59, 60</td>
</tr>
<tr>
<td>§ 14.1-120.1</td>
<td>122, 123</td>
</tr>
<tr>
<td>§ 14.1-120.1(1)-(5)</td>
<td>122</td>
</tr>
<tr>
<td>§ 14.1-120.1(6)</td>
<td>122</td>
</tr>
<tr>
<td>§ 14.1-125.1</td>
<td>59, 60</td>
</tr>
<tr>
<td>§ 14.1-125.1(1)(i)</td>
<td>60</td>
</tr>
<tr>
<td>§ 14.1-133.2</td>
<td>57-61</td>
</tr>
<tr>
<td>§ 14.1-178</td>
<td>55-57</td>
</tr>
<tr>
<td>§ 14.1-184</td>
<td>25</td>
</tr>
<tr>
<td>§ 14.1-190</td>
<td>57</td>
</tr>
<tr>
<td>§ 14.1-195.1</td>
<td>145</td>
</tr>
<tr>
<td>§ 14.1-195.2(A)</td>
<td>146</td>
</tr>
<tr>
<td>§ 14.1-198</td>
<td>55</td>
</tr>
<tr>
<td>Tit. 15.1</td>
<td>48, 226</td>
</tr>
<tr>
<td>Tit. 15.1, Ch. 11</td>
<td>68</td>
</tr>
<tr>
<td>Tit. 15.1, Ch. 33</td>
<td>78</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td></td>
</tr>
<tr>
<td>-------------------</td>
<td>--</td>
</tr>
<tr>
<td>Tit. 15.1, Ch. 40</td>
<td>98, 99</td>
</tr>
<tr>
<td>§ 15.1-8.1(B)</td>
<td>140, 144</td>
</tr>
<tr>
<td>§ 15.1-11.5:3</td>
<td>96, 97</td>
</tr>
<tr>
<td>§ 15.1-21</td>
<td>72, 73</td>
</tr>
<tr>
<td>§ 15.1-21(A)</td>
<td>72</td>
</tr>
<tr>
<td>§ 15.1-21(B)</td>
<td>72, 73</td>
</tr>
<tr>
<td>§ 15.1-21(c)(2)</td>
<td>72, 73</td>
</tr>
<tr>
<td>§ 15.1-21(d)</td>
<td>72, 73</td>
</tr>
<tr>
<td>§ 15.1-21(D)(1)</td>
<td>72</td>
</tr>
<tr>
<td>§ 15.1-23.1</td>
<td>93, 94</td>
</tr>
<tr>
<td>§ 15.1-23.1(A)</td>
<td>94</td>
</tr>
<tr>
<td>§ 15.1-23.1(B)</td>
<td>94</td>
</tr>
<tr>
<td>§ 15.1-28.6</td>
<td>74-77</td>
</tr>
<tr>
<td>§ 15.1-28.6(1)</td>
<td>77</td>
</tr>
<tr>
<td>§ 15.1-28.6(2)</td>
<td>77</td>
</tr>
<tr>
<td>§ 15.1-28.6(3)</td>
<td>77</td>
</tr>
<tr>
<td>§ 15.1-28.6(5)</td>
<td>76</td>
</tr>
<tr>
<td>§ 15.1-50.4</td>
<td>43, 44</td>
</tr>
<tr>
<td>§ 15.1-50.4(A)</td>
<td>42</td>
</tr>
<tr>
<td>§ 15.1-66.4</td>
<td>69-71</td>
</tr>
<tr>
<td>§ 15.1-83.1(A)</td>
<td>44</td>
</tr>
<tr>
<td>§ 15.1-159.2</td>
<td>88, 89</td>
</tr>
<tr>
<td>§ 15.1-159.2(A)</td>
<td>88-90</td>
</tr>
<tr>
<td>§ 15.1-159.2(B)</td>
<td>89, 90</td>
</tr>
<tr>
<td>§ 15.1-159.5</td>
<td>89</td>
</tr>
<tr>
<td>§ 15.1-159.5(A)</td>
<td>89, 90</td>
</tr>
<tr>
<td>§ 15.1-159.5(B)</td>
<td>90</td>
</tr>
<tr>
<td>§ 15.1-163(A)</td>
<td>50</td>
</tr>
<tr>
<td>§ 15.1-167</td>
<td>50</td>
</tr>
<tr>
<td>§ 15.1-227.39(B)</td>
<td>45</td>
</tr>
<tr>
<td>§ 15.1-292</td>
<td>93, 95</td>
</tr>
<tr>
<td>§ 15.1-292(A)</td>
<td>93, 94, 241</td>
</tr>
<tr>
<td>§ 15.1-292.2</td>
<td>101, 241, 242</td>
</tr>
<tr>
<td>§ 15.1-292.4</td>
<td>91</td>
</tr>
<tr>
<td>§ 15.1-292.4(B)</td>
<td>91, 92</td>
</tr>
<tr>
<td>§ 15.1-307</td>
<td>95</td>
</tr>
<tr>
<td>§ 15.1-362.1</td>
<td>97</td>
</tr>
<tr>
<td>§ 15.1-362.1(A)</td>
<td>96, 97</td>
</tr>
<tr>
<td>§ 15.1-476</td>
<td>226, 227</td>
</tr>
<tr>
<td>§ 15.1-486</td>
<td>68, 86</td>
</tr>
<tr>
<td>§ 15.1-486.3</td>
<td>286, 287</td>
</tr>
<tr>
<td>§ 15.1-486.3(A)</td>
<td>287</td>
</tr>
<tr>
<td>§ 15.1-486.3(B)</td>
<td>287</td>
</tr>
<tr>
<td>§ 15.1-489</td>
<td>87</td>
</tr>
<tr>
<td>§ 15.1-490</td>
<td>87</td>
</tr>
<tr>
<td>§ 15.1-491</td>
<td>85</td>
</tr>
<tr>
<td>§ 15.1-491(a)</td>
<td>84</td>
</tr>
</tbody>
</table>
# 1995 REPORT OF THE ATTORNEY GENERAL

## CODE OF 1950 (contd.)

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 15.1-491(a2)</td>
<td>85</td>
</tr>
<tr>
<td>§ 15.1-491(c)</td>
<td>86</td>
</tr>
<tr>
<td>§§ 15.1-491.1 to -491.6</td>
<td>83</td>
</tr>
<tr>
<td>§ 15.1-491.2</td>
<td>85</td>
</tr>
<tr>
<td>§ 15.1-491.2(A)</td>
<td>83</td>
</tr>
<tr>
<td>§ 15.1-491.2(B)</td>
<td>83-85</td>
</tr>
<tr>
<td>§ 15.1-491.2(C)</td>
<td>85</td>
</tr>
<tr>
<td>§ 15.1-491.2:1(C)</td>
<td>85</td>
</tr>
<tr>
<td>§ 15.1-505</td>
<td>77, 102</td>
</tr>
<tr>
<td>§ 15.1-510</td>
<td>66, 67, 101, 102</td>
</tr>
<tr>
<td>§ 15.1-526.4</td>
<td>209</td>
</tr>
<tr>
<td>§ 15.1-706(d)</td>
<td>50</td>
</tr>
<tr>
<td>§ 15.1-821</td>
<td>140</td>
</tr>
<tr>
<td>§ 15.1-841</td>
<td>262, 263</td>
</tr>
<tr>
<td>§ 15.1-848</td>
<td>209</td>
</tr>
<tr>
<td>§§ 15.1-1239 to -1270</td>
<td>101</td>
</tr>
<tr>
<td>§ 15.1-1241(A)</td>
<td>101</td>
</tr>
<tr>
<td>§ 15.1-1250(b)</td>
<td>101</td>
</tr>
<tr>
<td>§ 15.1-1250(f)</td>
<td>101</td>
</tr>
<tr>
<td>§ 15.1-1268</td>
<td>101</td>
</tr>
<tr>
<td>§§ 15.1-1373 to -1392</td>
<td>78</td>
</tr>
<tr>
<td>§ 15.1-1374</td>
<td>79, 80, 82</td>
</tr>
<tr>
<td>§ 15.1-1374(a)</td>
<td>46</td>
</tr>
<tr>
<td>§ 15.1-1374(d)</td>
<td>45, 80, 82</td>
</tr>
<tr>
<td>§ 15.1-1374(d)(iv)</td>
<td>79, 82</td>
</tr>
<tr>
<td>§ 15.1-1374(d)(viii)</td>
<td>79, 80, 82</td>
</tr>
<tr>
<td>§ 15.1-1374(d)(ix)</td>
<td>46</td>
</tr>
<tr>
<td>§ 15.1-1375</td>
<td>78-82</td>
</tr>
<tr>
<td>§ 15.1-1379</td>
<td>45</td>
</tr>
<tr>
<td>§ 15.1-1379(A)</td>
<td>78</td>
</tr>
<tr>
<td>§ 15.1-1380</td>
<td>45</td>
</tr>
<tr>
<td>§§ 15.1-1400 to -1452</td>
<td>98</td>
</tr>
<tr>
<td>§ 15.1-1404(b)(5)</td>
<td>100</td>
</tr>
<tr>
<td>§ 15.1-1405(a1)</td>
<td>100</td>
</tr>
<tr>
<td>§§ 15.1-1635 to -1650</td>
<td>98</td>
</tr>
<tr>
<td>§ 15.1-1637</td>
<td>99, 100</td>
</tr>
<tr>
<td>§ 15.1-1638</td>
<td>99, 100</td>
</tr>
<tr>
<td>§ 15.1-1644</td>
<td>100</td>
</tr>
<tr>
<td>§ 15.1-1645</td>
<td>99</td>
</tr>
<tr>
<td>§ 15.1-1646</td>
<td>99, 100</td>
</tr>
<tr>
<td>§ 15.1-1648</td>
<td>99</td>
</tr>
<tr>
<td>Tit. 16.1, Ch. 11, Art. 7</td>
<td>110</td>
</tr>
<tr>
<td>Tit. 16.1, Ch. 11, Art. 13</td>
<td>113</td>
</tr>
<tr>
<td>§ 16.1-69.51</td>
<td>105</td>
</tr>
<tr>
<td>§ 16.1-106</td>
<td>104-106</td>
</tr>
<tr>
<td>§ 16.1-107</td>
<td>104-106</td>
</tr>
<tr>
<td>Code provision</td>
<td>Page(s)</td>
</tr>
<tr>
<td>----------------</td>
<td>---------</td>
</tr>
<tr>
<td>§ 16.1-112</td>
<td>104-106</td>
</tr>
<tr>
<td>§ 16.1-132</td>
<td>107, 108</td>
</tr>
<tr>
<td>§ 16.1-135</td>
<td>107, 108</td>
</tr>
<tr>
<td>§ 16.1-136</td>
<td>107</td>
</tr>
<tr>
<td>§ 16.1-228</td>
<td>113</td>
</tr>
<tr>
<td>§ 16.1-241</td>
<td>113</td>
</tr>
<tr>
<td>§ 16.1-248.1</td>
<td>112</td>
</tr>
<tr>
<td>§ 16.1-249</td>
<td>112</td>
</tr>
<tr>
<td>§ 16.1-249(E)</td>
<td>109</td>
</tr>
<tr>
<td>§ 16.1-249(E)(i)</td>
<td>110</td>
</tr>
<tr>
<td>§§ 16.1-269.1 to -269.6</td>
<td>109</td>
</tr>
<tr>
<td>§ 16.1-269.1(A)(2)</td>
<td>111</td>
</tr>
<tr>
<td>§ 16.1-269.6</td>
<td>110</td>
</tr>
<tr>
<td>§ 16.1-269.6(B)</td>
<td>109</td>
</tr>
<tr>
<td>§ 16.1-269.6(C)</td>
<td>109, 110</td>
</tr>
<tr>
<td>§ 16.1-271</td>
<td>109, 110</td>
</tr>
<tr>
<td>§ 16.1-278</td>
<td>113</td>
</tr>
<tr>
<td>§ 16.1-278(A)</td>
<td>112, 113</td>
</tr>
<tr>
<td>§§ 16.1-310 to -322</td>
<td>113</td>
</tr>
<tr>
<td>§ 16.1-310</td>
<td>112</td>
</tr>
<tr>
<td>§ 16.1-311(A)</td>
<td>112-114</td>
</tr>
<tr>
<td>§ 16.1-311(B)</td>
<td>112</td>
</tr>
<tr>
<td>§ 17-116.05:1(A)</td>
<td>123</td>
</tr>
<tr>
<td>§ 17-116.05:1(A)(ii)</td>
<td>121</td>
</tr>
<tr>
<td>§ 18.2-118</td>
<td>25</td>
</tr>
<tr>
<td>Tit. 18.2, Ch. 7, Art. 1</td>
<td>115, 193</td>
</tr>
<tr>
<td>§ 18.2-11(a)</td>
<td>103</td>
</tr>
<tr>
<td>§§ 18.2-247 to -264</td>
<td>115, 193</td>
</tr>
<tr>
<td>§ 18.2-247</td>
<td>115, 194</td>
</tr>
<tr>
<td>§ 18.2-250</td>
<td>193</td>
</tr>
<tr>
<td>§ 18.2-250(A)</td>
<td>194, 195</td>
</tr>
<tr>
<td>§ 18.2-250(A)(a)</td>
<td>195</td>
</tr>
<tr>
<td>§ 18.2-251</td>
<td>115</td>
</tr>
<tr>
<td>§ 18.2-259.1</td>
<td>115, 116</td>
</tr>
<tr>
<td>§ 18.2-259.1(A)</td>
<td>115, 116</td>
</tr>
<tr>
<td>§ 18.2-259.1(B)</td>
<td>115, 116</td>
</tr>
<tr>
<td>§ 18.2-266</td>
<td>196, 197</td>
</tr>
<tr>
<td>§ 18.2-266(ii)</td>
<td>196</td>
</tr>
<tr>
<td>§ 18.2-269(A)</td>
<td>196-198</td>
</tr>
<tr>
<td>§ 18.2-269(A)(1)-(2)</td>
<td>199</td>
</tr>
<tr>
<td>§ 18.2-269(B)</td>
<td>199</td>
</tr>
<tr>
<td>§ 18.2-270</td>
<td>197, 224, 225</td>
</tr>
<tr>
<td>§ 18.2-271</td>
<td>116, 197</td>
</tr>
<tr>
<td>§ 18.2-308</td>
<td>117-120, 124, 125, 127, 128, 130-132</td>
</tr>
<tr>
<td>§ 18.2-308(A)</td>
<td>127</td>
</tr>
<tr>
<td>§ 18.2-308(D)</td>
<td>122, 125, 126, 130, 131</td>
</tr>
<tr>
<td>§ 18.2-308(E)</td>
<td>131, 132</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>-----------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 18.2-308(E)(3)</td>
<td>132</td>
</tr>
<tr>
<td>§ 18.2-308(E)(4)</td>
<td>132</td>
</tr>
<tr>
<td>§ 18.2-308(E)(8)</td>
<td>132</td>
</tr>
<tr>
<td>§ 18.2-308(E)(13)</td>
<td>126, 127, 132</td>
</tr>
<tr>
<td>§ 18.2-308(G)</td>
<td>124, 125, 127, 128</td>
</tr>
<tr>
<td>§ 18.2-308(G)(1)</td>
<td>124</td>
</tr>
<tr>
<td>§ 18.2-308(H)</td>
<td>125, 128</td>
</tr>
<tr>
<td>§ 18.2-308(I)</td>
<td>126, 127, 129</td>
</tr>
<tr>
<td>§ 18.2-308(J2)</td>
<td>119, 120, 127, 129</td>
</tr>
<tr>
<td>§ 18.2-308(K)</td>
<td>117, 118, 123</td>
</tr>
<tr>
<td>§ 18.2-308(L)</td>
<td>121, 122, 126, 127, 129</td>
</tr>
<tr>
<td>§ 18.2-308(M)</td>
<td>128</td>
</tr>
<tr>
<td>§ 18.2-308(O)</td>
<td>120, 129</td>
</tr>
<tr>
<td>§ 18.2-308.1:2</td>
<td>131</td>
</tr>
<tr>
<td>§ 18.2-308.1:3</td>
<td>131</td>
</tr>
<tr>
<td>§ 18.2-325(1)</td>
<td>135</td>
</tr>
<tr>
<td>§ 18.2-340.1(1)</td>
<td>135, 136</td>
</tr>
<tr>
<td>§ 18.2-340.1(3)</td>
<td>134-136</td>
</tr>
<tr>
<td>§ 18.2-340.14</td>
<td>134-136</td>
</tr>
<tr>
<td>§ 18.2-374.1</td>
<td>137, 138</td>
</tr>
<tr>
<td>§ 18.2-374.1(A)</td>
<td>138</td>
</tr>
<tr>
<td>§ 18.2-374.1(B)(2)</td>
<td>138</td>
</tr>
<tr>
<td>§ 18.2-374.1(B)(3)</td>
<td>138</td>
</tr>
<tr>
<td>§ 18.2-374.1(B)(4)</td>
<td>137, 138</td>
</tr>
<tr>
<td>Tit. 19.1</td>
<td>25</td>
</tr>
<tr>
<td>§ 19.1-105</td>
<td>25</td>
</tr>
<tr>
<td>§ 19.1-315</td>
<td>23-25</td>
</tr>
<tr>
<td>§ 19.1-319</td>
<td>132</td>
</tr>
<tr>
<td>§ 19.1-320</td>
<td>146</td>
</tr>
<tr>
<td>Tit. 19.2</td>
<td>25</td>
</tr>
<tr>
<td>Tit. 19.2, Ch. 8, Art. 2</td>
<td>141</td>
</tr>
<tr>
<td>Tit. 19.2, Ch. 9</td>
<td>142</td>
</tr>
<tr>
<td>§ 19.2-13(B)(i)</td>
<td>107</td>
</tr>
<tr>
<td>§ 19.2-73</td>
<td>210</td>
</tr>
<tr>
<td>§ 19.2-80</td>
<td>44</td>
</tr>
<tr>
<td>§ 19.2-82</td>
<td>89</td>
</tr>
<tr>
<td>§§ 19.2-85 to -118</td>
<td>143</td>
</tr>
<tr>
<td>§ 19.2-92</td>
<td>143</td>
</tr>
<tr>
<td>§ 19.2-95</td>
<td>143</td>
</tr>
<tr>
<td>§ 19.2-102</td>
<td>142, 143</td>
</tr>
<tr>
<td>§ 19.2-123</td>
<td>107</td>
</tr>
<tr>
<td>§ 19.2-123(A)(2)-(4)</td>
<td>108</td>
</tr>
<tr>
<td>§ 19.2-123(A)(4)</td>
<td>108</td>
</tr>
<tr>
<td>§ 19.2-124</td>
<td>107, 108</td>
</tr>
<tr>
<td>§ 19.2-155</td>
<td>139, 140</td>
</tr>
<tr>
<td>§ 19.2-156</td>
<td>140</td>
</tr>
<tr>
<td>§ 19.2-169.1(A)</td>
<td>133</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 19.2-176(A)</td>
<td>133</td>
</tr>
<tr>
<td>§ 19.2-308</td>
<td>220, 221</td>
</tr>
<tr>
<td>§ 19.2-308.1</td>
<td>220, 221</td>
</tr>
<tr>
<td>§ 19.2-319</td>
<td>107</td>
</tr>
<tr>
<td>§ 19.2-332</td>
<td>23-25</td>
</tr>
<tr>
<td>§ 19.2-335</td>
<td>132</td>
</tr>
<tr>
<td>§ 19.2-336</td>
<td>144-146</td>
</tr>
<tr>
<td>§§ 20-125 to -146</td>
<td>27</td>
</tr>
<tr>
<td>§ 20-138(A)</td>
<td>27</td>
</tr>
<tr>
<td>§§ 22-294.1 to -294.3</td>
<td>152</td>
</tr>
<tr>
<td>Tit. 22.1, Ch. 5</td>
<td>161</td>
</tr>
<tr>
<td>Tit. 22.1, Ch. 5, Art. 7</td>
<td>157</td>
</tr>
<tr>
<td>Tit. 22.1, Ch. 15, Art. 2</td>
<td>164</td>
</tr>
<tr>
<td>§§ 22.1-28 to -57.5</td>
<td>162</td>
</tr>
<tr>
<td>§ 22.1-29</td>
<td>162</td>
</tr>
<tr>
<td>§ 22.1-29.1</td>
<td>162</td>
</tr>
<tr>
<td>§ 22.1-32</td>
<td>163</td>
</tr>
<tr>
<td>§ 22.1-36</td>
<td>162</td>
</tr>
<tr>
<td>§ 22.1-36.1</td>
<td>162</td>
</tr>
<tr>
<td>§ 22.1-44</td>
<td>156, 158</td>
</tr>
<tr>
<td>§ 22.1-47</td>
<td>162</td>
</tr>
<tr>
<td>§ 22.1-50</td>
<td>162</td>
</tr>
<tr>
<td>§ 22.1-53</td>
<td>162</td>
</tr>
<tr>
<td>§ 22.1-57.1</td>
<td>157</td>
</tr>
<tr>
<td>§ 22.1-57.3</td>
<td>156, 157, 162, 180</td>
</tr>
<tr>
<td>§ 22.1-57.3(A)</td>
<td>157</td>
</tr>
<tr>
<td>§ 22.1-57.3(B)</td>
<td>156, 159, 180, 181</td>
</tr>
<tr>
<td>§ 22.1-57.3(C)</td>
<td>156, 157</td>
</tr>
<tr>
<td>§ 22.1-60</td>
<td>146-148</td>
</tr>
<tr>
<td>§ 22.1-60(ii)</td>
<td>147, 148</td>
</tr>
<tr>
<td>§ 22.1-66</td>
<td>147, 148</td>
</tr>
<tr>
<td>§ 22.1-71</td>
<td>164</td>
</tr>
<tr>
<td>§ 22.1-79(5)</td>
<td>164</td>
</tr>
<tr>
<td>§ 22.1-84</td>
<td>164</td>
</tr>
<tr>
<td>§ 22.1-85</td>
<td>163, 164</td>
</tr>
<tr>
<td>§ 22.1-86</td>
<td>160-162</td>
</tr>
<tr>
<td>§ 22.1-86.1</td>
<td>160</td>
</tr>
<tr>
<td>§ 22.1-110</td>
<td>46</td>
</tr>
<tr>
<td>§ 22.1-146</td>
<td>45</td>
</tr>
<tr>
<td>§ 22.1-161</td>
<td>45</td>
</tr>
<tr>
<td>§ 22.1-166</td>
<td>45</td>
</tr>
<tr>
<td>§ 22.1-182</td>
<td>151, 152, 155</td>
</tr>
<tr>
<td>§§ 22.1-293 to -305.1</td>
<td>164</td>
</tr>
<tr>
<td>§ 23-7.4</td>
<td>272</td>
</tr>
<tr>
<td>§ 24-456</td>
<td>179</td>
</tr>
<tr>
<td>§ 24.1-1(11)</td>
<td>270</td>
</tr>
<tr>
<td>§ 24.1-23(8)</td>
<td>186</td>
</tr>
<tr>
<td>Code</td>
<td>Page</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>§ 24.1-79.1 et seq.</td>
<td>245</td>
</tr>
<tr>
<td>§ 24.1-79.3</td>
<td>244</td>
</tr>
<tr>
<td>§ 24.1-171</td>
<td>169</td>
</tr>
<tr>
<td>§ 24.1-172</td>
<td>169, 170</td>
</tr>
<tr>
<td>§ 24.1-277</td>
<td>179</td>
</tr>
<tr>
<td>Tit. 24.2</td>
<td>186</td>
</tr>
<tr>
<td>§ 24.2-101</td>
<td>176, 186, 270, 271</td>
</tr>
<tr>
<td>§ 24.2-219</td>
<td>180, 181</td>
</tr>
<tr>
<td>§ 24.2-219(B)(2)</td>
<td>180, 181</td>
</tr>
<tr>
<td>§ 24.2-231</td>
<td>244, 245</td>
</tr>
<tr>
<td>§ 24.2-404</td>
<td>186</td>
</tr>
<tr>
<td>§§ 24.2-405 to -407</td>
<td>182</td>
</tr>
<tr>
<td>§ 24.2-405</td>
<td>182-186</td>
</tr>
<tr>
<td>§ 24.2-406</td>
<td>182, 184-186</td>
</tr>
<tr>
<td>§ 24.2-407</td>
<td>182, 185-187</td>
</tr>
<tr>
<td>§ 24.2-509</td>
<td>169</td>
</tr>
<tr>
<td>§ 24.2-509(B)</td>
<td>165, 167-169</td>
</tr>
<tr>
<td>§ 24.2-684</td>
<td>46</td>
</tr>
<tr>
<td>§ 24.2-901</td>
<td>178</td>
</tr>
<tr>
<td>§ 24.2-908</td>
<td>172, 178</td>
</tr>
<tr>
<td>§ 24.2-1014</td>
<td>169, 171, 172, 174-177, 179</td>
</tr>
<tr>
<td>§ 24.2-1014(A)</td>
<td>171</td>
</tr>
<tr>
<td>§ 24.2-1014(B)</td>
<td>171, 172, 175</td>
</tr>
<tr>
<td>§ 24.2-1014(B)(1)</td>
<td>172</td>
</tr>
<tr>
<td>§ 24.2-1014(B)(1)-(3)</td>
<td>177</td>
</tr>
<tr>
<td>§ 24.2-1014(B)(2)</td>
<td>172</td>
</tr>
<tr>
<td>§ 24.2-1014(B)(3)(a)</td>
<td>172, 177</td>
</tr>
<tr>
<td>§ 24.2-1014(B)(3)(b)</td>
<td>172, 175, 177</td>
</tr>
<tr>
<td>§ 24.2-1014(E)</td>
<td>186</td>
</tr>
<tr>
<td>§ 24.2-1016</td>
<td>186</td>
</tr>
<tr>
<td>§ 24.2-1017</td>
<td>177, 179, 186</td>
</tr>
<tr>
<td>Tit. 32.1, Ch. 5, Art. 7</td>
<td>287, 288</td>
</tr>
<tr>
<td>§ 32.1-127.1:02</td>
<td>23, 24</td>
</tr>
<tr>
<td>§ 32.1-127.1:02(B)</td>
<td>24</td>
</tr>
<tr>
<td>§ 32.1-162.3</td>
<td>288</td>
</tr>
<tr>
<td>§ 32.1-162.3(D)</td>
<td>288</td>
</tr>
<tr>
<td>§ 32.1-286(B)</td>
<td>25</td>
</tr>
<tr>
<td>§ 33.1-69</td>
<td>204</td>
</tr>
<tr>
<td>Tit. 36, Ch. 1, Art. 1</td>
<td>78</td>
</tr>
<tr>
<td>§§ 36-1 to -10</td>
<td>78</td>
</tr>
<tr>
<td>§ 36-4</td>
<td>83</td>
</tr>
<tr>
<td>§ 36-4.1</td>
<td>81</td>
</tr>
<tr>
<td>§ 38.2-3411.1(A)</td>
<td>188</td>
</tr>
<tr>
<td>§ 38.2-3414(A)</td>
<td>188</td>
</tr>
<tr>
<td>§ 38.2-3418.1</td>
<td>187, 189</td>
</tr>
<tr>
<td>§ 38.2-3418.1(A.1)</td>
<td>187, 188</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>-----------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 38.2-3418.1:1(A)</td>
<td>188</td>
</tr>
<tr>
<td>§ 38.2-3419.1</td>
<td>188, 189</td>
</tr>
<tr>
<td>§ 42.1-70</td>
<td>59-61</td>
</tr>
<tr>
<td>Tit. 46.1, Chs. 1 to 4</td>
<td>210, 213</td>
</tr>
<tr>
<td>§ 46.1-6</td>
<td>210, 213</td>
</tr>
<tr>
<td>Tit. 46.2</td>
<td>202, 208, 210, 211</td>
</tr>
<tr>
<td>Tit. 46.2, Chs. 1, 2, 6, 8, 10</td>
<td>210, 213</td>
</tr>
<tr>
<td>Tit. 46.2, Ch. 3, Art. 6.1</td>
<td>197</td>
</tr>
<tr>
<td>Tit. 46.2, Ch. 3, Art. 19</td>
<td>210</td>
</tr>
<tr>
<td>Tit. 46.2, Ch. 8, Art. 3</td>
<td>210</td>
</tr>
<tr>
<td>Tit. 46.2, Ch. 20</td>
<td>200-202</td>
</tr>
<tr>
<td>Tit. 46.2, Ch. 25</td>
<td>200-202</td>
</tr>
<tr>
<td>§ 46.2-100</td>
<td>206, 208, 210, 213</td>
</tr>
<tr>
<td>§ 46.2-102</td>
<td>208-210, 213</td>
</tr>
<tr>
<td>§ 46.2-113</td>
<td>203, 206, 210</td>
</tr>
<tr>
<td>§ 46.2-208(A)(3)</td>
<td>208</td>
</tr>
<tr>
<td>§ 46.2-208(B)</td>
<td>208</td>
</tr>
<tr>
<td>§ 46.2-208(B)(9)</td>
<td>208</td>
</tr>
<tr>
<td>§§ 46.2-341.1 to -341.34</td>
<td>197</td>
</tr>
<tr>
<td>§ 46.2-341.4</td>
<td>197, 199</td>
</tr>
<tr>
<td>§ 46.2-341.7</td>
<td>196, 198</td>
</tr>
<tr>
<td>§ 46.2-341.24</td>
<td>196-199</td>
</tr>
<tr>
<td>§ 46.2-341.24(A)</td>
<td>197</td>
</tr>
<tr>
<td>§ 46.2-341.24(B)</td>
<td>197</td>
</tr>
<tr>
<td>§ 46.2-341.30(A)</td>
<td>199</td>
</tr>
<tr>
<td>§ 46.2-351</td>
<td>197</td>
</tr>
<tr>
<td>§ 46.2-389</td>
<td>197</td>
</tr>
<tr>
<td>§ 46.2-390.1</td>
<td>192-195</td>
</tr>
<tr>
<td>§ 46.2-390.1(A)</td>
<td>115, 116, 193, 194</td>
</tr>
<tr>
<td>§ 46.2-391</td>
<td>197</td>
</tr>
<tr>
<td>§§ 46.2-489 to -506</td>
<td>213</td>
</tr>
<tr>
<td>§ 46.2-492(D)(3)</td>
<td>210</td>
</tr>
<tr>
<td>§ 46.2-752</td>
<td>269</td>
</tr>
<tr>
<td>§ 46.2-752(A)(9)</td>
<td>269, 272</td>
</tr>
<tr>
<td>§ 46.2-818</td>
<td>203, 204</td>
</tr>
<tr>
<td>§§ 46.2-830 to -836</td>
<td>210</td>
</tr>
<tr>
<td>§ 46.2-830</td>
<td>210</td>
</tr>
<tr>
<td>§ 46.2-833</td>
<td>211</td>
</tr>
<tr>
<td>§ 46.2-833.01</td>
<td>206, 207, 209-211, 213</td>
</tr>
<tr>
<td>§ 46.2-833.01(A)</td>
<td>206, 211</td>
</tr>
<tr>
<td>§ 46.2-833.01(B)</td>
<td>206</td>
</tr>
<tr>
<td>§ 46.2-833.01(C)</td>
<td>207, 210</td>
</tr>
<tr>
<td>§ 46.2-833.01(D)</td>
<td>210, 212</td>
</tr>
<tr>
<td>§ 46.2-833.01(F)</td>
<td>212, 213</td>
</tr>
<tr>
<td>§ 46.2-888</td>
<td>203, 204</td>
</tr>
<tr>
<td>§ 46.2-931</td>
<td>204</td>
</tr>
<tr>
<td>§ 46.2-936</td>
<td>206, 210, 212</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>-----------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 46.2-937</td>
<td>212</td>
</tr>
<tr>
<td>§ 46.2-1300(A)</td>
<td>211</td>
</tr>
<tr>
<td>§ 46.2-1308</td>
<td>209</td>
</tr>
<tr>
<td>§§ 46.2-2000 to -2050</td>
<td>202</td>
</tr>
<tr>
<td>§ 46.2-2000</td>
<td>202</td>
</tr>
<tr>
<td>§§ 46.2-2016 to -2020</td>
<td>200, 201</td>
</tr>
<tr>
<td>§ 46.2-2016(A)</td>
<td>200</td>
</tr>
<tr>
<td>§§ 46.2-2017 to -2019</td>
<td>202</td>
</tr>
<tr>
<td>§ 46.2-2020</td>
<td>202</td>
</tr>
<tr>
<td>§§ 46.2-2500 to -2519</td>
<td>202</td>
</tr>
<tr>
<td>§ 46.2-2500</td>
<td>200, 201</td>
</tr>
<tr>
<td>§ 46.2-2501(3)</td>
<td>200-202</td>
</tr>
<tr>
<td>§ 46.2-2503</td>
<td>200, 201</td>
</tr>
<tr>
<td>§ 46.2-2506</td>
<td>202</td>
</tr>
<tr>
<td>Tit. 51.1</td>
<td>214</td>
</tr>
<tr>
<td>§§ 51.1-100 to -124</td>
<td>214</td>
</tr>
<tr>
<td>§§ 51.1-124.1 to -124.35</td>
<td>214</td>
</tr>
<tr>
<td>§ 51.1-124.1</td>
<td>214, 218</td>
</tr>
<tr>
<td>§ 51.1-124.22</td>
<td>214</td>
</tr>
<tr>
<td>§ 51.1-124.22(A)</td>
<td>217</td>
</tr>
<tr>
<td>§ 51.1-124.27</td>
<td>216</td>
</tr>
<tr>
<td>§ 51.1-124.32</td>
<td>216</td>
</tr>
<tr>
<td>Tit. 52, Ch. 2</td>
<td>208</td>
</tr>
<tr>
<td>§§ 52-12 to -15</td>
<td>208</td>
</tr>
<tr>
<td>§ 53-208</td>
<td>219</td>
</tr>
<tr>
<td>§ 53.1-1</td>
<td>220, 223</td>
</tr>
<tr>
<td>§ 53.1-10</td>
<td>223</td>
</tr>
<tr>
<td>§ 53.1-32</td>
<td>223</td>
</tr>
<tr>
<td>§ 53.1-32.1</td>
<td>222</td>
</tr>
<tr>
<td>§ 53.1-32.1(A)</td>
<td>223</td>
</tr>
<tr>
<td>§ 53.1-32.1(B)</td>
<td>223</td>
</tr>
<tr>
<td>§ 53.1-116</td>
<td>222, 224</td>
</tr>
<tr>
<td>§ 53.1-116(A)</td>
<td>220, 225</td>
</tr>
<tr>
<td>§ 53.1-151</td>
<td>225</td>
</tr>
<tr>
<td>§ 53.1-152</td>
<td>225</td>
</tr>
<tr>
<td>§ 53.1-153</td>
<td>225</td>
</tr>
<tr>
<td>§ 53.1-187</td>
<td>219, 220</td>
</tr>
<tr>
<td>§ 53.1-202.3</td>
<td>221-223</td>
</tr>
<tr>
<td>§§ 53.1-210 to -215</td>
<td>220</td>
</tr>
<tr>
<td>§ 53.1-210</td>
<td>219</td>
</tr>
<tr>
<td>§ 53.1-210 art. II(b)</td>
<td>221</td>
</tr>
<tr>
<td>§ 53.1-210 art. III(a)</td>
<td>221</td>
</tr>
<tr>
<td>§ 53.1-210 art. IV</td>
<td>221</td>
</tr>
<tr>
<td>§ 53.1-210 art. V(f)</td>
<td>219-221</td>
</tr>
<tr>
<td>§ 53.1-210 art. V(g)</td>
<td>220</td>
</tr>
<tr>
<td>Tit. 54.1</td>
<td>235</td>
</tr>
<tr>
<td>Tit. 54.1, Ch. 4</td>
<td>226</td>
</tr>
<tr>
<td>Code of 1950 (contd.)</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------</td>
<td>------</td>
</tr>
<tr>
<td>Tit. 54.1, Ch. 29, Arts. 1-6</td>
<td>236</td>
</tr>
<tr>
<td>Tit. 54.1, Ch. 29, Art. 8</td>
<td>232</td>
</tr>
<tr>
<td>Tit. 54.1, Ch. 33</td>
<td>236</td>
</tr>
<tr>
<td>Tit. 54.1, Ch. 34</td>
<td>194</td>
</tr>
<tr>
<td>Tit. 54.1, Ch. 40</td>
<td>239, 240</td>
</tr>
<tr>
<td>§ 54.1-103(C)</td>
<td>229, 230</td>
</tr>
<tr>
<td>§ 54.1-111(A)(1)</td>
<td>236</td>
</tr>
<tr>
<td>§ 54.1-400</td>
<td>226, 227</td>
</tr>
<tr>
<td>§ 54.1-401</td>
<td>226</td>
</tr>
<tr>
<td>§ 54.1-402.1</td>
<td>226-228</td>
</tr>
<tr>
<td>§ 54.1-406</td>
<td>227</td>
</tr>
<tr>
<td>§ 54.1-406(A)</td>
<td>228</td>
</tr>
<tr>
<td>§§ 54.1-2410 to -2414</td>
<td>237</td>
</tr>
<tr>
<td>§ 54.1-2710</td>
<td>229-231</td>
</tr>
<tr>
<td>§§ 54.1-2900 to -2973</td>
<td>236</td>
</tr>
<tr>
<td>§ 54.1-2900</td>
<td>237</td>
</tr>
<tr>
<td>§ 54.1-2902</td>
<td>236</td>
</tr>
<tr>
<td>§ 54.1-2903</td>
<td>237</td>
</tr>
<tr>
<td>§ 54.1-2929</td>
<td>236</td>
</tr>
<tr>
<td>§ 54.1-2962.1</td>
<td>237</td>
</tr>
<tr>
<td>§§ 54.1-2981 to -2993</td>
<td>232</td>
</tr>
<tr>
<td>§ 54.1-2983</td>
<td>234</td>
</tr>
<tr>
<td>§ 54.1-2986(C)</td>
<td>234</td>
</tr>
<tr>
<td>§§ 54.1-3300 to -3319</td>
<td>236</td>
</tr>
<tr>
<td>§ 54.1-3300</td>
<td>236</td>
</tr>
<tr>
<td>§ 54.1-3310</td>
<td>237</td>
</tr>
<tr>
<td>§§ 54.1-3400 to -3472</td>
<td>194</td>
</tr>
<tr>
<td>§ 54.1-3432</td>
<td>237</td>
</tr>
<tr>
<td>§ 54.1-3434</td>
<td>237, 238</td>
</tr>
<tr>
<td>§ 54.1-3448</td>
<td>194</td>
</tr>
<tr>
<td>§§ 54.1-4000 to -4014</td>
<td>239</td>
</tr>
<tr>
<td>§ 54.1-4000</td>
<td>239, 240</td>
</tr>
<tr>
<td>§ 54.1-4005</td>
<td>240</td>
</tr>
<tr>
<td>§ 54.1-4008</td>
<td>239</td>
</tr>
<tr>
<td>§ 54.1-4009(A)(1)</td>
<td>240</td>
</tr>
<tr>
<td>§ 54.1-4012</td>
<td>240</td>
</tr>
<tr>
<td>§§ 55-248.2 to -248.40</td>
<td>264</td>
</tr>
<tr>
<td>§ 55-248.5(4)</td>
<td>264</td>
</tr>
<tr>
<td>§§ 55-248.41 to -248.52</td>
<td>242</td>
</tr>
<tr>
<td>§ 55-248.45:1</td>
<td>241, 242</td>
</tr>
<tr>
<td>Tit. 56</td>
<td>202, 241</td>
</tr>
<tr>
<td>Tit. 56, Ch. 1</td>
<td>241</td>
</tr>
<tr>
<td>Tit. 56, Ch. 10</td>
<td>241</td>
</tr>
<tr>
<td>Tit. 56, Ch. 10.1</td>
<td>241</td>
</tr>
<tr>
<td>Tit. 56, Ch. 10.2:1</td>
<td>242</td>
</tr>
<tr>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>-------</td>
<td>------</td>
</tr>
<tr>
<td>56, Ch. 17</td>
<td>95</td>
</tr>
<tr>
<td>56-1 to -46.2</td>
<td>241</td>
</tr>
<tr>
<td>56-1.2</td>
<td>240-242</td>
</tr>
<tr>
<td>56-35</td>
<td>241</td>
</tr>
<tr>
<td>56-232 to -265</td>
<td>241</td>
</tr>
<tr>
<td>56-265.1 to -265.9</td>
<td>241</td>
</tr>
<tr>
<td>56-265.13:1 to -265.13:7</td>
<td>242</td>
</tr>
<tr>
<td>56-273</td>
<td>201, 202</td>
</tr>
<tr>
<td>56-291.3:1 to -291.3:5</td>
<td>200</td>
</tr>
<tr>
<td>56-523</td>
<td>95</td>
</tr>
<tr>
<td>57, Ch. 3, Art. 3.2</td>
<td>242, 243</td>
</tr>
<tr>
<td>57-35.11 to -35.35</td>
<td>242</td>
</tr>
<tr>
<td>57-35.11</td>
<td>243</td>
</tr>
<tr>
<td>57-35.11:1</td>
<td>242, 243</td>
</tr>
<tr>
<td>57-35.19</td>
<td>242</td>
</tr>
<tr>
<td>58-266.1(A)(4)</td>
<td>256, 259</td>
</tr>
<tr>
<td>58-441.3(p)</td>
<td>256, 259</td>
</tr>
<tr>
<td>58-829.1:1</td>
<td>265</td>
</tr>
<tr>
<td>58-831.01</td>
<td>268</td>
</tr>
<tr>
<td>58.1, Ch. 6</td>
<td>48</td>
</tr>
<tr>
<td>58.1, Ch. 26, 276, 278, 279</td>
<td></td>
</tr>
<tr>
<td>58.1, Ch. 31, Art. 1</td>
<td>48</td>
</tr>
<tr>
<td>58.1, Ch. 32, Art. 7</td>
<td>273</td>
</tr>
<tr>
<td>58.1, Ch. 39, Art. 2</td>
<td>50</td>
</tr>
<tr>
<td>58.1, Ch. 39, Art. 5</td>
<td>48, 49</td>
</tr>
<tr>
<td>58.1, Ch. 40</td>
<td>87</td>
</tr>
<tr>
<td>58.1-3</td>
<td>289, 290</td>
</tr>
<tr>
<td>58.1-3(A)</td>
<td>290, 291</td>
</tr>
<tr>
<td>58.1-3(B)</td>
<td>291</td>
</tr>
<tr>
<td>58.1-600 to -639</td>
<td>263</td>
</tr>
<tr>
<td>58.1-602</td>
<td>256, 259, 261-263</td>
</tr>
<tr>
<td>58.1-603</td>
<td>263</td>
</tr>
<tr>
<td>58.1-603(4)</td>
<td>261</td>
</tr>
<tr>
<td>58.1-605(A)</td>
<td>263</td>
</tr>
<tr>
<td>58.1-638(A)(3)(c)</td>
<td>17</td>
</tr>
<tr>
<td>58.1-2600 to -2690</td>
<td>278</td>
</tr>
<tr>
<td>58.1-2600</td>
<td>276-278</td>
</tr>
<tr>
<td>58.1-2652</td>
<td>274</td>
</tr>
<tr>
<td>58.1-2658</td>
<td>275</td>
</tr>
<tr>
<td>58.1-2658</td>
<td>274, 275, 278</td>
</tr>
<tr>
<td>58.1-3100 to -3122.1</td>
<td>48</td>
</tr>
<tr>
<td>58.1-3109</td>
<td>50</td>
</tr>
<tr>
<td>58.1-3127</td>
<td>50</td>
</tr>
<tr>
<td>58.1-3252</td>
<td>273, 274</td>
</tr>
<tr>
<td>58.1-3280 to -3294</td>
<td>273</td>
</tr>
<tr>
<td>58.1-3281</td>
<td>273, 274</td>
</tr>
<tr>
<td>Code</td>
<td>Page</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>§ 58.1-3503(A)</td>
<td>240</td>
</tr>
<tr>
<td>§ 58.1-3503(A)(1)-(5)</td>
<td>264</td>
</tr>
<tr>
<td>§ 58.1-3505</td>
<td>264, 265</td>
</tr>
<tr>
<td>§ 58.1-3505(A)</td>
<td>264, 265</td>
</tr>
<tr>
<td>§ 58.1-3505(B)</td>
<td>264</td>
</tr>
<tr>
<td>§ 58.1-3506</td>
<td>267</td>
</tr>
<tr>
<td>§ 58.1-3506(A)(7)</td>
<td>266-268</td>
</tr>
<tr>
<td>§ 58.1-3506(A)(21)</td>
<td>265</td>
</tr>
<tr>
<td>§ 58.1-3507</td>
<td>274</td>
</tr>
<tr>
<td>§ 58.1-3507(A)</td>
<td>275</td>
</tr>
<tr>
<td>§ 58.1-3511(A)</td>
<td>269, 270, 272</td>
</tr>
<tr>
<td>§ 58.1-3511(B)</td>
<td>275</td>
</tr>
<tr>
<td>§ 58.1-3522</td>
<td>273, 274</td>
</tr>
<tr>
<td>§ 58.1-3662</td>
<td>267</td>
</tr>
<tr>
<td>§ 58.1-3700</td>
<td>48, 49, 233, 254</td>
</tr>
<tr>
<td>§ 58.1-3701</td>
<td>251, 253</td>
</tr>
<tr>
<td>§ 58.1-3703(A)</td>
<td>249, 256, 259</td>
</tr>
<tr>
<td>§ 58.1-3703(B)</td>
<td>256, 258, 259</td>
</tr>
<tr>
<td>§ 58.1-3703(B)(1)</td>
<td>276-279</td>
</tr>
<tr>
<td>§ 58.1-3703(B)(4)</td>
<td>49, 255-259</td>
</tr>
<tr>
<td>§ 58.1-3706(A)(2)</td>
<td>277</td>
</tr>
<tr>
<td>§ 58.1-3706(A)(4)</td>
<td>277</td>
</tr>
<tr>
<td>§ 58.1-3708</td>
<td>246, 250</td>
</tr>
<tr>
<td>§ 58.1-3708(A)</td>
<td>246, 247, 249</td>
</tr>
<tr>
<td>§ 58.1-3708(C)</td>
<td>247, 248</td>
</tr>
<tr>
<td>§ 58.1-3711</td>
<td>249</td>
</tr>
<tr>
<td>§ 58.1-3711(A)</td>
<td>249, 250</td>
</tr>
<tr>
<td>§ 58.1-3714</td>
<td>248-250</td>
</tr>
<tr>
<td>§ 58.1-3715</td>
<td>246-250</td>
</tr>
<tr>
<td>§ 58.1-3731</td>
<td>276, 277, 279</td>
</tr>
<tr>
<td>§ 58.1-3819</td>
<td>261, 262</td>
</tr>
<tr>
<td>§ 58.1-3833</td>
<td>263</td>
</tr>
<tr>
<td>§ 58.1-3840</td>
<td>261-263</td>
</tr>
<tr>
<td>§ 58.1-3910</td>
<td>50</td>
</tr>
<tr>
<td>§ 58.1-3941</td>
<td>50</td>
</tr>
<tr>
<td>§§ 58.1-3980 to -3993</td>
<td>48</td>
</tr>
<tr>
<td>§ 58.1-3980</td>
<td>48</td>
</tr>
<tr>
<td>§ 58.1-3984</td>
<td>48</td>
</tr>
<tr>
<td>§§ 58.1-4000 to -4028</td>
<td>87</td>
</tr>
<tr>
<td>§ 58.1-4003</td>
<td>218</td>
</tr>
<tr>
<td>§ 58.1-4007</td>
<td>86</td>
</tr>
<tr>
<td>§ 58.1-4007(A)(7)</td>
<td>87</td>
</tr>
<tr>
<td>§ 58.1-4007(A)(10)</td>
<td>87</td>
</tr>
<tr>
<td>§ 58.1-4010(A)</td>
<td>87</td>
</tr>
<tr>
<td>§§ 62.1-44.2 to -44.34:28</td>
<td>67</td>
</tr>
<tr>
<td>§ 62.1-44.2(2)</td>
<td>68</td>
</tr>
<tr>
<td>§ 62.1-44.6</td>
<td>68</td>
</tr>
</tbody>
</table>
### CODE OF 1950 (contd.)

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 62.1-44.15</td>
<td>68</td>
</tr>
<tr>
<td>§ 62.1-44.15:3(A)</td>
<td>68</td>
</tr>
<tr>
<td>§ 62.1-44.16(1)</td>
<td>101</td>
</tr>
<tr>
<td>§ 62.1-44.32</td>
<td>102</td>
</tr>
<tr>
<td>Tit. 63.1, Ch. 11</td>
<td>279</td>
</tr>
<tr>
<td>Tit. 63.1, Ch. 13</td>
<td>290</td>
</tr>
<tr>
<td>§ 63.1-25</td>
<td>282</td>
</tr>
<tr>
<td>§ 63.1-53</td>
<td>281, 282, 285, 286</td>
</tr>
<tr>
<td>§ 63.1-126</td>
<td>285</td>
</tr>
<tr>
<td>§§ 63.1-172 to -182.1</td>
<td>288</td>
</tr>
<tr>
<td>§ 63.1-172</td>
<td>288, 289</td>
</tr>
<tr>
<td>§ 63.1-174</td>
<td>289</td>
</tr>
<tr>
<td>§ 63.1-174.001(B)(3)</td>
<td>288</td>
</tr>
<tr>
<td>§ 63.1-175</td>
<td>289</td>
</tr>
<tr>
<td>§ 63.1-209</td>
<td>281, 282, 285, 286</td>
</tr>
<tr>
<td>§§ 63.1-220 to -238.02</td>
<td>279</td>
</tr>
<tr>
<td>§ 63.1-220</td>
<td>280</td>
</tr>
<tr>
<td>§ 63.1-220.1</td>
<td>279, 280</td>
</tr>
<tr>
<td>§ 63.1-220.4</td>
<td>279, 280</td>
</tr>
<tr>
<td>§ 63.1-248.6:1(A)</td>
<td>285</td>
</tr>
<tr>
<td>§ 63.1-248.6:1(C)</td>
<td>282, 285</td>
</tr>
<tr>
<td>§ 63.1-249</td>
<td>291</td>
</tr>
<tr>
<td>§§ 63.1-274.1 to -274.9</td>
<td>290</td>
</tr>
<tr>
<td>§ 63.1-274.6</td>
<td>289, 290</td>
</tr>
<tr>
<td>§ 64.1-1</td>
<td>291, 292</td>
</tr>
<tr>
<td>§ 64.1-122.2</td>
<td>291, 292</td>
</tr>
<tr>
<td>§ 64.1-122.2(A)(2)</td>
<td>292</td>
</tr>
<tr>
<td>§ 65.2-200</td>
<td>218</td>
</tr>
<tr>
<td>§§ 65.2-201 to -204</td>
<td>218</td>
</tr>
</tbody>
</table>

### CONSTITUTION OF VIRGINIA

#### CONSTITUTION OF 1952

<table>
<thead>
<tr>
<th>Article, §</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. I, § 16</td>
<td>150, 153</td>
</tr>
<tr>
<td>Art. IV, § 58</td>
<td>150, 153</td>
</tr>
<tr>
<td>Art. IV, § 67</td>
<td>150, 153</td>
</tr>
<tr>
<td>Art. IX, § 141</td>
<td>150, 152, 153</td>
</tr>
</tbody>
</table>

#### CONSTITUTION OF 1971

<table>
<thead>
<tr>
<th>Article, §</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. I, § 11</td>
<td>16</td>
</tr>
<tr>
<td>Art. I, § 16</td>
<td>80, 82, 83, 153</td>
</tr>
<tr>
<td>Art. II, § 1</td>
<td>272</td>
</tr>
<tr>
<td>Art. IV, § 13</td>
<td>231</td>
</tr>
<tr>
<td>Art. IV, § 16</td>
<td>80, 82, 83, 150, 153</td>
</tr>
<tr>
<td>Art. VI, § 7</td>
<td>41</td>
</tr>
<tr>
<td>Art. VI, § 11</td>
<td>41</td>
</tr>
<tr>
<td>Art. VII</td>
<td>43, 44</td>
</tr>
<tr>
<td>Art. VII, § 4</td>
<td>42, 44, 47, 48, 71, 89</td>
</tr>
</tbody>
</table>
CONSTITUTION OF 1971 (contd.)

<table>
<thead>
<tr>
<th>Article</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. VII, § 5</td>
<td>44</td>
</tr>
<tr>
<td>Art. VII, § 6</td>
<td>42-44</td>
</tr>
<tr>
<td>Art. VII, § 10(b)</td>
<td>45, 46</td>
</tr>
<tr>
<td>Art. VIII, § 7</td>
<td>161, 164</td>
</tr>
<tr>
<td>Art. VIII, § 10</td>
<td>150, 152</td>
</tr>
<tr>
<td>Art. IX</td>
<td>218</td>
</tr>
<tr>
<td>Art. IX, § 1</td>
<td>218</td>
</tr>
<tr>
<td>Art. X, § 1</td>
<td>266, 267</td>
</tr>
<tr>
<td>Art. X, § 4</td>
<td>278</td>
</tr>
<tr>
<td>Art. X, § 6</td>
<td>266</td>
</tr>
<tr>
<td>Art. X, § 6(a)</td>
<td>266</td>
</tr>
<tr>
<td>Art. X, § 6(b)-(i)</td>
<td>266</td>
</tr>
<tr>
<td>Art. X, § 6(f)</td>
<td>264-266</td>
</tr>
<tr>
<td>Art. X, § 6(i)</td>
<td>266-268</td>
</tr>
<tr>
<td>Art. X, § 7</td>
<td>216</td>
</tr>
</tbody>
</table>

RULES OF SUPREME COURT OF VIRGINIA

<table>
<thead>
<tr>
<th>Rule</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canon 2(A)</td>
<td>41</td>
</tr>
<tr>
<td>Canon 2(B)</td>
<td>41</td>
</tr>
<tr>
<td>Canon 7(A)(1)(b)</td>
<td>41</td>
</tr>
<tr>
<td>Canon 7(A)(1)(c)</td>
<td>41</td>
</tr>
<tr>
<td>Canon 7(A)(3)</td>
<td>41</td>
</tr>
<tr>
<td>R. 1:12</td>
<td>106</td>
</tr>
<tr>
<td>R. 2:2</td>
<td>61</td>
</tr>
<tr>
<td>R. 2A:2</td>
<td>106</td>
</tr>
<tr>
<td>R. 3:3(a)</td>
<td>61</td>
</tr>
<tr>
<td>R. 3A:12(b)</td>
<td>23, 24</td>
</tr>
<tr>
<td>R. 3A:12(d)</td>
<td>25</td>
</tr>
<tr>
<td>R. 3A:19</td>
<td>109</td>
</tr>
<tr>
<td>R. 4:10(a)</td>
<td>133</td>
</tr>
<tr>
<td>R. 5:9(a)</td>
<td>106</td>
</tr>
<tr>
<td>R. 5:20</td>
<td>244, 245</td>
</tr>
<tr>
<td>R. 5:23 to 5:38</td>
<td>245</td>
</tr>
<tr>
<td>R. 5:38(a)</td>
<td>245</td>
</tr>
<tr>
<td>R. 5:39</td>
<td>245</td>
</tr>
<tr>
<td>R. 5A:6(a)</td>
<td>106</td>
</tr>
<tr>
<td>Pt. 6, § III</td>
<td>41</td>
</tr>
<tr>
<td>R. 7A:13</td>
<td>106</td>
</tr>
</tbody>
</table>